

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

House Bill 3157

BY DELEGATES KIMBLE, HOLSTEIN, HANNA, KEATON,
KESSINGER, MAZZOCCHI, SUMMERS, COOPER,
MCGEEHAN, PHILLIPS AND HORST

[Introduced March 15, 2021; Referred to the
Committee on Education then the Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §18-34-1, §18-34-2, §18-34-3, §18-34-4, §18-34-5, §18-34-6, §18-34-7, §18-
 3 34-8, §18-34-9, §18-34-10, §18-34-11, §18-34-12, §18-34-13, and §18-34-14, all relating
 4 to the Forming Open and Robust University Minds (FORUM) Act; providing for legislative
 5 findings regarding the exercise of First Amendment rights on public university campuses
 6 in this state as being critical components of the education experience for students;
 7 providing for definitions; defining protected expressive activities; defining public forums
 8 and prohibiting “free speech zones;” establishing reasonable time, place, and manner
 9 restrictions; providing for the freedom of association; developing policies and procedures
 10 for the implementation of this article; providing for accountability to the public and
 11 remedies for violation of this article; giving immunity and providing for severability; and
 12 providing for an effective date.

Be it enacted by the Legislature of West Virginia:

ARTICLE 34. THE FORMING OPEN AND ROBUST UNIVERSITY MINDS (FORUM)

ACT.

§18-34-1. Short title.

1 This article may be cited and known as the Forming Open and Robust University Minds
 2 Act.

§18-34-2. Legislative findings.

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

5 Furthermore, the Supreme Court has called public universities, “peculiarly the marketplace
 6 of ideas,” Healy v. James, 408 U.S. 169, 180 (1972), where young adults learn to exercise these

7 constitutional rights necessary to participate in our system of government and to tolerate others'
8 exercise of the same rights, and there is "no room for the view that...First Amendment protections
9 should apply with less force on college campuses than in the community at large," Healy, 408
10 U.S. at 180;

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

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

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

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

§18-34-3. Definitions.

1 As used in this section:

2 (a) "Benefit" means the following:

3 (1) Recognition;

4 (2) Registration;

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

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

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

10 (b) "Campus Community" includes students, administrators, faculty and staff at the
11 institution of higher education and their invited guests.

12 (c) "Harassment" shall mean only that expression that is unwelcome, so severe, pervasive,
13 and subjectively and objectively offensive, that a student is effectively denied equal access to
14 educational opportunities or benefits provided by the public institution of higher education, which
15 includes free, robust, and uninhibited debate and deliberation by students.

16 (d) "Materially and substantially disrupts" means when a person, with the intent to or with
17 knowledge of doing so, significantly hinders another person's or group's expressive activity,
18 prevents the communication of the message, or prevents the transaction of the business of a
19 lawful meeting, gathering or procession by:

20 (1) Engaging in fighting, violent, or other unlawful behavior; or

21 (2) Physically blocking or using threats of violence to prevent any person from attending,
22 listening to, viewing, or otherwise participating in an expressive activity. Conduct that "materially
23 disrupts" shall not include conduct that is protected under the First Amendment to the United
24 States Constitution or West Virginia Constitution. Such protected conduct includes, but is not
25 limited to, lawful protests in the outdoor areas of campus generally accessible to the members of
26 the public (except during times when those areas have been reserved in advance for other
27 events), or minor, brief, or fleeting nonviolent disruptions of events that are isolated and short in
28 duration.

29 (3) Use of sound to drown out or muffle expressive activity.

30 (e) "Outdoor areas of campus" means the generally accessible outside areas of campus
31 where members of the campus community are commonly allowed, such as grassy areas,
32 walkways or other similar common areas and does not include outdoor areas where access is
33 restricted from a majority of the campus community.

34 (f) “Public institution of higher education” means any public technical institute, public junior
35 college, public senior college or university, law school, medical or dental school, public state
36 college, or other agency of higher education as defined in §18B-1-1, et seq.

37 (g) “Student” means any person who is enrolled on a full-time or part-time basis in a public
38 institution of higher education.

39 (h) “Student organization” means an officially recognized group at a public institution of
40 higher education, or a group seeking official recognition, comprised of admitted students that
41 receive, or are seeking to receive, benefits through the institution of higher education as defined
42 in this section.

§18-34-4. Protective expressive activities.

1 Expressive activities protected under the provisions of this article include, but are not
2 limited to, any lawful verbal, written, audio-visual, or electronic means by which individuals may
3 communicate ideas to one another, including all forms of peaceful assembly, protests, speeches
4 and guest speakers, distribution of literature, carrying signs, and circulating petitions.

§18-34-5. Public forums defined; “free speech zones” prohibited.

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

§18-34-6. Time, place and manner restrictions.

1 (a) Any person who wishes to engage in expressive activity on campus shall be permitted
2 to do so freely, as long as the person's conduct is not unlawful and does not materially and
3 substantially disrupt the functioning of the public institution of higher education, subject only to
4 the requirements of section 3 herein.

5 (b) Nothing in this section shall prohibit public institutions of higher education from
6 maintaining and enforcing reasonable time, place and manner restrictions that are narrowly
7 tailored to serve a significant institutional interest only when such restrictions employ clear,
8 published, content and viewpoint-neutral criteria. Any such restrictions shall allow for members of
9 the campus community to spontaneously and contemporaneously assemble, speak and distribute
10 literature.

11 (c) Nothing in this section shall be interpreted as preventing public institutions of higher
12 education from prohibiting, limiting, or restricting expression that the First Amendment does not
13 protect (e.g., true threats, expression directed to provoke imminent lawless actions and likely to
14 produce it.) or prohibiting harassment as defined in section 1 of this article.

15 (d) Nothing in this section shall enable individuals to engage in conduct that intentionally,
16 materially, and substantially disrupts another's expressive activity if that activity is occurring in a
17 campus space reserved for that activity under the exclusive use or control of a particular group.

§18-34-7. Freedom of association and nondiscrimination against students and student organizations.

1 No public institution of higher education may deny a religious, political or ideological
2 student organization any benefit or privilege available to any other student organization, or
3 otherwise discriminate against such an organization, based on the expression of the organization,
4 including any requirement that the leaders or members of such organization:

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

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

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

§18-34-8. Development of policies and procedures.

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

§18-34-9. Accountability to the Public.

1 Each public institution of higher education shall publicly post on their website, as well as
2 submit to the governor and state legislature by (30 days prior to the beginning of the state
3 legislative session), a report which will detail the course of action implemented to be in compliance
4 with the requirements of this article. A report shall also be given in the instance of any changes
5 or updates to the chosen course of action. The information required in the report must be:

6 (a) Accessible from the institution's Internet website home page by use of not more than
7 three links;

8 (b) Searchable by keywords and phrases; and

9 (c) Accessible to the public without requiring registration or use of a user name, a
10 password, or another user identification.

11 The report shall include:

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

19 (b) Any other information each public institution of higher education deems valuable for

20 the public to evaluate whether free expression rights for all members of the campus community
21 have been equally protected and enforced consistent with this article.

22 If a public institution of higher education is sued for an alleged violation of First Amendment
23 rights, a supplementary report with a copy of the complaint, or any amended complaint, must be
24 submitted to the governor and state legislature within 30 days.

§18-34-10. Remedies.

1 Any person or student association aggrieved by a violation of this article may bring an
2 action against the public institution of higher education and its employees acting in their official
3 capacities, responsible for the violation and seek appropriate relief, including, but not limited to,
4 injunctive relief, monetary damages, reasonable attorneys' fees, and court costs. If a court should
5 find a violation of this article, the Court may award such person or student organization reasonable
6 attorney fees if the Court finds that such person or student organization substantially prevailed in
7 the action and that the violation was sufficiently clear or obvious such that the institution had no
8 reasonable expectation of prevailing in the action.

§18-34-11. Statute of limitations.

1 A person shall be required to bring suit for violation of this section not later than one year
2 after the day the cause of action accrues. For purposes of calculating the one-year limitation
3 period, each day that the violation persists, and each day that a policy in violation of this section
4 remains in effect, shall constitute a new day that the cause of action has accrued.

§18-34-12. Immunity.

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

§18-34-13. Severability.

1 If any provision of this article or any application of such provision to any person or

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

§18-34-14. Effective date.

- 1 This article shall take effect upon its passage.

NOTE: The purpose of this bill is to create the Forming Open and Robust University Minds (FORUM) Act, to provide legislative findings, to give definitions, to define protected expressive activities, to define public forums and prohibit “free speech zones,” to allow for the freedom of association, to develop policies and procedures, to provide accountability to the public and remedies, to give immunity and severability, and to provide for an effective date.

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