

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

House Bill 4203

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[Introduced January 19, 2018; Referred
to the Committee on Education then the Judiciary.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §18-20-1, §18-20-2, §18-20-3, §18-20-4, §18-20-5, §18-20-6 and §18-20-7,
3 all relating to creating the Campus Free Speech Act; making findings; creating the
4 Committee on Free Expression; requiring freshman orientation; authorizing the Higher
5 Education Policy Commission and state institutions of higher learning to adopt additional
6 policies; providing limitations; defining terms; providing enforcement actions; and
7 providing for damages.

Be it enacted by the Legislature of West Virginia:

ARTICLE 20. CAMPUS FREE SPEECH ACT.

§18-20-1. Short title.

1 This article may be cited and known as the Campus Free Speech Act.

§18-20-2. Legislative findings.

2 The Constitution of West Virginia recognizes in section seven, article III, that "No law
3 abridging the freedom of speech, or of the press, shall be passed."

4 The state institutions of higher learning have historically embraced a commitment to
5 freedom of expression in policy.

6 It is appropriate for the state institutions of higher learning to restate and confirm their
7 commitment to free expression.

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

16 The Legislature views freedom of expression as being of critical importance and requires
17 that each state institution ensure free, robust, and uninhibited debate and deliberation by students
18 of state institutions of higher learning whether on or off campus.

19 The Legislature has determined that it is a matter of statewide concern that all state
20 institutions of higher learning officially recognize freedom of speech as a fundamental right:

§18-20-3. Policies required.

1 The Higher Education Policy Commission shall develop and adopt a policy on free
2 expression that states, at least, the following:

3 (1) The primary function of each state institution of higher learning is the discovery,
4 improvement, transmission, and dissemination of knowledge by means of research, teaching,
5 discussion, and debate. To fulfill this function, the state institution of higher learning must strive
6 to ensure the fullest degree of intellectual freedom and free expression.

7 (2) It is not the proper role of any state institution of higher learning to shield individuals
8 from speech protected by the First Amendment, including, without limitation, ideas and opinions
9 they find unwelcome, disagreeable, or even deeply offensive.

10 (3) Students and faculty have the freedom to discuss any problem that presents itself, as
11 the First Amendment permits and within the limits of narrowly tailored viewpoint and content
12 neutral restrictions on time, place, and manner of expression that are consistent with this article
13 and that are necessary to achieve a significant institutional interest, provided that these
14 restrictions are clear, published, and provide ample alternative means of expression. Students
15 and faculty shall be permitted to assemble and engage in spontaneous expressive activity as long
16 as such activity is lawful and does not materially and substantially disrupt the functioning of the
17 state institution of higher learning, subject to the requirements of this section.

18 (4) Any person lawfully present on campus may protest or demonstrate there. It shall be
19 made clear that protests and demonstrations that infringe upon the rights of others to engage in
20 or listen to expressive activity shall not be permitted and shall be subject to sanction. This does

21 not prohibit professors or other instructors from maintaining order in the classroom.

22 (5) The campuses of the state institutions of higher learning are open to any speaker whom
23 students, student groups, or members of the faculty have invited.

24 (6) The public areas of campuses of the state institutions of higher learning are traditional
25 public forums, open on the same terms to any speaker.

26 (7) The policy shall include a range of disciplinary sanctions for anyone under the
27 jurisdiction of a state institution of higher learning who interferes with the free expression of others.

28 (8) In all disciplinary cases involving expressive conduct, students are entitled to a
29 disciplinary hearing under published procedures, including, at a minimum: (A) The right to receive
30 advance written notice of the charges, (B) the right to review the evidence in support of the
31 charges, (C) the right to confront witnesses against them, (D) the right to present a defense, (E)
32 the right to call witnesses, (F) a decision by an impartial arbiter or panel, (G) the right of appeal,
33 and (H) the right to active assistance of counsel.

34 (9) The state institutions of higher learning: (A) Shall strive to remain neutral, as an
35 institution, on the public policy controversies of the day; and (B) may not take action, as an
36 institution, on the public policy controversies of the day in such a way as to require students or
37 faculty to publicly express a given view of social policy.

§18-20-4. Committee on Free Expression.

1 (a) The Higher Education Policy Commission shall establish the Committee on Free
2 Expression and appoint seven individuals from among its membership to the committee. The
3 members of the committee shall elect a chair from the members of the committee. Each member
4 of the committee shall serve on the committee at the pleasure of the Higher Education Policy
5 Commission. Each member's term shall be equal to the remainder of the member's respective
6 term on the Higher Education Policy Commission. In the event of a vacancy on the Committee,
7 the Higher Education Policy Commission shall appoint a replacement from among its
8 membership.

9 (b) All employees of the state institutions of higher learning and all State agencies shall
10 cooperate with the Committee on Free Expression by providing information requested by the
11 committee.

12 (c) The Committee on Free Expression shall report to the public, the Higher Education
13 Policy Commission, the Governor, and the Legislature by September 1 of every year. The report
14 shall include all of the following:

15 (1) A description of any barriers to or disruptions of free expression within the state
16 institutions of higher learning.

17 (2) A description of the administrative handling and discipline relating to these disruptions
18 or barriers.

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

21 (4) Any assessments, criticisms, commendations, or recommendations the committee
22 sees fit to include.

§18-20-5. Freshman orientation.

1 All state institutions of higher learning shall include in freshman orientation programs a
2 section describing the policies regarding free expression consistent with this article.

§18-20-6. Guidelines and additional policies authorized.

1 The Higher Education Policy Commission, and the state institutions of higher learning
2 subject to approval of the Higher Education Policy Commission, may adopt additional policies and
3 guidelines to further the purposes of the policies adopted pursuant to this article. Nothing in this
4 article may be construed to prevent institutions from regulating student speech or activity that is
5 prohibited by law. Except as further limited by this article, state institutions of higher learning shall
6 be allowed to restrict student expression only for expressive activity not protected by the First
7 Amendment, including all of the following:

8 (1) Violations of state or federal law.

9 (2) Expression that a court has deemed unprotected defamation.

10 (3) Harassment.

11 (A) "Peer-on-peer harassment" is defined as conduct directed by a student toward
12 another individual student that is so severe, pervasive, and objectively offensive that it effectively
13 deprives the victim of access to the educational opportunities or benefits provided by the
14 institution.

15 (B) "Quid pro quo sexual harassment" is defined as explicitly or implicitly conditioning a
16 student's participation in an education program or activity or basing an educational decision on
17 the student's submission to unwelcome sexual advances, requests for sexual favors, or other
18 verbal, nonverbal, or physical conduct of a sexual nature.

19 (4) True threats, which are defined as statements meant by the speaker to communicate
20 a serious expression of intent to commit an act of unlawful violence to a particular individual or
21 group of individuals.

22 (5) An unjustifiable invasion of privacy or confidentiality not involving a matter of public
23 concern.

24 (6) An action that unlawfully disrupts the function of the institution.

§18-20-7. Actions to enforce the provisions of this article.

1 (a) A state institution of higher learning may restrict expressive conduct in the public areas
2 of campus only if it demonstrates that the restriction satisfies all of the following criteria:

3 (1) Is necessary to achieve a compelling governmental interest.

4 (2) Is the least restrictive means of furthering that compelling governmental interest.

5 (3) Leaves open ample other opportunities to engage in the expressive conduct.

6 (4) Provides for spontaneous assembly and distribution of literature.

7 (b) The Attorney General or any person whose expressive rights are violated under this
8 section may bring an action in a court of competent jurisdiction against the state institution of

9 higher learning to enjoin any violation of this section and to recover reasonable court costs and
10 reasonable attorneys' fees.

11 (c) In an action brought under subsection (b) of this section, if the court finds that a violation
12 of this section occurred, the court shall award the aggrieved person injunctive relief for the
13 violation and shall award reasonable court costs and reasonable attorneys' fees. The court shall
14 also award damages of \$1,000 or actual damages, whichever is higher.

15 (d) A person shall bring an action for a violation of this section within one year after the
16 date the cause of action accrues. For the purpose of calculating the one-year limitation period,
17 each day that the violation persists or each day that a policy in violation of this section remains in
18 effect constitutes a new violation of this section and shall be considered a day that the cause of
19 action has accrued.

20 (e) Nothing in this section may be construed to make any chancellor, other official, or other
21 employee of a state institution of higher learning personally liable for acts taken pursuant to their
22 official duties.

NOTE: The purpose of this bill is to create the Campus Free Speech Act. The bill makes findings. The bill creates the Committee on Free Expression. The bill requires freshman orientation. The bill authorizes the Higher Education Policy Commission and state institutions of higher learning to adopt additional policies. The bill provides limitations. The bill defines terms. The bill provides enforcement actions. The bill provides for damages.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.