



State of Wisconsin
2021 - 2022 LEGISLATURE

LRB-5373/1
ARG:wlj

2021 SENATE BILL 747

November 30, 2021 - Introduced by Senators TESTIN and STROEBEL, cosponsored by Representatives CABRAL-GUEVARA, MURPHY, ALLEN, ARMSTRONG, BRANDTJEN, HORLACHER, JAMES, KUGLITSCH, MOSES, PENTERMAN, SCHRAA, TITTL, TUSLER and WICHGERS. Referred to Committee on Universities and Technical Colleges.

AUTHORS SUBJECT TO CHANGE

1 **AN ACT** *to amend* 36.11 (6) (c) and 38.04 (7m); and *to create* 36.41, 38.34 and
2 39.285 (1) (c) of the statutes; **relating to:** free speech and academic freedom at
3 University of Wisconsin System institutions and technical colleges, causes of
4 action against the Board of Regents of the University of Wisconsin System and
5 technical college district boards, and Wisconsin grant funding allocation.

Analysis by the Legislative Reference Bureau

This bill establishes certain standards related to free speech and academic freedom at University of Wisconsin System institutions and technical colleges. For violation of these standards, a UW institution or technical college may become ineligible for Wisconsin grant funding allocation and the Board of Regents of the UW System or technical college district board may be subject to a civil cause of action. If a UW institution or technical college loses its Wisconsin grant funding allocation, it must replace the amount of each student's lost Wisconsin grant with the same amount in institutional financial aid funded from administrative expense moneys.

First Amendment protections

Under the bill, a UW institution or technical college may not do any of the following: 1) restrict noncommercial speech protected under the First Amendment; 2) maintain and enforce time, place, and manner restrictions on expressive activities on the publicly accessible, open outdoor areas of its campus unless those restrictions meet specified requirements; 3) designate any area of a campus a "free speech zone"

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or otherwise create policies restricting noncommercial expressive activities to a particular area of a campus; 4) charge fees for additional security based on the anticipated content of speech or anticipated reaction to speech; or 5) sanction individuals or groups for discriminatory harassment unless the speech is unwelcome, targets its victim on the basis of a protected class under law, and is demonstrably so severe, pervasive, and objectively offensive that it effectively bars a student from receiving equal access to educational opportunities or benefits. The bill also specifies that all of an institution's or technical college's indoor and outdoor public areas are considered public forums. An institution or technical college must make every reasonable effort to prevent protected speech and sanctioned events, activities, and instruction from being disrupted.

The bill requires an institution or technical college to annually do all of the following: 1) conduct a survey of all students and employees on First Amendment rights, academic freedom, perceived political or other bias at the institution or technical college, and whether campus culture promotes self-censorship; 2) submit a report to the legislature detailing the results of this survey; and 3) provide all students and employees with instruction in academic freedom, due process, and First Amendment protections.

Academic freedom

Under the bill, an institution or technical college may not sanction an individual on the basis of content or viewpoints expressed while the individual is directly engaged in instruction, research, or service explicitly related to the individual's role as a student or faculty member of the institution or technical college.

Penalties and Wisconsin grants

Under current law, the Wisconsin grant program, administered by the Higher Educational Aids Board, provides grants to resident students enrolled in eligible types of postsecondary schools, including UW institutions and technical colleges. The amount of funding available for these types of eligible postsecondary schools varies, and the UW System and technical colleges must annually submit to HEAB a proposed formula for awarding Wisconsin grants to students enrolled in UW institutions or technical colleges. HEAB must then approve, modify, or disapprove these proposed formulas for awarding grants to UW or technical college students in the next fiscal year.

Under this bill, a UW institution or technical college that violates any of the free speech or academic freedom provisions described above more than once in a 10-year period is ineligible for allocation of Wisconsin grants for the longer of 1) a period of no less than one fiscal year; or 2) if the institution's or technical college's administrator causes the violation, until the administrator is permanently removed from his or her administrative role. HEAB's formula for awarding Wisconsin grants must take these loss of allocation penalties into consideration. The violation giving rise to this penalty may be found, by a preponderance of the evidence, by any of the following: 1) a state or federal court; 2) HEAB; or 3) a legislative standing committee having jurisdiction over matters relating to higher education. If a violating UW institution or technical college is ineligible for allocation of Wisconsin grants, the institution or technical college must make an award of institutional financial aid to

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each affected student in the amount that the student would have received as a Wisconsin grant if the institution or technical college had not committed the violation. This institutional financial aid must be paid from the UW institution's or technical college's administrative expense moneys.

In addition, the bill requires a UW institution or technical college that is found to have violated any of the free speech or academic freedom provisions described above to include, for 10 years, the following disclaimer on all notices to individuals regarding admission to the UW institution or technical college: "NOTICE: We are required by the State of Wisconsin to inform you that within the last 10 years ... [insert name of UW institution or technical college] has violated the free speech or academic freedom provisions in the Wisconsin statutes."

Cause of action

Under the bill, the attorney general, a district attorney, or any person whose expressive rights were violated may bring a court action against the Board of Regents of the UW System or the technical college district board for violation by a UW institution or technical college of any of the free speech or academic freedom provisions described above and may seek an injunction and recovery of compensatory damages for persons aggrieved by the violation. In such an action, if the court finds a violation, the court must award to the plaintiffs all of the following: 1) total damages for all persons aggrieved by the violation of not less than \$500 for the initial violation plus \$50 for each day after the complaint is served that the violation remains ongoing, but not exceeding an aggregate amount of \$100,000 for all cases stemming from a single controversy; and 2) court costs and reasonable attorney fees. An award to the plaintiffs of damages, court costs, or attorney fees must be paid from the UW institution's or technical college's administrative expense moneys.

For further information see the state and local fiscal estimate, which will be printed as an appendix to this bill.

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

- 1 **SECTION 1.** 36.11 (6) (c) of the statutes is amended to read:
- 2 36.11 (6) (c) By February 10 of each year, the board shall develop and submit
- 3 to the higher educational aids board for its review under s. 39.285 (1) a proposed
- 4 formula for the awarding of grants under s. 39.435, except for grants awarded under
- 5 s. 39.435 (2) or (5), for the next fiscal year to students enrolled in the system. The
- 6 proposed formula shall take into consideration any institution's loss of funding
- 7 allocation under s. 36.41 (4) (b) and (c).

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1 **SECTION 2.** 36.41 of the statutes is created to read:

2 **36.41 Campus free speech and academic freedom. (1) DEFINITION.** In this
3 section, “employee” means a member of the faculty, academic staff, or university staff
4 assigned to an institution.

5 **(2) FIRST AMENDMENT PROTECTIONS.** (a) An institution may not do any of the
6 following:

7 1. Restrict noncommercial speech protected under the First Amendment of the
8 U.S. Constitution.

9 2. Maintain and enforce time, place, and manner restrictions on expressive
10 activities on the open outdoor areas of its campus that are generally accessible to the
11 public unless those restrictions meet all of the following requirements:

12 a. The restrictions are reasonable, in furtherance of a significant institutional
13 interest, and employ clear, published, content-neutral and viewpoint-neutral
14 criteria.

15 b. The restrictions provide for ample alternative means for communication and
16 allow for members of the institution’s community to spontaneously and
17 contemporaneously distribute literature and assemble.

18 3. Designate any area of a campus a “free speech zone” or otherwise create
19 policies restricting noncommercial expressive activities to a particular area of a
20 campus.

21 4. Charge fees for additional security based on the anticipated content of speech
22 or anticipated reaction to speech.

23 5. Sanction individuals or groups for discriminatory harassment unless the
24 speech is unwelcome, targets its victim on the basis of the victim’s real or perceived
25 membership in a class protected under federal, state, or local law, and is

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1 demonstrably so severe, pervasive, and objectively offensive that it effectively bars
2 a student from receiving equal access to educational opportunities or benefits. This
3 subdivision does not preclude an institution from providing additional resources to
4 a student affected by speech that cannot be sanctioned under this subdivision or from
5 taking nonpunitive actions designed to promote a welcoming, inclusive
6 environment.

7 (b) All indoor and outdoor public areas operated by an institution or under the
8 institution's jurisdiction shall be considered public forums.

9 (c) An institution shall make every reasonable effort to prevent protected
10 speech and institution-sanctioned events, activities, and instruction from being
11 disrupted. Nothing in this section shall prevent or inhibit an institution from
12 preventing disruptions or punishing disrupters if the institution, to do so, does not
13 prevent or punish expression that is protected under the First Amendment.

14 (d) An institution shall do all of the following:

15 1. Conduct an annual survey of all students and employees on First
16 Amendment rights, academic freedom, perceived political, ideological, or other bias
17 at the institution, and whether campus culture promotes self-censorship.

18 2. Annually submit to the legislature under s. 13.172 (2) a report detailing the
19 results of the survey under subd. 1.

20 3. Annually provide all students and employees with instruction in academic
21 freedom, due process, and First Amendment protections.

22 **(3) ACADEMIC FREEDOM.** An institution may not sanction an individual on the
23 basis of the content or viewpoints expressed while the individual is directly engaged
24 in instruction, research, or service explicitly related to the individual's role as a
25 student or faculty member of the institution.

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1 (4) PENALTIES; INSTITUTIONAL AID. (a) An institution that violates this section,
2 for 10 years following the date of the finding of the violation under par. (e), shall
3 include a disclaimer on all notices, both printed or electronic, to individuals
4 regarding admission to the institution, in a type size no smaller than the majority
5 of the rest of the notice, in substantially the following form: “NOTICE: We are
6 required by the State of Wisconsin to inform you that within the last 10 years ...
7 [insert name of institution] has violated the free speech or academic freedom
8 provisions in the Wisconsin statutes.”

9 (b) An institution that violates this section more than once in a 10-year period
10 is ineligible for allocation of grants under s. 39.435, except grants awarded under s.
11 39.435 (2) or (5), for a period of no less than one fiscal year.

12 (c) In addition to the period of ineligibility under par. (b), if an institution’s
13 administrator causes the violation of this section, the institution is not eligible for
14 allocation of grants under s. 39.435, except grants awarded under s. 39.435 (2) or (5),
15 until the administrator is permanently removed from his or her administrative role.

16 (d) If an institution that violates this section is ineligible under par. (b) or (c)
17 for allocation of grants under s. 39.435, except grants awarded under s. 39.435 (2)
18 or (5), the institution shall make an award of institutional financial aid to each
19 student affected by the institution’s ineligibility under par. (b) or (c) in the amount
20 that the student would have received as a grant under s. 39.435 if the institution had
21 not violated this section. The board shall ensure that the institutional financial aid
22 awarded to each student under this paragraph is paid from moneys allocated for the
23 administrative expenses of the institution.

24 (e) The penalties under this subsection apply if any of the following find, on the
25 basis of a preponderance of the evidence, that the institution violated this section:

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- 1 1. A state or federal court in this state.
- 2 2. The higher educational aids board.
- 3 3. Any standing committee of the legislature having jurisdiction over matters
- 4 relating to higher education.

5 **(5) CAUSE OF ACTION.** (a) Any person identified in par. (b) may bring an action
6 in circuit court against the board for violation of this section by an institution and
7 may seek any of the following:

- 8 1. An injunction against violation of this section.
- 9 2. Recovery from the board of compensatory damages for persons aggrieved by
- 10 the violation.

11 (b) Any of the following persons may bring an action under par. (a):

- 12 1. The attorney general.
- 13 2. A district attorney.
- 14 3. Any person whose expressive rights were violated through the violation of
- 15 this section.

16 (c) Subject to par. (d), in an action brought under par. (a), if the court finds a
17 violation, the court shall award to the plaintiffs all of the following:

18 1. Total damages for all persons aggrieved by the violation of not less than \$500
19 for the initial violation plus \$50 for each day the violation remains ongoing, which
20 shall accrue starting on the day after the complaint is served on the board.

21 2. Notwithstanding s. 814.04 (1), court costs and reasonable attorney fees.

22 (d) In an action brought under par. (a), the total damages, excluding court costs
23 and attorney fees, that may be awarded to plaintiffs in a case or cases stemming from
24 a single controversy may not exceed an aggregate amount of \$100,000. In violations

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1 harming multiple plaintiffs, the court shall divide the damages equitably among
2 them until the maximum award is exhausted, if applicable.

3 (e) If a court awards to plaintiffs damages, court costs, or attorney fees in an
4 action brought under this subsection, the board shall pay the total amount of the
5 award from moneys allocated under s. 36.09 (1) (h) to the violating institution for the
6 institution's administrative expenses.

7 **SECTION 3.** 38.04 (7m) of the statutes is amended to read:

8 38.04 (7m) FINANCIAL AIDS. By February 10 of each year, the board shall develop
9 and submit to the higher educational aids board for its review under s. 39.285 (1) a
10 proposed formula for the awarding of grants under s. 39.435, except for grants
11 awarded under s. 39.435 (2) or (5), for the next fiscal year to students enrolled in the
12 technical colleges. The proposed formula shall take into consideration any technical
13 college's loss of funding allocation under s. 38.34 (4) (b) and (c).

14 **SECTION 4.** 38.34 of the statutes is created to read:

15 **38.34 Campus free speech and academic freedom. (1) DEFINITIONS.** In
16 this section:

17 (a) "Employee" means a staff member, faculty member, or administrator
18 employed by a district board.

19 (b) "Student" means an individual enrolled in a district school.

20 **(2) FIRST AMENDMENT PROTECTIONS.** (a) A district board may not do any of the
21 following:

22 1. Restrict noncommercial speech protected under the First Amendment of the
23 U.S. Constitution.

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1 2. Maintain and enforce time, place, and manner restrictions on expressive
2 activities on the open outdoor areas of district campuses that are generally accessible
3 to the public unless those restrictions meet all of the following requirements:

4 a. The restrictions are reasonable, in furtherance of a significant interest of the
5 district board, and employ clear, published, content-neutral and viewpoint-neutral
6 criteria.

7 b. The restrictions provide for ample alternative means for communication and
8 allow for members of the district campus's community to spontaneously and
9 contemporaneously distribute literature and assemble.

10 3. Designate any area of a district campus a "free speech zone" or otherwise
11 create policies restricting noncommercial expressive activities to a particular area
12 of a district campus.

13 4. Charge fees for additional security based on the anticipated content of speech
14 or anticipated reaction to speech.

15 5. Sanction individuals or groups for discriminatory harassment unless the
16 speech is unwelcome, targets its victim on the basis of the victim's real or perceived
17 membership in a class protected under federal, state, or local law, and is
18 demonstrably so severe, pervasive, and objectively offensive that it effectively bars
19 a student from receiving equal access to educational opportunities or benefits. This
20 subdivision does not preclude a district board from providing additional resources to
21 a student affected by speech that cannot be sanctioned under this subdivision or from
22 taking nonpunitive actions designed to promote a welcoming, inclusive
23 environment.

24 (b) All indoor and outdoor public areas owned or operated by a district board
25 shall be considered public forums.

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1 (c) A district board shall make every reasonable effort to prevent protected
2 speech and district board-sanctioned events, activities, and instruction from being
3 disrupted. Nothing in this section shall prevent or inhibit a district board from
4 preventing disruptions or punishing disrupters if the district board, to do so, does not
5 prevent or punish expression that is protected under the First Amendment.

6 (d) A district board shall do all of the following:

7 1. Conduct an annual survey of all students and employees on First
8 Amendment rights, academic freedom, perceived political, ideological, or other bias
9 at the district schools, and whether campus culture promotes self-censorship.

10 2. Annually submit to the legislature under s. 13.172 (2) a report detailing the
11 results of the survey under subd. 1.

12 3. Annually provide all students and employees with instruction in academic
13 freedom, due process, and First Amendment protections.

14 **(3) ACADEMIC FREEDOM.** A district board may not sanction an individual on the
15 basis of the content or viewpoints expressed while the individual is directly engaged
16 in instruction, research, or service explicitly related to the individual's role as a
17 student or faculty member of a district school.

18 **(4) PENALTIES; INSTITUTIONAL AID.** (a) A district board that violates this section,
19 for 10 years following the date of the finding of the violation under par. (e), shall
20 include a disclaimer on all notices, both printed or electronic, to individuals
21 regarding admission to a technical college of the district, in a type size no smaller
22 than the majority of the rest of the notice, in substantially the following form:
23 "NOTICE: We are required by the State of Wisconsin to inform you that within the
24 last 10 years ... [insert name of technical college] has violated the free speech or
25 academic freedom provisions in the Wisconsin statutes."

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1 (b) A district board that violates this section more than once in a 10-year period
2 is ineligible for allocation of grants under s. 39.435, except grants awarded under s.
3 39.435 (2) or (5), for a period of no less than one fiscal year.

4 (c) In addition to the period of ineligibility under par. (b), if a district board
5 administrator causes the violation of this section, the district board is not eligible for
6 allocation of grants under s. 39.435, except grants awarded under s. 39.435 (2) or (5),
7 until the administrator is permanently removed from his or her administrative role.

8 (d) If a district board that violates this section is ineligible under par. (b) or (c)
9 for allocation of grants under s. 39.435, except grants awarded under s. 39.435 (2)
10 or (5), the district board shall make an award of institutional financial aid to each
11 student affected by the district board's ineligibility under par. (b) or (c) in the amount
12 that the student would have received as a grant under s. 39.435 if the district board
13 had not violated this section. The district board shall pay the institutional financial
14 aid awarded to each student under this paragraph from moneys that the district
15 board has allocated for its administrative expenses.

16 (e) The penalties under this subsection apply if any of the following find, on the
17 basis of a preponderance of the evidence, that the district board violated this section:

- 18 1. A state or federal court in this state.
- 19 2. The higher educational aids board.
- 20 3. Any standing committee of the legislature having jurisdiction over matters
21 relating to higher education.

22 **(5) CAUSE OF ACTION.** (a) Any person identified in par. (b) may bring an action
23 in circuit court against a district board for violation of this section and may seek any
24 of the following:

- 25 1. An injunction against violation of this section.

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1 2. Recovery from the district board of compensatory damages for persons
2 aggrieved by the violation.

3 (b) Any of the following persons may bring an action under par. (a):

4 1. The attorney general.

5 2. A district attorney.

6 3. Any person whose expressive rights were violated through the violation of
7 this section.

8 (c) Subject to par. (d), in an action brought under par. (a), if the court finds a
9 violation, the court shall award to the plaintiffs all of the following:

10 1. Total damages for all persons aggrieved by the violation of not less than \$500
11 for the initial violation plus \$50 for each day the violation remains ongoing, which
12 shall accrue starting on the day after the complaint is served on the district board.

13 2. Notwithstanding s. 814.04 (1), court costs and reasonable attorney fees.

14 (d) In an action brought under par. (a), the total damages, excluding court costs
15 and attorney fees, that may be awarded to plaintiffs in a case or cases stemming from
16 a single controversy may not exceed an aggregate amount of \$100,000. In violations
17 harming multiple plaintiffs, the court shall divide the damages equitably among
18 them until the maximum award is exhausted, if applicable.

19 (e) If a court awards to plaintiffs damages, court costs, or attorney fees in an
20 action brought under this subsection, the district board shall pay the total amount
21 of the award from moneys that the district board has allocated for its administrative
22 expenses.

23 (f) Section 893.80 does not apply to an action brought against a district board
24 under this section.

25 **SECTION 5.** 39.285 (1) (c) of the statutes is created to read:

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1 39.285 (1) (c) The board shall ensure that any proposed formula approved
2 under par. (a) takes into consideration any University of Wisconsin institution's loss
3 of funding allocation under s. 36.41 (4) (b) and (c) or technical college district board's
4 loss of funding allocation under s. 38.34 (4) (b) and (c).

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(END)