

# WEST VIRGINIA LEGISLATURE

## 2018 REGULAR SESSION

**Introduced**

### **Senate Bill 111**

**FISCAL  
NOTE**

BY SENATORS TRUMP, RUCKER, MAYNARD, AND KARNES

[Introduced January 10, 2018; Referred  
to the Committee on Education; and then to the Committee  
on the Judiciary]

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, §18B-20-12, §18B-20-13 and  
4 §18B-20-14, all relating to enacting the Forming Open and Robust University Minds Act;  
5 and addressing the exercise of First Amendment rights on public university campuses.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 20. FORMING OPEN AND ROBUST UNIVERSITY MINDS (FORUM) ACT.**

**§18B-20-1. Legislative findings.**

1 The Legislature finds:

2 (1) The First Amendment of the United States Constitution and the West Virginia  
3 Constitution protect the rights of free speech, freedom of the press, freedom of religion, and  
4 freedom of association for all citizens.

5 (2) The United States Supreme Court has called public universities, “peculiarly the  
6 marketplace of ideas,” Healy v. James, 408 U.S. 169, 180 (1972), where young adults learn to  
7 exercise these Constitutional rights necessary to participate in our system of government and to  
8 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 (3) The exercise of First Amendment rights on public university campuses in this state is  
12 a critical component of the education experience for students and requires that each public  
13 university in this state ensure free, robust, and uninhibited debate and deliberations by students  
14 whether on or off campus.

15 (4) Public universities in this state and elsewhere are failing to provide adequate  
16 safeguards for the First Amendment rights of their students leading to a stifling of expression on  
17 campus.

18 (5) The United States Supreme Court has warned that if public universities stifle student

speech and prevent the open exchange of ideas on campus, “our civilization will stagnate and die.” Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

(6) A significant amount of taxpayer dollars is appropriated to public institutions of higher education each year and as such, this Legislature must ensure that all public institutions of higher education receiving state funds recognize freedom of speech as a fundamental right for all, now therefore be it enacted by the State Legislature of the State of West Virginia as follows:

**§18B-20-2. Short title.**

This article may be known and cited as the “Forming Open and Robust University Minds (FORUM) Act.”

**§18B-20-3. Definitions.**

As used in this article:

“Benefit” means the following: (1) Recognition; (2) registration; (3) the use of facilities of the institution of higher education for meetings or speaking purposes; (4) the use of channels of communication; and (5) funding sources that are otherwise available to other student associations at the public institution of higher education.

“Campus community” includes students, administrators, faculty and staff at the institution of higher education and their invited guests.

“Counter demonstration” means lawful action or conduct that criticizes or objects to the free expression activities of others on campus, does not violate the rights of others in the campus community by materially disrupting previously scheduled or reserved activities in a portion or section of the campus at that scheduled time.

“Harassment” means only that expression that is so severe, pervasive, and subjectively and objectively offensive that it unreasonably interferes with an individual’s access to an educational opportunities or benefits provided by the public institution of higher education.

“Outdoor areas of campus” means the generally accessible outside areas of campus where members of the university community are commonly allowed, such as grassy areas,

walkways or other similar common areas and does not include outdoor areas where access is restricted to a majority of the campus community.

“Public institution of higher education” means any public technical institute, public junior college, public senior college or university, law school, medical or dental school, public state college, or other agency of higher education as defined in §18B-1-2 of this code.

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

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

**§18B-20-4. Expressive activities described.**

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

**§18B-20-5. Reasonable restrictions allowed.**

The outdoor areas of campuses of public institutions of higher education in this state are traditional public forums. Public institutions of higher education may maintain and enforce reasonable time, place and manner restrictions narrowly tailored in service of a significant institutional interest only when the restrictions employ clear, published, content, and viewpoint-neutral criteria, and provide for ample alternative means of expression. The restrictions shall allow members of the campus community to spontaneously and contemporaneously assemble and distribute literature. This section does not limit the right of student expression elsewhere on campus.

**§18B-20-6. Noncommercial expressive activity allowed.**

1       (a) Any person who wishes to engage in noncommercial expressive activity on campus  
2 shall be permitted to do so freely, if the person's conduct is not unlawful and does not materially  
3 and substantially disrupt the functioning of the public institution of higher education, subject only  
4 to the requirements of §18B-20-5 of this code. This section does not prohibit public institutions of  
5 higher education from maintaining and enforcing reasonable time, place and manner restrictions  
6 that are narrowly tailored to serve a significant institutional interest only when the restrictions  
7 employ clear, published, content and viewpoint-neutral criteria. The restrictions shall allow for  
8 members of the campus community to spontaneously and contemporaneously assemble and  
9 distribute literature.

10       (b) This section does not prevent public institutions of higher education from prohibiting,  
11 limiting, or restricting expression that the First Amendment does not protect (e.g. true threats,  
12 expression directed to provoke imminent lawless actions and likely to produce it) or prohibit  
13 harassment as defined in §18B-20-3 of this code.

14       (c) This section does not limit the right of members of the campus community from holding  
15 counter demonstrations, if the conduct of the counter demonstrations is not unlawful and does  
16 not materially and substantially prohibit the free expression rights of others on campus, or does  
17 not disrupt the functioning of the institution of higher education.

**§18B-20-7. Freedom of association and nondiscrimination against students and student organizations.**

1       A public institution of higher education may not deny a belief-based student organization  
2 any benefit or privilege available to any other student organization, or otherwise discriminate  
3 against a belief-based organization, based on the expression of the organization, including any  
4 requirement that the leaders or members of the organization:

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

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

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

**§18B-20-8. Free speech education for members of the campus community.**

1        Public institutions of higher education shall make public in their handbooks, on their  
2 websites, and through their orientation programs for students the policies, regulations and  
3 expectations of students regarding free expression on campus consistent with this article.

**§18B-20-9. Development of educational materials, programs, 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.

**§18B-20-10. Accountability to the public.**

1        (a) Each public institution of higher education shall publicly post on its website, as well as  
2 submit to the Governor and Legislature by December 1 of each year a report which details the  
3 course of action implemented to follow the requirements of this article. A report shall also be given  
4 in the instance of any changes or updates to the chosen course of action. The information required  
5 in the report must be:

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

8        (2) Searchable by keywords and phrases; and

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

11        (4) 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

the campus community determined to be responsible for those specific barriers or incidents involving students shall be reported without revealing those students' personally identifiable information; and

(B) Any other information each public institution of higher education considers valuable for the public to evaluate whether free expression rights for all members of the campus community have been equally protected and enforced consistent with this article.

(b) For purposes of bringing a civil action under this article, for an alleged violation of First Amendment rights, a public institution of higher education is "government agency" as that term is used in §55-17-1 *et seq.* of this code, and the requirements of that article must be followed.

#### **§18B-20-11 Remedies.**

Any person or student association aggrieved by a violation of this article may bring an action against the public institution of higher education and any other persons responsible for the violation and seek appropriate relief, including, but not limited to, injunctive relief, monetary damages, reasonable attorneys' fees, and court costs, subject to section thirty-five, Article VI of the West Virginia Constitution.

Any person or student organization aggrieved by a violation of this article may assert such violation as a defense or counter claim in any disciplinary action or in any civil or administrative proceedings brought against the student or student organization. This section does not limit any other remedies available to any person or student organization.

#### **§18B-20-12. Limitation of actions.**

A person may bring suit for violation of this section only within one year after the day the cause of action accrues. For purposes of calculating the one-year limitation period, each day that the violation persists, and each day that a policy in violation of this section remains in effect, is a new violation of this section and, therefore, a new day that the cause of action has accrued.

#### **§18B-20-13. Immunity.**

The state waives immunity under the Eleventh Amendment of the United States

Constitution and consents to suit in a federal court for lawsuits arising out of this article. A public institution of higher education that violates this article is not immune from suit or liability for the violation.

**§18B-20-14. Adoption of policy on free expression.**

The Higher Education Policy Commission and West Virginia Council for Community and Technical College Education shall each 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, and 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 within the limits of reasonable viewpoint, and content-neutral restrictions on time, place, and manner of expression that are consistent with this article 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 may assemble and engage in spontaneous expressive activity as long as the activity is not unlawful and does not materially and substantially disrupt the functioning of the institution;

(4) That the public areas of campuses of the institution are traditional public forums, open on the same terms to any speaker; and

(5) That the institution:

(A) Shall strive to remain neutral, as an institution, on the public policy controversies of the day; and



- 23            (B) May not take action, as an institution, on the public policy controversies of the day in  
24            such a way as to require students or faculty to publicly express a given view of social policy.

NOTE: The purpose of this bill is to enact the “Forming Open and Robust University Minds (FORUM) Act” which addresses the exercise of First Amendment rights on public university campuses.

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