

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

House Bill 2390

By Delegates Kimble, Horst, Kirby, McGeehan,
Ridenour, Phillips, C. Pritt, Mazzocchi and Fast

[Introduced January 11, 2023; Referred to the
Committee on Education then the Judiciary]

1 A BILL to amend and reenact §18B-20-1, §18B-20-3, §18B-20-5, §18B-20-6, §18B-20-7, and
 2 §18B-20-9 of the Code of West Virginia, 1931, as amended; and to amend said code by
 3 adding thereto two new sections, designated §18B-20-10 and §18B-20-11, all relating to
 4 establishing the Forming Open and Robust University Minds (FORUM) Act through
 5 strengthening existing free expression on campus laws; providing for legislative findings
 6 regarding the exercise of First Amendment rights on public university campuses in this
 7 state as being critical components of the education experience for students; clarifying the
 8 definition of public forums; modifying certain time, place, and manner restrictions;
 9 strengthening development of policies and procedures; ensuring a reporting requirement
 10 and establishing the framework for reporting requirements; clarifying the statute of
 11 limitations; providing for immunity; and providing for severability.

Be it enacted by the Legislature of West Virginia:

**ARTICLE 20. ~~FREE EXPRESSION ON CAMPUS~~ FORMING OPEN AND ROBUST
UNIVERSITY MINDS (FORUM).**

§18B-20-1. Definitions Legislative findings and definitions.

1 The West Virginia Legislature finds that the First Amendment of the United States
 2 Constitution and the West Virginia Constitution protect the rights of freedom of speech, freedom of
 3 the press, freedom of religion, freedom of association and freedom to petition the Government for
 4 all citizens.

5 Furthermore, the Supreme Court has called public universities, “peculiarly the marketplace
 6 of ideas,” Healy v. James, 408 U.S. 169, 180 (1972), where young adults learn to exercise these
 7 constitutional rights necessary to participate in our system of government and to tolerate others’
 8 exercise of the same rights, and there is “no room for the view that...First Amendment protections
 9 should apply with less force on college campuses than in the community at large,” Healy, 408 U.S.
 10 at 180.

11 This Legislature views the exercise of First Amendment rights on public university
12 campuses in this state as critical components of the education experience for students and
13 requires that each public university in this state ensure free, robust, and uninhibited debate and
14 deliberations by students whether on or off campus.

15 This Legislature also finds that public universities in this state and elsewhere are failing to
16 provide adequate safeguards for the First Amendment rights of their students leading to a stifling
17 of expression on campus.

18 The Supreme Court has warned that if public universities stifle student speech and prevent
19 the open exchange of ideas on campus, “our civilization will stagnate and die.” *Sweezy v. New*
20 *Hampshire*, 354 U.S. 234, 250 (1957).

21 Finally, this Legislature has determined that a significant amount of taxpayer dollars is
22 appropriated to public institutions of higher education each year and as such, this Legislature must
23 ensure that all public institutions of higher education receiving state funds recognize freedom of
24 speech as a fundamental right for all.

25 As used in this article:

26 (a) “Benefit” means the following:

27 (1) Recognition;

28 (2) Registration;

29 (3) The use of facilities of the institution of higher education for meetings or speaking
30 purposes;

31 (4) The use of channels of communication; and

32 (5) Funding sources that are otherwise available to other student organizations at the
33 public institution of higher education.

34 (4) (b) “Campus community” includes students, administrators, faculty, and staff at the
35 institution of higher education, and their invited guests;

36 (2) (c) “Harassment” means an expression that is unwelcome, so severe, pervasive, and

37 subjectively and objectively offensive that a student is effectively denied equal access to
38 educational opportunities or benefits provided by the state institution of higher education or sexual
39 harassment as defined by federal law and federal regulations applicable to state institutions of
40 higher education;

41 ~~(3)~~ (d) “Materially and substantially disrupts” means an occurrence where a person or
42 group significantly hinders another person’s or group’s expressive activity, prevents the
43 communication of the message, prevents the transaction of the business of a lawful meeting,
44 gathering, or procession, or interferes with or prevents the operations and functions of a state
45 institution of higher education by:

46 ~~(A)~~ (1) Engaging in fighting, violent, or other unlawful behavior;

47 ~~(B)~~ (2) Physically blocking or using threats of violence to prevent any person from
48 attending, listening to, viewing, or otherwise participating in an expressive activity;

49 ~~(C)~~ (3) Using sound to drown out or muffle expressive activity; or

50 ~~(D)~~ (4) Violating a state institution of higher education’s reasonable time, place, and
51 manner restrictions.

52 ~~(E)~~ (5) Conduct that “materially and substantially disrupts” shall not include conduct that is
53 protected under the First Amendment to the United States Constitution or West Virginia
54 Constitution. The protected conduct includes, but is not limited to, lawful protests in the outdoor
55 areas of campus generally accessible to the members of the public (except during times when
56 those areas have been reserved in advance for other events), or minor, brief, or fleeting nonviolent
57 disruptions of events that are isolated and short in duration.

58 ~~(4)~~ (e) “Outdoor areas of campus” means the generally accessible outside areas of
59 campus where members of the campus community are commonly allowed, such as grassy areas,
60 walkways, or other similar common areas and does not include outdoor areas where access is
61 restricted from a majority of the campus community.

62 (f) “Public institution of higher education” means any public technical institute, public junior

63 college, public senior college or university, law school, medical or dental school, public state
64 college, or other agency of higher education as defined in §18B-1-1, et seq of this code.

65 (5) (g) “State institution of higher education” means any university, college, or community
66 and technical college under the jurisdiction of a governing board as defined in §18B-1-2 of this
67 code.

68 (6) (h) “Student” means any person who is enrolled on a full-time or part-time basis in a
69 state institution of higher education.

70 (7) (i) “Student organization” means an officially recognized group at a state institution of
71 higher education, or a group seeking official recognition, comprised of admitted students that
72 receive, or are seeking to receive, benefits through the institution of higher education as defined in
73 this section.

§18B-20-3. Public forums; establishment of “free speech zones” prohibited.

1 The outdoor areas of campuses of state institutions of higher education shall be
2 considered public forums for the campus community, and state institutions of higher education
3 shall not limit free speech by creating “free speech zones” or other designated areas of campus
4 outside of which expressive activities are prohibited. Public institutions of higher education may
5 maintain and enforce reasonable time, place and manner restrictions narrowly tailored in service
6 of a significant institutional interest only when such restrictions employ clear, published, content-
7 and viewpoint-neutral criteria, and provide for ample alternative means of expression. Any such
8 restrictions shall allow for members of the campus community to spontaneously and
9 contemporaneously assemble and distribute literature. Nothing in this section shall be interpreted
10 as limiting the right of student expression elsewhere on campus.

§18B-20-5. Freedom of association and nondiscrimination against students and student organizations.

1 A state institution of higher education may not deny a religious, political, or ideological
2 student organization which is open to all students any benefit or privilege made available to any

3 other student organization by the state institution of higher education, or otherwise discriminate
4 against an organization, based on the expression of the organization, including any requirement
5 that the leaders or members of such organization:

6 (a) Affirm and adhere to the organization's sincerely held beliefs;

7 (b) Comply with the organization's standards of conduct; or

8 (c) Further the organization's mission or purpose, as defined by the student organization.

§18B-20-6. Development of policies and procedures.

1 State institutions of higher education shall develop materials to educate the campus
2 community on the institution's free speech policies to ensure that those persons who have
3 responsibility for discipline or education of students, such as administrators, campus police
4 officers, residence life officials, and professors, understand the policies, regulations, and duties of
5 public institutions of higher education regarding free expression on campus consistent with this
6 article.

§18B-20-7. Accountability to the public; reporting requirement.

1 (a) Each state institution of higher education shall publicly post on its website any policies it
2 has enacted regarding protected expressive activity under the First Amendment to the United
3 States Constitution.

4 (b) Each campus shall report to the Higher Education Policy Commission or the Council for
5 Community and Technical College Education, as applicable, a description of any barriers to, or
6 incidents of disruption of, free expression occurring on campus, including, but not limited to,
7 attempts to block or prohibit speakers and investigations into students or student organizations for
8 their speech. The description shall include the nature of each barrier or incident, as well as what
9 disciplinary action, if any, was taken against members of the campus community determined to be
10 responsible for those specific barriers or incidents involving students and shall be reported without
11 revealing those students' personally identifiable information. Annually, by August 1, the
12 commission and council shall report to the Legislative Oversight Commission on Education

13 Accountability any barriers or incidents reported to them pursuant to this subsection.

14 (c) Each public institution of higher education shall publicly post on their website, as well as
15 submit to the Governor and State Legislature by (30 days prior to the beginning of the state
16 legislative session), a report which will detail the course of action implemented to be in compliance
17 with the requirements of this article. A report shall also be given in the instance of any changes or
18 updates to the chosen course of action. The information required in the report must be:

19 (1) Accessible from the institution's Internet website home page by use of not more than
20 three links;

21 (2) Searchable by keywords and phrases; and

22 (3) Accessible to the public without requiring registration or use of a user name, a
23 password, or another user identification.

24 (d) The report shall include:

25 (1) A description of any barriers to or incidents of disruption of free expression occurring on
26 campus, including, but not limited to, attempts to block or prohibit speakers and investigations into
27 students or student organizations for their speech. The description shall include the nature of each
28 barrier or incident, as well as what disciplinary action, if any, was taken against members of the
29 campus community determined to be responsible for those specific barriers or incidents involving
30 students shall be reported without revealing those students' personally identifiable information;
31 and

32 (2) Any other information each public institution of higher education deems valuable for the
33 public to evaluate whether free expression rights for all members of the campus community have
34 been equally protected and enforced consistent with this article.

35 (e) If a public institution of higher education is sued for an alleged violation of First
36 Amendment rights, a supplementary report with a copy of the complaint, or any amended
37 complaint, must be submitted to the Governor and State Legislature within 30 days.

§18B-20-9. Statute of limitations.

1 Any action brought pursuant to this article shall be commenced not later than one year
 2 after the day the cause of action accrues. For purposes of calculating the one-year limitation
 3 period, each day that the violation persists, and each day that a policy in violation of this section
 4 remains in effect, shall constitute a new day that the cause of action has accrued.

§18B-20-10. **Immunity.**

1 The state waives immunity under the Eleventh Amendment of the United States
 2 Constitution and consents to suit in a federal court for lawsuits arising out of this article. A public
 3 institution of higher education that violates this article is not immune from suit or liability for the
 4 violation.

§18B-20-11. **Severability.**

1 If any provision of this article or any application of such provision to any person or
 2 circumstance is held to be unconstitutional, the remainder of this article and the application of the
 3 provision to any other person or circumstance shall not be affected.

NOTE: The purpose of this bill is to establish the Forming Open and Robust University Minds (FORUM) Act through strengthening existing free expression on campus laws. The bill provides for legislative findings regarding the exercise of First Amendment rights on public university campuses in this state as being critical components of the education experience for students. The bill clarifies the definition of public forums. The bill modifies certain time, place, and manner restrictions. The bill strengthens development of policies and procedures. The bill ensures a reporting requirement and establishes the framework for reporting requirements. The bill clarifies the statute of limitations. The bill provides for immunity. Finally, the bill provides for severability.

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