



WISCONSIN LEGISLATIVE COUNCIL

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TO: SENATOR LEAH VUKMIR

FROM: Julia Norsetter, Staff Attorney

RE: Comparison of 2017 Assembly Bill 299 and LRB-2443/1

DATE: May 10, 2017

This memorandum is in response to your request for a comparison of 2017 Assembly Bill 299 ("the bill") and LRB-2443/1 ("the bill draft"). Both proposals generally establish requirements and prohibitions relating to freedom of speech and expression on university and college campuses in Wisconsin. This memorandum compares the major provisions of the free expression policy outlined in each proposal.

LEGISLATIVE FINDINGS AND POLICY DECLARATION

Assembly Bill 299

The bill contains legislative findings, including that the Wisconsin Constitution recognizes the right to speak freely and prohibits laws abridging the liberty of speech, that the University of Wisconsin (UW) System ("System") has historically embraced a commitment to freedom of expression in policy, and that in recent years, institutions have abdicated their responsibility to uphold free speech principles and these failures make it appropriate for the System to restate and confirm its commitment in this regard. The bill also contains a legislative finding that the Legislature has determined that it is a matter of statewide concern that all UW institutions officially recognize freedom of speech as a fundamental right.

LRB-2443/1

The bill draft contains a declaration of policy that it is not the role of a university, college campus, or technical college to shield individuals from speech that is protected by the First Amendment of the U.S. Constitution.

APPLICABILITY AND RULE-MAKING

Assembly Bill 299

The bill requires the UW System Board of Regents ("the Board") to adopt a policy on free expression no later than 120 days after the effective date of the bill. The bill permits the Board to adopt a policy on free expression without promulgating administrative rules. A policy adopted by the Board must contain certain statements as required by the bill and discussed below. The bill applies to System two- and four-year campuses. Finally, the bill provides that the policy adopted by the Board supersedes and nullifies any prior provisions in the policies and rules of the Board or an institution that restrict speech on campus.

LRB-2443/1

The bill draft applies to System two-and four-year campuses as well as the Wisconsin Technical Colleges System ("WTCS"). The bill draft creates a policy on free expression in chs. 36 and 38, Stats., which govern the System and WTCS respectively. As such, the contents of the policies are directly in the statutes, as opposed to requiring the Board or WTCS to adopt a policy. With respect to disciplinary procedures, however, the bill draft requires the Board to promulgate rules as discussed below.

CONTENT

There exists overlap in the terms of the free expression policies in the bill and the bill draft, as well as several distinctions. The policies in the bill and bill draft are summarized below.

Assembly Bill 299

The bill requires the policy adopted by the Board to contain certain statements, including that:

- The primary function of an institution is the discovery, improvement, transmission, and dissemination of knowledge through research, teaching, discussion, and debate. To fulfill this function, an institution must strive to ensure the fullest degree of intellectual freedom and free expression.
- It is not the proper role of an institution to shield individuals from speech protected by the First Amendment of the U.S. Constitution, including ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.
- Students and faculty have the freedom to discuss any problem that presents itself as permitted by the First Amendment and within the limits of reasonable viewpoint-neutral and content-neutral restrictions on time, place, and manner restrictions that are consistent with the bill and necessary to achieve a significant institutional interest, and that are clear, published, and provide ample alternative means of expression. Students and faculty are permitted to engage in spontaneous expressive activity as long as it is not unlawful and does not materially and substantially disrupt the functioning of an institution.

- Any person lawfully on the campus may protest or demonstrate there. Any protest or demonstration that interferes with the rights of others to engage in or listen to expressive activity is not permitted and is subject to sanction. Professors and other instructors are not prohibited from maintaining order in the classroom.
- Campuses of the institution are open to any speaker invited by students, student groups, or members of the faculty.
- The public areas of the institutions are public forums and open on the same terms to any speaker.
- Each institution must strive to remain neutral, as an institution, on the public policy controversies of the day and 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.

LRB-2443/1

The bill draft establishes certain requirements and prohibitions that apply to the System and WTCS, including:

- Students, faculty, and staff have the right to assemble and engage in expressive activity.
- The campuses are open to any speaker who is invited by students, faculty, or staff.
- The public areas of campuses are traditional public forums.
- University, college campus, and technical college administrators shall remain neutral on public policy controversies and may not take action that requires students, faculty, or staff to express specified viewpoints.
- Any person lawfully present on the campus may protest or demonstrate.
- University, college campus, and technical college administrators must make all reasonable efforts and make available all reasonable resources to ensure the safety of individuals invited to speak on campus.
- University, college campus, and technical college administrators shall notify an individual invited to speak on campus if the administrators determine that they cannot ensure the individual's safety and must allow the individual to speak on campus in spite of that determination.
- Any protest or demonstration that infringes on the rights of others to engage in or listen to expressive activity is prohibited and university, college campus, and technical college administrators must sanction individuals who violate that prohibition. Faculty and staff are not prohibited from maintaining order in a classroom.

- No person may threaten an invited speaker or threaten to organize protest or riots or to incite violence to dissuade or intimate an invited speaker from attending a campus event.

DISCIPLINE

Assembly Bill 299

The bill requires a policy adopted by the Board to have certain disciplinary provisions, including a range of sanctions for anyone under the jurisdiction of the institution who engages in disorderly conduct that interferes with the free expression of others. The bill also requires the policy to state that a student is entitled to a disciplinary hearing in all disciplinary cases involving expressive conduct. A disciplinary hearing must have published procedures, including the rights to receive advanced written notice of the charges, review evidence in support of the charges, call witnesses, and receive assistance of counsel in cases where a possible penalty is suspension for longer than nine days or expulsion. The bill also contains required penalties for a student who has twice been found responsible for interfering with the expressive rights of others. The required penalty is suspension for a minimum of one semester or expulsion.

LRB-2443/1

The bill draft requires the Board or WTCS Board to promulgate rules that establish two disciplinary processes: (1) a process for students, faculty, and staff who violate the terms of the freedom of expression policy created by the bill draft; and (2) a process for individuals to complain to a university, college campus, or technical college that the individual's free speech rights have been or will be violated. The bill draft requires that the disciplinary rules contain certain disciplinary sanctions for students, including denial of campus privileges, payment of restitution, suspension, and expulsion. The bill draft also requires that the rules contain certain disciplinary sanctions for faculty and staff, including a written reprimand, reduction in salary or rank, suspension, and dismissal.

CONSTRUCTION AND RESTRICTION ON EXPRESSION

Assembly Bill 299

The bill provides a statement that nothing in the bill shall be construed to prevent institutions from regulating student speech or activity that is prohibited by law. The bill also provides a list of student expressive conduct that may be restricted by institutions because it is not protected by the First Amendment. The list is subject to any other limitations in the bill. The list of student expressive activity that may be restricted includes:

- Violations of state or federal law.
- Expression that a court has deemed unprotected defamation.

- Peer-on-peer harassment.¹
- Quid pro quo sexual harassment.²
- True threats.³
- An unjustifiable invasion of privacy or confidentiality not involving a matter of public concern.
- An action that unlawfully disrupts the function of an institution.
- A violation of reasonable time, place, and manner restriction on expressive activities that is consistent with the description of such restrictions in the bill.

LRB-2443/1

The bill draft provides a statement that nothing in the bill draft shall be construed to prevent the Board, a university or college campus, or the WTCS Board or a district from regulating speech or activities that are prohibited by law or that substantially disrupt the functioning of a university or college campus or a technical college.

COUNCIL ON FREE EXPRESSION

Assembly Bill 299

The bill requires the Board to create a council of free expression. The council would include no less than 15 members, 13 of which represent each university in the System. The final two members are the chairpersons of the Assembly and Senate standing committees having jurisdiction over universities. The council is responsible for submitting an annual report to the Board, Governor, and Legislature which describes any barriers or disruptions to free expression on campus and the administrative handling and discipline relating to free expression, among other items.

¹ The bill defines the term "peer-on-peer harassment" to mean conduct directed by one student towards another individual student on the basis of that other student's race, color, creed, religion, political views, sex, national origin, disability, ancestry, age, sexual orientation, gender identity, pregnancy, marital status, parental status, or military status, that is so severe, pervasive, and objectively offensive that it effectively deprives the victim of access to the educational opportunities or benefits provided by an institution.

² The bill defines the term "quid pro quo sexual harassment" to mean 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, or other verbal, nonverbal, or physical conduct of a sexual nature.

³ The bill defines the term "true threat" to mean 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 speech that is similarly protected under the First Amendment of the U.S. Constitution, regardless of whether the speaker has the ability to carry out the true threat.

Case law definition annotated in statute

LRB-2443/1

The bill draft does not contain a provision on creating a council on free expression.

FRESHMAN ORIENTATION

Assembly Bill 299

The bill provides that each System institution must include a section describing free expression policies in freshman orientation.

LRB-2443/1

The bill draft does not contain a provision regarding freshman orientation.

ENFORCEMENT

Assembly Bill 299

The bill also provides that a person whose expressive rights are violated may bring an action to enjoin the violation of the bill's provisions or of the policy adopted by the Board. The bill further provides that if a court finds that a violation occurred, the court must award injunctive relief, damages, and reasonable attorney fees and costs. Under the bill, damages are limited to actual damages caused by the violation or \$1,000, whichever is greater. The bill provides for a one-year statute of limitations for a violation.

LRB-2443/1

The bill draft does not contain a similar provision regarding enforcement.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

JN:ksm