

2017 DRAFTING REQUEST

Bill

For: **Robin Vos (608) 266-9171** Drafter: **mkunkel**
 By: **Alicia** Secondary Drafters:
 Date: **3/3/2017** May Contact:
 Same as LRB: **-3295**

Submit via email: **YES**
 Requester's email: **Rep.Vos@legis.wisconsin.gov**
 Carbon copy (CC) to: **aaron.gary@legis.wisconsin.gov**

Pre Topic:

No specific pre topic given

Topic:

Campus free speech act

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	mkunkel 3/7/2017				
/P1	mkunkel 3/31/2017	kfollett 3/8/2017	lparisi 3/8/2017		
/P2	mkunkel 4/4/2017	kfollett 3/31/2017	rmilford 3/31/2017		
/P3	mkunkel 4/18/2017	kfollett 4/5/2017	mbarman 4/5/2017		
/P4	mkunkel	kfollett	lparisi		

per MDK

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/1	4/26/2017	wjackson 4/26/2017	rmilford 4/26/2017	rmilford 4/26/2017	

FE Sent For:

2
None
Needed

<END>

Kunkel, Mark

From: Schweitzer, Alicia
Sent: Wednesday, March 01, 2017 3:51 PM
To: Kunkel, Mark
Subject: Bill Draft Requests
Attachments: Campus Free Speech ACT.pdf; TGTProposal.docx

Good Afternoon,

Per our conversation, I have attached two documents. The first document, the Campus Free Speech ACT, I would like drafted as is stated in the attachment.

As for the second drafting request, I have attached the Tommy G. Thompson Center Proposal. Please note this is just a draft, but the center's mission is stated in the document.

If you have any questions, please let me know. Thank you for your assistance.

Regards,

Alicia Schweitzer

Office of Assembly Speaker Robin Vos

PH 608-237-9163

alicia.schweitzer@legis.wi.gov

CAMPUS FREE SPEECH ACT

WHEREAS, [free speech provision of state constitution] recognizes that "[quote]"; and

WHEREAS, the state institutions of higher education have historically embraced a commitment to freedom of expression in policy; and

WHEREAS, in recent years, state institutions of higher education have abdicated their responsibility to uphold free-speech principles, and these failures make it appropriate for all state institutions of higher education to restate and confirm their commitment in this regard; and

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

WHEREAS, this legislature views freedom of expression as being of critical importance and requires that each state institution of higher education ensure free, robust, and

uninhibited debate and deliberation by students of state institutions whether on or off campus; and

WHEREAS, this legislature has determined that it is a matter of statewide concern that all state institutions of higher education officially recognize freedom of speech as a fundamental right; now, therefore,

BE IT ENACTED:

Section 1.

The Board of Trustees of the state university system shall develop and adopt a policy on free expression that contains, at least, the following:

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

2. A statement that it is not the proper role of the institution to shield individuals from speech protected by the First Amendment, including, without limitation, ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.

3. That students and faculty have the freedom to discuss any problem that presents itself, as the First Amendment permits and

CAMPUS FREE SPEECH ACT

within the limits of reasonable viewpoint — and content-neutral restrictions on time, place, and manner of expression that are consistent with this act and that are necessary to achieve a significant institutional interest; provided that these restrictions are clear, published, and provide ample alternative means of expression. Students and faculty shall be permitted to assemble and engage in spontaneous expressive activity as long as such activity is not unlawful and does not materially and substantially disrupt the functioning of the institution, subject to the requirements of this subsection.

4. Any person lawfully present on campus may protest or demonstrate there. Such statement shall make clear that protests and demonstrations that infringe upon the rights of others to engage in or listen to expressive activity shall not be permitted and shall be subject to sanction. This does not prohibit professors or other instructors from maintaining order in the classroom.

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

6. That the public areas of campuses of the institution are traditional public forums, open on the same terms to any speaker.

7. The policy shall include a range of disciplinary sanctions for anyone under the jurisdiction of the institution who interferes with the free expression of others.

8. In all disciplinary cases involving expressive conduct, students are entitled to a disciplinary hearing under published procedures, including, at minimum (1) the right to receive advanced written notice of the charges, (2) the right to review the evidence in support of the charges, (3) the right to confront witnesses against them, (4) the right to present a defense, (5) the right to call witnesses, (6) a decision by an impartial arbiter or panel, and (7) the right of appeal.

When suspension for longer than 30 days or expulsion are potential penalties, students are entitled to a disciplinary hearing under published procedures, including, at minimum, all of the above procedures, plus the right to active assistance of counsel.

9. Any student who has twice been found responsible for infringing the expressive rights of others will be suspended for a minimum of one year, or expelled.

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

11. That this statement supersedes and nullifies any prior provisions in the policies and regulations of the institution that restrict speech on campus and are, therefore, inconsistent with this statement on free expression. The institution will remove or

CAMPUS FREE SPEECH ACT

revise any such provisions in its policies and regulations to ensure compatibility with the above statement on free expression.

Section 2

The Board of Trustees of the state university system shall create a single Committee on Free expression consisting of no less than 15 members. The Committee on Free Expression shall report to the public, the board of trustees, the governor, and the state legislature on September 1 of every year. The report shall include:

1. A description of any barriers to or disruptions of free expression within state institutions of higher education.
2. A description of the administrative handling and discipline relating to these disruptions or barriers.
3. A description of substantial difficulties, controversies, or successes in maintaining a posture of administrative and institutional neutrality with regard to political or social issues.
4. Any assessments, criticisms, commendations, or recommendations the committee sees fit to include.

Section 3

State institutions of higher education shall include in freshman orientation programs a section describing to all students the policies and regulations regarding free expression consistent with this act.

Section 4

The university system board of trustees is authorized to adopt regulations to further the purposes of the policies adopted pursuant to this Act. Nothing in this Act shall be construed to prevent institutions from regulating student speech or activity that is prohibited by law. Except as further limited by this Act, institutions shall be allowed to restrict student expression only for expressive activity not protected by the First Amendment, including:

(A) Violations of state or federal law.

(B) Expression that a court has deemed unprotected defamation.

(C) Harassment.

(1) "Peer-on-peer harassment," which is defined as conduct directed by a student towards another individual student, on the basis of that student's membership or perceived membership in a protected class, that is so severe, pervasive, and objectively offensive that it effectively deprives the victim of access to the educational opportunities or benefits provided by the university.

(2) "Quid pro quo sexual harassment," which is defined as explicitly or implicitly conditioning a student's participation in an education program or activity or basing an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors,

CAMPUS FREE SPEECH ACT

or other verbal, nonverbal, or physical conduct of a sexual nature.

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

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

(F) An action that unlawfully disrupts the function of the university.

(G) Reasonable time, place, and manner restrictions on expressive activities consistent with Section 1.3 herein.

Section 5

A. A state institution of higher education may restrict expressive conduct in the public areas of campus only if it demonstrates that the restriction:

1. Is necessary to achieve a compelling governmental interest;
2. Is the least restrictive means of furthering that compelling governmental interest;
3. Leaves open ample other opportunities to engage in the expressive conduct; and
4. Provides for spontaneous assembly and distribution of literature.

B. The following persons may bring an action in a court of competent jurisdiction to enjoin any violation of this section or to

recover reasonable court costs and reasonable attorney fees:

1. The attorney general.
2. A person whose expressive rights are violated by a violation of this section.

C. In an action brought under subsection B of this section, if the court finds that a violation of this section occurred, the court shall award the aggrieved person injunctive relief for the violation and shall award reasonable court costs and reasonable attorney fees. The court shall also award damages of \$1,000 or actual damages, whichever is higher.

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





State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-2408/P1

MDK: *kf*

O-note

*64 wed
3-8*

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Gen

1 AN ACT ...; relating to: free expression within the University of Wisconsin
2 System.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

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

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

4 **36.02 Campus free speech act. (1) LEGISLATIVE FINDINGS.** The legislature
5 finds all of the following:

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

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

✓
****NOTE: Section 36.05 (12) defines "system" as the UW System, which I substituted for "institutions of higher education" in the instructions. Also note that I created a definition of "institution" to include universities, which are the 4-year UW schools, and "college campuses," which are the 2-year UW schools.

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 ³three highly regarded reports are inspiring
12 articulations of 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 student's membership or
23 perceived membership in a protected class, that is so severe, pervasive, and

1 objectively offensive that it effectively deprives the victim of access to the educational
2 opportunities or benefits provided by an institution.

***NOTE: Do you want to clarify what constitutes a "protected class"? For example, should protected class refer to the prohibited bases for student discrimination under s. 36.12 (1) (race, color, creed, religion, sex, national origin, disability, ancestry, age, sexual orientation, pregnancy, marital status, or parental status)?

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 meant by the speaker to communicate a
9 serious expression of an intent to commit an act of unlawful violence to a particular
10 individual or group of individuals.

11 (4) FREE EXPRESSION POLICY. (a) *Statements*. The Board of Regents shall develop
12 and adopt a policy on free expression that contains statements of at least all the
13 following:

***NOTE: I reorganized Section 1 of the model act so that provisions regarding statements (items 1 to 6 and 10) are covered under this paragraph (a), provisions regarding discipline (items 7 to 9) are covered under paragraph (b), and item 11 (inconsistent policies and rules) is covered under paragraph (c).

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

 ****NOTE: The instructions say, "including, without limitation, ideas and opinions,
etc." Under our drafting conventions, it is not necessary to say "without limitation."

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 and content-neutral restrictions on time, place,
7 and manner of expression that are consistent with this section and that are
8 necessary to achieve a significant institutional interest, provided that these
9 restrictions are clear, published, and provide ample alternative means of expression.
10 Students and faculty shall be permitted to assemble and engage in spontaneous
11 expressive activity as long as such activity is not unlawful and does not materially
12 and substantially disrupt the functioning of an institution, subject to the
13 requirements of this section.

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

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 traditional public forums and open
22 on the same terms to any speaker.

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 interferes with 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 f. The right to call witnesses.

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

18 h. The right of appeal.

19 i. The right to active assistance of counsel, if suspension for longer than 30 days
20 or expulsion are potential penalties.

21 3. Require suspension for a ^{year} minimum of one year or expulsion of any student
22 who has twice been found responsible for infringing ^{upon} the expressive rights of others.

23 (c) *Inconsistent policies and rules.* The policy required under par. (a) ✓
24 supersedes and nullifies any prior provisions in the policies and rules of the Board
25 of Regents or an institution that restrict speech on campus and are, therefore,

1 inconsistent with the policy. The Board of Regents and each institution shall remove
2 or revise any such provisions in its policies and rules to ensure compatibility with the
3 the policy required under par. (a).

4 (5) COUNCIL ON FREE EXPRESSION. The Board of Regents shall create a single
5 council on free expression consisting of no less than 15 members. Annually no later
6 than September 1, the council shall submit to the Board of Regents, the governor, and
7 the chief clerk of each house of the legislature, for distribution to the appropriate
8 standing committees under s. 13.172 (3), a report that includes all of the following:

****NOTE: The model act refers to a committee on free expression. However, under
our structure of state government, a committee usually refers to a temporary body
created in session law that terminates upon the completion of an assignment. See the
definition of "committee" in s. 15.01 (3). A "council" usually refers to body that functions
on a continuing basis to study a problem. See s. 15.01 (4). Therefore, the above refers to
a council. If that is not okay, please let me know.

be ****NOTE: The instructions require the council to report to the public, but I think
that will be accomplished by submitting the report to the Board of Regents, governor, and
legislature. However, let me know if you want to require the Board of Regents to make
the report available to the public on its Internet website or in some other manner.

9 (a) A description of any barriers to or disruptions of free expression within
10 institutions.

11 (b) A description of the administrative handling and discipline relating to
12 disruptions or barriers described in par. (a).

13 (c) A description of substantial difficulties, controversies, or successes in
14 maintaining a posture of administrative and institutional neutrality with regard to
15 political or social issues.

16 (d) Any assessments, criticisms, commendations, or recommendations the
17 council sees fit to include in the report.

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

4

1 (7) RULES. The Board of Regents may promulgate rules to further the purposes
2 of the policy required under sub. (3) (a).

****NOTE: I divided Section 4 of the model act into subsections (7), (8), and (9).

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) PUBLIC AREAS. (a) An institution may restrict expressive conduct in the
20 public areas of campus only if it demonstrates that the restriction satisfies all of the
21 following:

- 22 1. Is necessary to achieve a compelling governmental interest.
- 23 2. Is the least restrictive means of furthering the compelling governmental
24 interest.

1 3. Leaves open ample other opportunities to engage in the expressive conduct.

2 4. Provides for spontaneous assembly and distribution of literature in the public
3 areas of campus.

****NOTE: I added "in the public areas of campus" to clarify that the above does not interfere with the Board of Regents' authority to regulate the distribution of political literature in state-owned residence halls under s. 36.11 (1) (em), which I don't think qualify as public areas of campus. Is that okay? Also, it may be advisable to confirm with the UW that a residence hall would not be considered a public area of campus.

4

(b) Any of the following may bring an action to enjoin any violation of this
5 subsection:

6 1. The attorney general.

7 2. A person whose expressive rights are violated by a violation of this
8 subsection.

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

****NOTE: The model act refers to awarding the "aggrieved person" injunctive relief and I think that one could argue whether the attorney general is considered an aggrieved person. Therefore, I eliminated the reference to an aggrieved person.

14 (d) The attorney general or a person specified in par. (b) 2. shall bring an action
15 for a violation of this subsection within one year after the date the cause of action
16 accrues. For the purpose of calculating the one-year limitation period, each day that
17 the violation persists or each day that a policy in violation of this subsection remains
18 in effect constitutes a new violation of this subsection and shall be considered a day
19 that the cause of action has accrued.

****NOTE: The instructions allow a "person" to bring an action within the specified time limits, and I think one could argue that person refers to a person whose expressive rights are violated, and not the attorney general. Therefore, I clarified that the attorney

general and a person whose expressive rights are violated are both subject to the time limits.

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

2 36.35 (1) POWER TO SUSPEND; RULES. The board may delegate the power to
3 suspend or expel students for misconduct or other cause prescribed by the board.

4 Subject to sub. (4) and s. 36.02 (4) (b), the board shall promulgate rules under ch. 227
5 governing student conduct and procedures for the administration of violations.

6 **History:** 1973 c. 335; 1985 a. 332 s. 251 (1); 1991 a. 316; 2015 a. 279.

(END)

D-Note

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-2408/P1.dn

MDK: 

Pate

Speaker Vos:

This preliminary draft includes NOTES that explain how I prepared the draft or describe issues to be resolved. After you review this draft, I can prepare an introducible version of the draft. Also note that the draft applies to the UW System, and not technical colleges. Is that okay?

Mark D. Kunkel
Senior Legislative Attorney
(608) 266-0131
mark.kunkel@legis.wisconsin.gov

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-2408/P1dn
MDK:kjf

March 8, 2017

Speaker Vos:

This preliminary draft includes NOTES that explain how I prepared the draft or describe issues to be resolved. After you review this draft, I can prepare an introducible version of the draft. Also note that the draft applies to the UW System, and not technical colleges. Is that okay?

Mark D. Kunkel
Senior Legislative Attorney
(608) 266-0131
mark.kunkel@legis.wisconsin.gov

Kunkel, Mark

From: Schweitzer, Alicia
Sent: Wednesday, March 29, 2017 3:35 PM
To: Kunkel, Mark
Subject: RE: LRB-2408

Hi Mark,

I would like to keep the words "indecent, profane, boisterous" in the bill. I recognize the issue you addressed but I believe adding those words would bring the section closer to the legislative intent. I did take those words from the disorderly conduct statute. I am not sure if there is a better way to do that.

Also, if you do not thing it adds anything but more restrictions, I am fine with taking intent out and continuing with the word interfere. I would also like to use "interfere" as the sole word as well.

Thank you again for your help!

Alicia Schweitzer

From: Kunkel, Mark
Sent: Wednesday, March 29, 2017 3:26 PM
To: Schweitzer, Alicia <Alicia.Schweitzer@legis.wisconsin.gov>
Subject: RE: LRB-2408

If you want to impose a requirement for intent, you could allow intent to be determined both subjectively (what did the actor actually intend) or objectively (what would a reasonable person conclude that the actor intended). What do you think of the following? I borrowed "reasonable person" from a Michigan law on cyberbullying, MCLS § 380.1310.

The [UW Board of Regents policy] required under par. (a) shall satisfy all of the following:

1. Include a range of disciplinary sanctions for anyone under the jurisdiction of the institution who engages in violent, abusive, unreasonably loud, or otherwise disorderly conduct that interferes is intended to interfere or that a reasonable person would know is likely to interfere with the free expression of others.

I deleted "indecent, profane, boisterous, obscene" because I think that, without defining them, they have broad or potential ambiguous meanings.

If you don't want to impose an intent requirement, you could refer to engaging in the conduct that interferes with free expression. I don't think you add a lot by specifying that the conduct results in or has the effect of interfering. I think it is probably sufficient to say that the conduct interferes.

Also, instead of using two words (infringe and interfere) in the bill, you might want to pick one. If you use both, a reader might conclude that they have different meanings.

From: Schweitzer, Alicia
Sent: Wednesday, March 29, 2017 10:13 AM
To: Kunkel, Mark <Mark.Kunkel@legis.wisconsin.gov>
Subject: RE: LRB-2408

Good Morning Mark,

I was thinking about the phrases within the bill draft again and was wondering if maybe adding the following would make it more clear.

Interferes with the expressive rights of others by engaging in violent, abusive, indecent, profane, boisterous, obscene, unreasonably loud and/or otherwise disorderly conduct with the intent to disturb or silence the free expression of others.

I am concerned that the word "intent" is too restrictive. Do you know of a better option? Such as "in order" or something else?

Thank you again for your help. Please let me know if you think this would hit the spot I am looking for.

Regards,

Alicia Schweitzer

From: Kunkel, Mark
Sent: Tuesday, March 28, 2017 4:33 PM
To: Schweitzer, Alicia <Alicia.Schweitzer@legis.wisconsin.gov>
Subject: RE: LRB-2408

You are correct – I think it would add to the potential broadness problem, so maybe it isn't a good solution.

Maybe you could tell the Board of Regents that the range of disciplinary sanctions must be based on the degree (or extent) of interference (or infringement), so that lesser degrees would be subject to lesser sanctions and greater degrees would be subject to greater sanctions. That approach might make it clear that you want the Board to penalize lesser interference/infringement, and you could direct the Board to specify what constitutes lesser and greater degrees.

From: Schweitzer, Alicia
Sent: Tuesday, March 28, 2017 4:24 PM
To: Kunkel, Mark <Mark.Kunkel@legis.wisconsin.gov>
Subject: RE: LRB-2408

Hi Mark,

Would adding that language cause greater issues due to the broadness or is it so broad that it is kind of all encompassing?

From: Kunkel, Mark
Sent: Tuesday, March 28, 2017 4:02 PM
To: Schweitzer, Alicia <Alicia.Schweitzer@legis.wisconsin.gov>
Subject: RE: LRB-2408

Regarding your concern about infringing and interfering, here is a possible solution. You could revise proposed s. 36.02 (4) (a) 4. to refer to infringing *in any way* on the expressive rights of others. Likewise, you could revise proposed s. 36.02 (4) (b) 1. to refer to interfering *in any way* with the free expression of others. That might accomplish the goal of getting the Board of Regents to interpret those words broadly.

From: Schweitzer, Alicia
Sent: Tuesday, March 28, 2017 1:19 PM
To: Kunkel, Mark <Mark.Kunkel@legis.wisconsin.gov>
Subject: RE: LRB-2408

Hi Mark,

Thank you for your response. The information you provided was extremely helpful.

I would like to specify the types of interference or infringement that are prohibited. My goal is to better define the terms but still have them encompass a variety of scenarios. Would you suggest using language from Black laws dictionary as well as adding in even more specifics?

Thank you,

Alicia Schweitzer

From: Kunkel, Mark
Sent: Tuesday, March 28, 2017 11:15 AM
To: Schweitzer, Alicia <Alicia.Schweitzer@legis.wisconsin.gov>
Subject: RE: LRB-2408

Alicia:

There are a handful of Wisconsin statutes that prohibit a person from interfering with or infringing on the rights of another. For example, s. 49.498 (3) (a) 8. requires a nursing facility to protect and promote the right of a resident to participate in social, religious and community activities that do not interfere with the rights of other residents. Section 707.52(1)(d) allows a campground operator to terminate the contract of a campground member who unreasonably infringes on the rights of other campground members. No published court decisions have considered what the words "interfere" and "infringe" mean under those statutes and, even if they did, they would not be helpful in determining what the words mean with respect to 1st Amendment rights.

Under their dictionary meanings, the words have broad definitions. (See below.) If the bill by itself prohibited interfering with or infringing on the expressive rights of another, a court might conclude that the prohibition is so broad that the prohibition itself violates the 1st Amendment. For example, in *Milwaukee v. Wroten*, 160 Wis.2d 207 (1991), a Milwaukee City ordinance prohibited interfering with police officers in the discharge of their duties. The Wisconsin Supreme Court found that the prohibition was unconstitutional under the "overbreadth doctrine." Under that doctrine, a court will invalidate an ordinance or statute that is worded so broadly that it has the effect of chilling or inhibiting speech that is otherwise protected by the 1st Amendment. If your bill directly prohibited a person from interfering with or infringing on another's rights, a court might find that the prohibition is overbroad and therefore violates the expressive rights of the person doing the interfering or infringing.

However, your bill does not by itself impose that prohibition. Instead, the bill directs the Board of Regents to adopt a policy that makes it clear that protests and demonstrations that infringe on the expressive rights of others are not permitted and subject to sanction. See proposed s. 36.02 (4) (a) 4. The bill also requires the Board of Regents to include in the policy a range of disciplinary sanctions for interfering with the free expression of others. See proposed s. 36.02 (4) (b) 1. As a result, the Board of Regents will have to fill in the details and specify the types of infringement and interference that are prohibited.

Under 1st Amendment case law, universities are allowed to promulgate and enforce rules that prohibit disruptive groups or individual protests. See W. Kaplan and B. Lee, *The Law of Higher Education*, vol. 2 at s. 9.5.3 (4th ed. 2006), citing

Healy v. James, 408 U.S. 169 (1972). The U.S. Supreme Court has held that student conduct is not protected by the 1st Amendment if it materially and substantially interferes with appropriate discipline in the operation of the school, or if the conduct materially disrupts classwork or involves substantial disorder or invasion of the rights of others. See *Tinker v. Des Moines Indep. Community School District*, 393 U.S. 503, 513 (1969).

The policy adopted by the Board of Regents will have to comply with 1st Amendment case law. I don't think it is necessary to require the Board of Regents to ensure that the 1st Amendment rights of all parties are protected, but if you want to do so, I could add some language. Alternatively, if you want to specify the types of interference or infringement that are prohibited, let me know.

Please call me if you want to discuss these issues further.

--Mark

Dictionary definitions. The bill does not define "infringe" or "interfere," so the Board of Regents would be bound by the dictionary-definition of those words. Current law would also allow the Board of Regents to promulgate rules interpreting the meaning of those words, as long as the interpretation does not "exceed the bounds of correct interpretation." Section 227.11 (2) (a) (intro.). Unfortunately, dictionary definitions do not help to narrow the meaning of the words. Merriam Webster defines "infringe" as "to encroach upon in a way that violates law or the rights of another." Black's law dictionary defines "infringement" to include a violation of right. As for "interfere," Merriam Webster's definition includes "to interpose in a way that hinders or impedes" and Black's law dictionary's definition includes "to check; hamper; hinder; infringe; encroach; trespass; disturb; intervene; intermeddle; interpose."

From: Schweitzer, Alicia
Sent: Tuesday, March 28, 2017 9:16 AM
To: Kunkel, Mark <Mark.Kunkel@legis.wisconsin.gov>
Subject: LRB-2408

Good Morning,

I wanted to check in and see if you had any information regarding the terms "infringing upon the expressive rights of others" or "interferes with the free expression" and their meaning in the state of Wisconsin.

My hope is to complete my draft changes and have them to you by today or tomorrow morning at the latest.

Thank you for all of your help.

Alicia Schweitzer
Office of Assembly Speaker Robin Vos
PH 608-237-9163
alicia.schweitzer@legis.wi.gov



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-2408/R1 pp2
MDK:kjf

6-NOTE

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

TOO LATE
BY 2 PM,
IF POSSIBLE

RM
has
seen
RMA

1 **AN ACT** to amend 36.35 (1); and to create 36.02 of the statutes; relating to: free
2 expression within the University of Wisconsin System.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

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

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

4 **36.02 Campus Free Speech Act. (1) LEGISLATIVE FINDINGS.** The legislature
5 finds all of the following:

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

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

****NOTE: Section 36.05 (12) defines "system" as the UW System, which I substituted for "institutions of higher education" in the instructions. Also note that I created a definition of "institution" to include universities, which are the 4-year UW schools, and "college campuses," which are the 2-year UW schools.

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 student's membership or
23 perceived membership in a protected class, that is so severe, pervasive, and

INSERT 2-22

other

1 objectively offensive that it effectively deprives the victim of access to the educational
2 opportunities or benefits provided by an institution.

****NOTE: Do you want to clarify what constitutes a "protected class"? For example, should protected class refer to the prohibited bases for student discrimination under s. 36.12 (1) (race, color, creed, religion, sex, national origin, disability, ancestry, age, sexual orientation, pregnancy, marital status, or parental status)?

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 meant by the speaker to communicate a
9 serious expression of an intent to commit an act of unlawful violence to a particular
10 individual or group of individuals.

11 (4) FREE EXPRESSION POLICY. (a) *Statements*. The Board of Regents shall develop
12 and adopt a policy on free expression that contains statements of at least all the
13 following:

****NOTE: I reorganized Section 1 of the model act so that provisions regarding statements (items 1 to 6 and 10) are covered under this paragraph (a), provisions regarding discipline (items 7 to 9) are covered under paragraph (b), and item 11 (inconsistent policies and rules) is covered under paragraph (c).

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

****NOTE: The instructions say, "including, without limitation, ideas and opinions, etc." Under our drafting conventions, it is not necessary to say "without limitation."*

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 and content-neutral restrictions on time, place,
7 and manner of expression that are consistent with this section and that are
8 necessary to achieve a significant institutional interest, provided that these
9 restrictions are clear, published, and provide ample alternative means of expression.

10 Students and faculty shall be permitted to assemble and engage in spontaneous
11 expressive activity as long as such activity is not unlawful and does not materially
12 and substantially disrupt the functioning of an institution, subject to the
13 requirements of this section.

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

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 traditional public forums and open
22 on the same terms to any speaker.

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 interferes with 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 f. The right to call witnesses.

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

18 h. The right of appeal.

19 i. The right to active assistance of counsel, if suspension for longer than 30 days
20 or expulsion are potential penalties.

21 3. Require suspension for a minimum of one year or expulsion of any student
22 who has twice been found responsible for infringing upon the expressive rights of
23 others.

24 (c) *Inconsistent policies and rules.* The policy required under par. (a)
25 supersedes and nullifies any prior provisions in the policies and rules of the Board

INSERT
6-6

1 of Regents or an institution that restrict speech on campus and are, therefore,
2 inconsistent with the policy. The Board of Regents and each institution shall remove
3 or revise any such provisions in its policies and rules to ensure compatibility with the
4 the policy required under par. (a).

5 (5) COUNCIL ON FREE EXPRESSION. (ca) The Board of Regents shall create a single
6 council on free expression consisting of no less than 15 members. Annually no later
7 than September 1, the council shall submit to the Board of Regents, the governor, and (cb)
8 the chief clerk of each house of the legislature, for distribution to the appropriate
9 standing committees under s. 13.172 (3), a report that includes all of the following:

***NOTE: The model act refers to a committee on free expression. However, under our structure of state government, a committee usually refers to a temporary body created in session law that terminates upon the completion of an assignment. See the definition of "committee" in s. 15.01 (3). A "council" usually refers to a body that functions on a continuing basis to study a problem. See s. 15.01 (4). Therefore, the above refers to a council. If that is not okay, please let me know.

***NOTE: The instructions require the council to report to the public, but I think that will be accomplished by submitting the report to the Board of Regents, governor, and legislature. However, let me know if you want to require the Board of Regents to make the report available to the public on its Internet website or in some other manner.

10 1. (a) A description of any barriers to or disruptions of free expression within
11 institutions.

12 2. (b) A description of the administrative handling and discipline relating to
13 disruptions or barriers described in par. (a). *subd. 1.*

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

17 4. (d) Any assessments, criticisms, commendations, or recommendations the
18 council sees fit to include in the report.

INSERT 6-18

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

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

~~***NOTE: I divided Section 4 of the model act into subsections (7), (8), and (9).~~

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

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

12 (a) Violations of state or federal law.

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

14 (c) Peer-on-peer harassment.

15 (d) Quid pro quo sexual harassment.

16 (e) True threats.

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

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

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

22 (10) ~~PUBLIC AREAS.~~ (a) ~~An institution may restrict expressive conduct in the~~
23 ~~public areas of campus only if it demonstrates that the restriction satisfies all of the~~
24 ~~following:~~

ENFORCEMENT.

- 1 1. Is necessary to achieve a compelling governmental interest.
- 2 2. Is the least restrictive means of furthering the compelling governmental
- 3 interest.
- 4 3. Leaves open ample other opportunities to engage in the expressive conduct.
- 5 4. Provides for spontaneous assembly and distribution of literature in the public
- 6 areas of campus.

***NOTE: I added "in the public areas of campus" to clarify that the above does not interfere with the Board of Regents' authority to regulate the distribution of political literature in state-owned residence halls under s. 36.11 (1) (em), which I don't think qualify as public areas of campus. Is that okay? Also, it may be advisable to confirm with the UW that a residence hall would not be considered a public area of campus.

7 (b) Any of the following may bring an action to enjoin any violation of this
 8 subsection: INSERT 8-8

- 9 1. The attorney general.
- 10 2. A person whose expressive rights are violated by a violation of this
- 11 subsection.

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

***NOTE: The model act refers to awarding the "aggrieved person" injunctive relief and I think that one could argue whether the attorney general is considered an aggrieved person. Therefore, I eliminated the reference to an aggrieved person.

17 (d) The attorney general or a person specified in par. (b) 2. shall bring an action
 18 for a violation of this subsection within one year after the date the cause of action
 19 accrues. For the purpose of calculating the one-year limitation period, each day that
 20 the violation persists or each day that a policy in violation of this subsection remains

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

***NOTE: The instructions allow a "person" to bring an action within the specified time limits, and I think one could argue that person refers to a person whose expressive rights are violated, and not the attorney general. Therefore, I clarified that the attorney general and a person whose expressive rights are violated are both subject to the time limits.

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 (END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2408/P2dn

MDK: *kjf*

Date

Speaker Vos:

This version is identical to the prior version, except for the following: ✓

- X 1. Proposed s. 36.02 (3) (b) ✓ mentions the protected classes specified in s. 36.12 (1). Note that other antidiscrimination statutes refer to additional protected classes. For example, s. 111.321 includes arrest record, conviction record, and military service. Do you want to add any of those protected classes to proposed s. 36.02 (3) (b)? ✓
2. Proposed s. 36.02 (4) (a) 4. uses "interfere with" instead of "infringe upon."
3. Proposed s. 36.02 (4) (b) 1. is revised to refer to types of conduct.
- X 4. Proposed s. 36.02 (4) (b) 3. refers to one semester, instead of one year.
5. Proposed s. 36.02 (5) (a) specifies ^{one two} 2 members of the council.
6. Proposed s. 36.02 (5) (c) is a new requirement for making the report available on the UW System's Internet site.
- X 7. Proposed s. 36.02 (10) is renamed "Enforcement" and par. (a) ✓ from the previous version is deleted. Also, I revise ✓ the prior version's par. (b) (intro.), which is now par. (a) (intro.).

Finally, do you want to clarify whether the Board of Regents must promulgate rules for the policy required under proposed s. 36.02 (4) (a)? If you want the Board of Regents to promulgate rules, I would clarify that the board must adopt the policy by promulgating rules. If you want to allow the Board of Regents to adopt the policy without promulgating rules, I would create an exception to the definition of rule in s. 227.01 (13). Let me know how you want to proceed.

Mark D. Kunkel
Senior Legislative Attorney
(608) 266-0131
mark.kunkel@legis.wisconsin.gov

**2017-2018 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-2408/P2ins
MDK:...

1

INSERT 2-22:

2

race, color, creed, religion, sex, national origin, disability, ancestry, age, sexual
3 orientation, pregnancy, marital status, or parental status,

4

INSERT 5-8:

5

engages in violent, abusive, indecent, profane, boisterous, obscene, unreasonably
6 loud, or other disorderly conduct that

7

INSERT 6-6:

8

Two of those members shall be the chairpersons of the senate and assembly standing
9 committees having jurisdiction over universities as determined by the speaker of the
10 assembly and the president of the senate.

11

INSERT 6-18:

12

(c) The Board of Regents shall make the report required under par. (b) available

13

to the public on the system's Internet site.

14

INSERT 8-8:

15

section or the policy adopted under sub. (4)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2408/P2dn

MDK:kjf

March 31, 2017

Speaker Vos:

This version is identical to the prior version, except for the following:

1. Proposed s. 36.02 (3) (b) mentions the protected classes specified in s. 36.12 (1). Note that other antidiscrimination statutes refer to additional protected classes. For example, s. 111.321 includes arrest record, conviction record, and military service. Do you want to add any of those protected classes to proposed s. 36.02 (3) (b)?
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Mark D. Kunkel
Senior Legislative Attorney
(608) 266-0131
mark.kunkel@legis.wisconsin.gov

Kunkel, Mark

From: Schweitzer, Alicia
Sent: Monday, April 03, 2017 1:21 PM
To: Kunkel, Mark
Subject: LRB - 2408

Hi Mark,

Could I also get an analysis for the bill to send to the speaker?

Thank you,

Alicia Schweitzer

Kunkel, Mark

From: Schweitzer, Alicia
Sent: Monday, April 03, 2017 3:49 PM
To: Kunkel, Mark
Subject: RE: LRB-2408

That makes sense. Thank you

From: Kunkel, Mark
Sent: Monday, April 03, 2017 3:48 PM
To: Schweitzer, Alicia <Alicia.Schweitzer@legis.wisconsin.gov>
Subject: RE: LRB-2408

Regarding your 2nd item, I think the language is okay is.

Page 4, line 22 refers to “anyone ... who engages in violent, abusive, indecent, profane, boisterous, obscene, unreasonably loud, or other disorderly conduct that *interferes* with the free expression of others.” Parsing out the grammar, the language refers to violent conduct that interferes..., abusive conduct that interferes..., etc. Let me know if you agree.

From: Schweitzer, Alicia
Sent: Monday, April 03, 2017 1:16 PM
To: Kunkel, Mark <Mark.Kunkel@legis.wisconsin.gov>
Subject: LRB-2408

Good Afternoon Mark,

I left a message for you regarding LRB 2408 but I realize now all of the phones are currently down. I wanted to make the following changes to the draft:

- Clarify that members of the council should come from every university in addition to the chairs of the committees.
- Page 5 line 14 still says “infringing upon the expressive rights” – I thought we were going to change that to interfere. Please let me know your opinion. Also, page 4 line 23 describes what interfere means but does not refer to the word specifically. Should we adjust that to say something like..” who interferes with the free expression of others by engaging in violent, abusive.....”
- Also, we will not have them promulgate rules – please let me know if you recommend any changes to address that portion.

Thank you again for all of your help! If you would like to speak to me about these issues, please call my cell phone at 608-320-0727

Regards,

Alicia Schweitzer
Office of Assembly Speaker Robin Vos
PH 608-237-9163
alicia.schweitzer@legis.wi.gov



University of Wisconsin System

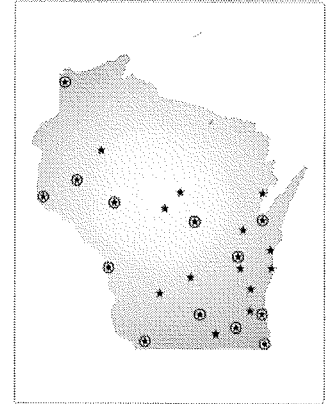
What is the UW System

The University of Wisconsin System is one of the largest systems of public higher education in the country, serving approximately 180,000 students each year and employing more than 39,000 faculty and staff statewide.

The UW System is made up of 13 four-year universities, 13 freshman-sophomore UW Colleges campuses, and statewide UW-Extension. Together, these institutions are a tremendous academic, cultural, and economic resource for Wisconsin, the nation, and the world.

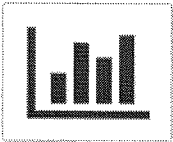
UW System at a Glance

- Enrollment:** Approximately 180,000
- Institutions:** 13 four-year universities, 13 freshman-sophomore UW Colleges campuses, Statewide UW-Extension
- Annual Budget:** \$6 billion
- State Funding:** \$1 billion
- Gifts, Grants and Contracts:** \$1.5 billion
- Economic Impact:** \$15+ billion annually
- Degrees Awarded:** More than 36,000 annually



Accountability (<https://www.wisconsin.edu/accountability/>)

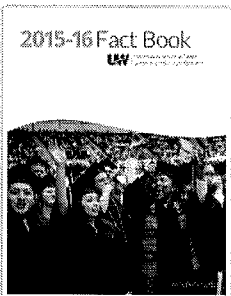
Explore interactive charts and maps of information about UW System and UW institutions.



(<https://www.wisconsin.edu/accountability/>)

Reference Information ([https://www.wisconsin.edu/download/publications\(2\)/Fact-Book.pdf](https://www.wisconsin.edu/download/publications(2)/Fact-Book.pdf))

Get information on academics, enrollment, faculty and staff, and more, compiled annually.

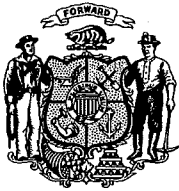


([https://www.wisconsin.edu/download/publications\(2\)/Fact-Book.pdf](https://www.wisconsin.edu/download/publications(2)/Fact-Book.pdf))

- History
- Mission Statements
- Organization & Roles
- Presidents of the UW System
- Presidents of the Board of Regents

Merger of Two Systems of Higher Education

The University of Wisconsin System was created on October 11, 1971, by Chapter 100, Laws of 1971, which combined the two public university systems of the state under a single board of regents. The 1971 legislature set July 1, 1973, as the final date for completion of the merger, but the 1973 Assembly Bill 930, drafted with the help of a Merger Implementation Study Committee to achieve that objective, did not pass in the assembly until the spring session of 1974 and died for lack of senate action when the regular session ended. The bill passed both houses, as Senate Bill 2, in the special session in May 1974 and became law on July 9, 1974. The bill combined the former Chapter 36 (former University of Wisconsin) and Chapter 37 (former Wisconsin State Universities) to create a new Chapter 36 (University of Wisconsin System) of the Wisconsin Statutes.



by WED
4-5
PM

pm has
been
run

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

INSEAT 1A

INSEAT 1-2

1 **AN ACT to amend** 36.35 (1); and **to create** 36.02 of the statutes; **relating to:** free
2 expression within the University of Wisconsin System.

Analysis by the Legislative Reference Bureau

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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, sex, national origin, disability, ancestry, age, sexual orientation,
24 pregnancy, marital status, or parental status, that is so severe, pervasive, and

1 objectively offensive that it effectively deprives the victim of access to the educational
2 opportunities or benefits provided by 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 meant by the speaker to communicate a
9 serious expression of an intent to commit an act of unlawful violence to a particular
10 individual or group of individuals.

11 (4) FREE EXPRESSION POLICY. (a) *Statements*. The Board of Regents shall develop
12 and adopt a policy on free expression that contains statements of at least all the
13 following:

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

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

22 3. That students and faculty have the freedom to discuss any problem that
23 presents itself, as the First Amendment of the U.S. Constitution permits and within
24 the limits of reasonable viewpoint and content-neutral restrictions on time, place,
25 and manner of expression that are consistent with this section and that are

1 necessary to achieve a significant institutional interest, provided that these
2 restrictions are clear, published, and provide ample alternative means of expression.
3 Students and faculty shall be permitted to assemble and engage in spontaneous
4 expressive activity as long as such activity is not unlawful and does not materially
5 and substantially disrupt the functioning of an institution, subject to the
6 requirements of this section.

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

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

14 6. That the public areas of institutions are traditional public forums and open
15 on the same terms to any speaker.

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

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

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

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

- 4 a. The right to receive advanced written notice of the charges.
- 5 b. The right to review the evidence in support of the charges.
- 6 c. The right to confront witnesses against them.
- 7 d. The right to present a defense.
- 8 e. The right to call witnesses.
- 9 f. A decision by an impartial arbiter or panel.
- 10 g. The right of appeal.
- 11 h. The right to active assistance of counsel, if suspension for longer than 30 days
12 or expulsion are potential penalties.

interfering with

13 3. Require suspension for a minimum of one semester or expulsion of any
14 student who has twice been found responsible for ~~infringing~~ *interfering* upon the expressive
15 rights of others.

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

22 (5) COUNCIL ON FREE EXPRESSION. (a) The Board of Regents shall create a single
23 council on free expression consisting of no less than 15 members. ~~Two of those~~
24 members shall be the chairpersons of the assembly and senate standing committees

IN SEPT 5-23

the

1 having jurisdiction over universities as determined by the speaker of the assembly
2 and the president of the senate.

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

7 1. A description of any barriers to or disruptions of free expression within
8 institutions.

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

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

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

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

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

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.

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) Any of the following may bring an action to enjoin any
16 violation of this section or the policy adopted under sub. (4): ^(a)

17 1. The attorney general.

18 2. A person whose expressive rights are violated by a violation of this
19 subsection. INSERT 7-19

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

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

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

8 36.35 (1) POWER TO SUSPEND; RULES. The board may delegate the power to
9 suspend or expel students for misconduct or other cause prescribed by the board.
10 Subject to sub. (4) and s. 36.02 (4) (b), the board shall promulgate rules under ch. 227
11 governing student conduct and procedures for the administration of violations.

12 (END)

7
INSERT 8-11

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INSERT 1-2:

, providing an exemption from rule-making procedures, and granting rule-making authority

INSERT 1A:

This bill requires the Board of Regents of the University of Wisconsin (UW) System to adopt a policy on free expression that applies at the 4-year and 2-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. 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 traditional public forums and open on the same terms to any speaker; and 7) that institutions must remain neutral on public policy controversies.

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 4-year university and

four *two*

four

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 or the attorney general 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.

1

INSERT 5-23:

2

Thirteen of the members shall each represent one of the universities of the system

3

and 2

4

INSERT 7-19:

5

or the policy adopted under sub. (4) (a) ✓

6

INSERT 8-11:

7

SECTION 1. 227.01 (13) (Lo) of the statutes is created to read: ✓

8

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

Kunkel, Mark

From: Schweitzer, Alicia
Sent: Thursday, April 13, 2017 12:36 PM
To: Kunkel, Mark
Subject: Freedom of Expression_ LRB 2408

Good Afternoon Mark,

I was wondering if I could make the following changes to the Freedom of Expression bill:

- Remove the reference of colleges that do not fall within the Board of Regents/UW System.
- Add "military status, sexual orientation and gender identity" to line 24 on page 3
- Add a requirement that the Board of Regents must develop this policy within 120 days
- Change line 11 on page 6 from 30 days to 9 days

NOT REPLY

Please let me know if these changes are possible. We are looking at introducing this by the last week in April.

Thank you for your help!

Alicia Schweitzer

Office of Assembly Speaker Robin Vos
PH 608-237-9163
alicia.schweitzer@legis.wi.gov

Kunkel, Mark

From: Schweitzer, Alicia
Sent: Wednesday, April 19, 2017 11:47 AM
To: Kunkel, Mark
Subject: RE: LRB-2408

Here is the case law they referred to:

CHAPTER 947 CRIMES AGAINST PUBLIC PEACE, ORDER AND OTHER INTERESTS

A "true threat" is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. State v. Perkins, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762, 99-1924.

Page 4, line 24: Yes, the way you wrote it looks good.

From: Kunkel, Mark
Sent: Wednesday, April 19, 2017 11:13 AM
To: Schweitzer, Alicia <Alicia.Schweitzer@legis.wisconsin.gov>
Subject: RE: LRB-2408

Page 4, line 8: I haven't researched the case law on true threat. Did the AG suggest how to adjust the definition? If not, can you get their input on how it should be adjusted? I could do the research, but it would be faster if the AG advised on how to change.

Page 4, line 24: should it read "the limits of reasonable viewpoint-neutral and content-neutral"?

Other changes look okay.

From: Schweitzer, Alicia
Sent: Wednesday, April 19, 2017 11:07 AM
To: Kunkel, Mark <Mark.Kunkel@legis.wisconsin.gov>
Subject: RE: LRB-2408

Hi Mark,

I just got done with the AG's office. They have a few suggestions:

- Page 3 Line 23-24: add political views
- Page 4 Line 8 – True Threat: Due to case law, the AG's office suggested we adjust the definition to match the case law definition or at least add pieces in so we keep the same intent and stay within the law. He believes the phrase "unlawful violence" may be too broad.
- Page 4 Line 24 – add "viewpoint-neutral"
- Page 5 line 14 – eliminate "traditional"
- Page 8 line 17 – eliminate "the attorney general"

Thank you so much for all of your assistance on this bill. I greatly appreciate it! Please let me know if you have any questions.

Regards,

Alicia Schweitzer

From: Kunkel, Mark
Sent: Wednesday, April 19, 2017 10:27 AM
To: Schweitzer, Alicia <Alicia.Schweitzer@legis.wisconsin.gov>
Subject: RE: LRB-2408

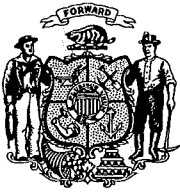
I can hold off until I hear from you about the AG's office. It won't take long to finalize.

--Mark

From: Schweitzer, Alicia
Sent: Wednesday, April 19, 2017 10:16 AM
To: Kunkel, Mark <Mark.Kunkel@legis.wisconsin.gov>
Subject: LRB-2408

If you still have not sent the bill draft, I would ask you to hold off for a few more minutes. I am meeting with the AG's office to clarify another portion. We may have to remove language about them bringing forth charges.

Thank you



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-2408/R3
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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

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.

INSERT IA

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. 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 ~~traditional~~ public forums and open on the same terms to any speaker; and 7) that institutions must remain neutral on public policy controversies.

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 ~~of the attorney general~~ 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.

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, sex, national origin, disability, ancestry, age, sexual orientation,
24 pregnancy, marital status, or parental status, that is so severe, pervasive, and

or military status,

gender identity,

1 objectively offensive that it effectively deprives the victim of access to the educational
2 opportunities or benefits provided by 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.

INSERT 4-10

8 (d) "True threat" means a statement ~~meant by the speaker to communicate a~~
9 ~~serious expression of an intent to commit an act of unlawful violence to a particular~~
10 ~~individual or group of individuals.~~

INSERT 4-11

11 (4) FREE EXPRESSION POLICY. (a) *Statements.* The Board of Regents shall develop
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18 expression.

19 2. That it is not the proper role of an institution to shield individuals from
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21 and opinions they find unwelcome, disagreeable, or even deeply offensive.

22 3. That students and faculty have the freedom to discuss any problem that
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25 and manner of expression that are consistent with this section and that are

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1 necessary to achieve a significant institutional interest, provided that these
2 restrictions are clear, published, and provide ample alternative means of expression.
3 Students and faculty shall be permitted to assemble and engage in spontaneous
4 expressive activity as long as such activity is not unlawful and does not materially
5 and substantially disrupt the functioning of an institution, subject to the
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10 not be permitted and shall be subject to sanction. This statement shall not prohibit
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14 6. That the public areas of institutions are traditional public forums and open
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5 b. The right to review the evidence in support of the charges.

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20 or revise any such provisions in its policies and rules to ensure compatibility with the
21 the policy required under par. (a).

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15 council sees fit to include in the report.

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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
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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) Any of the following may bring an action to ~~enjoin any~~
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18 ~~12~~ 2. A person whose expressive rights are violated by a violation of this section
19 or the policy adopted under sub. (4) (a).

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

1 (c) ~~The attorney general~~ or a person specified in par. (a) 2. shall bring an action
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3 accrues. For the purpose of calculating the one-year limitation period, each day that
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9 suspend or expel students for misconduct or other cause prescribed by the board.
10 Subject to sub. (4) and s. 36.02 (4) (b), the board shall promulgate rules under ch. 227
11 governing student conduct and procedures for the administration of violations.

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

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

14

(END)

1

INSERT 1A:

2

and requires the policy to be adopted no later than 120 days after the bill's effective

3

date

4

INSERT 4-10:

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that a speaker would reasonably foresee that a listener would reasonably interpret

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as a serious expression of a purpose to inflict harm, as distinguished from hyperbole,

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jest, innocuous talk, expressions of political views, or other speech that is similarly

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protected under the First Amendment of the U.S. Constitution, regardless of

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whether the speaker has the ability to carry out the threat

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INSERT 4-11:

11

No later than 120 days after the effective date of this paragraph ... [LRB insert date],

12

INSERT 8-14:

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(10) ENFORCEMENT. (a) A person whose expressive rights are violated by a

14

violation of this section or the policy adopted under sub. (4) (a) may bring an action

15

to enjoin the violation of this section or the policy.

Kunkel, Mark

From: Schweitzer, Alicia
Sent: Wednesday, April 26, 2017 4:49 PM
To: Kunkel, Mark
Subject: RE: LRB-2408

Hey I apologize. Just to clarify, I want it jacketed and sent to those offices so we can get it now. Thank you

From: Kunkel, Mark
Sent: Wednesday, April 26, 2017 4:47 PM
To: Schweitzer, Alicia <Alicia.Schweitzer@legis.wisconsin.gov>
Subject: RE: LRB-2408

okay

From: Schweitzer, Alicia
Sent: Wednesday, April 26, 2017 4:47 PM
To: Kunkel, Mark <Mark.Kunkel@legis.wisconsin.gov>
Subject: RE: LRB-2408

No jacket

From: Kunkel, Mark
Sent: Wednesday, April 26, 2017 4:35 PM
To: Schweitzer, Alicia <Alicia.Schweitzer@legis.wisconsin.gov>
Subject: RE: LRB-2408

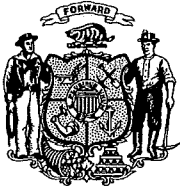
Okay, I will convert the /P4 to a /1 and create a companion for Sen. Harsdorf.

Do you know if you want the bills jacketed for introduction? The jacket is a sort of work product control mechanism – after a bill is jacketed, we can't make any more changes until we get the jacket returned to the LRB. So, if you think there will be no more changes, you could have the bills jacketed. And if you do have more changes after jacketing, we can still make the changes, but will have to get the jackets back you and Sen. Harsdorf.

From: Schweitzer, Alicia
Sent: Wednesday, April 26, 2017 4:30 PM
To: Kunkel, Mark <Mark.Kunkel@legis.wisconsin.gov>
Subject: LRB-2408

We are going to go with the 4th draft and put it out as is. Can you send a senate version to Sen. Harsdorf's office please?

Our goal is to get this out by 5pm.



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-2408/P40

MDK:kjf

1

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

RM has been RM

No changes

by
5 PM

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.

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.

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

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.

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:

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).

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.

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

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)