

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Committee Substitute

for

Senate Bill 657

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SYPOLT, TARR, WOODRUM, ROBERTS, KARNES, AND
GRADY

[Originating in the Committee on Education; reported
on March 19, 2021]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §18B-20-1, §18B-20-2, §18B-20-3, §18B-20-4, §18B-20-5, §18B-20-6, §18B-
3 20-7, §18B-20-8, §18B-20-9, §18B-20-10, §18B-20-11, and §18B-20-12, all relating to
4 free expression on state institution of higher education campuses; 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”; permitting expressive activity on campus under
9 certain conditions; allowing state institutions of higher education to maintain and enforce
10 reasonable time, place, and manner restrictions under certain parameters; prohibiting a
11 state institution of higher education from denying a religious, political, or ideological
12 student organization any benefit or privilege available to any other student organization or
13 otherwise discriminate against the organization; requiring state institutions of higher
14 education to develop materials, programs, and procedures to ensure that those persons
15 having responsibility for discipline or education of students understand the policies,
16 regulations, and duties of state institutions of higher education regarding free expression
17 on campus; requiring each state institution of higher education to create a report detailing
18 the course of action implemented to be in compliance with the free expression on campus
19 article; allowing an aggrieved person or student association to bring an action against the
20 state institution of higher education and its employees acting in their official capacities,
21 responsible for the violation and seek appropriate relief; providing statute of limitations;
22 waiving immunity under the Eleventh Amendment of the United States Constitution; and
23 providing for severability.

Be it enacted by the Legislature of West Virginia:

ARTICLE 20. FREE EXPRESSION ON CAMPUS.

§18B-20-1. 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 United States Supreme Court has called public universities, “peculiarly
6 the marketplace of ideas”, *Healy v. James*, 408 U.S. 169, 180 (1972), where young adults learn
7 to exercise these constitutional rights necessary to participate in our system of government and
8 to tolerate others’ exercise of the same rights, and there is “no room for the view that..First
9 Amendment protections should apply with less force on college campuses than in the community
10 at large,” *Healy*, 408 U.S. at 180;

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

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

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

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

§18B-20-2. Definitions.

1 As used in this article:

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 state
9 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 state institution of higher education.

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

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

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

27 or

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

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

33 (f) "State institution of higher education" means any university, college, or community and
34 technical college under the jurisdiction of a governing board as defined in §18B-1-2 of this code.

35 (g) "Student" means any person who is enrolled on a full-time or part-time basis in a state
36 institution of higher education.

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

§18B-20-3. 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.

§18B-20-4. Public forums defined; "free speech zones" prohibited.

1 The outdoor areas of campuses of state institutions of higher education in this state shall
2 be deemed public forums for the campus community, and state 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. Nothing in this section shall be interpreted as limiting the right
5 of student expression elsewhere on campus.

§18B-20-5. 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 state institution of higher education, subject only to
4 other provisions set forth this article.

5 (b) Nothing in this article shall prohibit state 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
9 of the campus community to spontaneously and contemporaneously assemble, speak, and
10 distribute literature.

11 (c) Nothing in this article shall be interpreted as preventing state 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 §18B-20-2 of this code.

15 (d) Nothing in this article 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.

§18B-20-6. Freedom of association and nondiscrimination against students and student organizations.

1 No state 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.

§18B-20-7. Development of policies and procedures.

1 State 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 state institutions of higher education regarding free expression
5 on campus consistent with this article.

§18B-20-8. Accountability to the public.

1 Each state institution of higher education shall publicly post on their website, as well as
2 submit to the Governor and Legislature by December 1, 2021, a report which will detail the course
3 of action implemented to be in compliance with the requirements of this article. A report shall also
4 be given in the instance of any changes or updates to the chosen course of action. The information
5 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 state institution of higher education deems valuable for the
20 public to evaluate whether free expression rights for all members of the campus community have

21 been equally protected and enforced consistent with this article.

22 If a state 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 Legislature within 30 days.

§18B-20-9. Remedies.

1 Any person or student association aggrieved by a violation of this article may bring an
2 action against the state 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.

§18B-20-10. Statute of limitations.

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

§18B-20-11. 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 state
3 institution of higher education that violates this article is not immune from suit or liability for the
4 violation.

§18B-20-12. 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

CS for SB 657

3 provision to any other person or circumstance shall not be affected.