

Department of Legislative Services
Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE

House Bill 677
Appropriations

(Delegate Shank, *et al.*)

Higher Education - Nonpublic Institutions of Higher Education - Free Speech

This bill prohibits the private nonprofit institutions of higher education that qualify for State aid under the Sellinger funding formula from making or enforcing a rule that subjects an enrolled student to disciplinary sanction based solely on conduct that is speech or other communication that, when engaged in outside the campus or other facility of the institution, is protected from governmental restriction by the First Amendment of the U.S. Constitution or the Maryland Constitution. A student enrolled at an institution at the time that the institution makes or enforces such a rule may bring a civil action in a court of competent jurisdiction for injunctive or declaratory relief, as determined by the court to be appropriate. The court may award attorney's fees to a prevailing plaintiff.

Fiscal Summary

State Effect: It is assumed that any additional workload for the District Court as a result of the bill can be handled with existing budgeted resources.

Local Effect: It is assumed that any additional workload for the circuit courts as a result of the bill can be handled with existing budgeted resources.

Small Business Effect: Minimal.

Analysis

Bill Summary: To the extent that the application of this bill would not be consistent with the religious tenets of an institution controlled by a religious organization, the bill does not apply to the institution.

The bill does not:

- authorize the prior restraint of student speech;
- prohibit an institution from imposing discipline for harassment, threats, or intimidation, unless the act is protected by the U.S. Constitution or Maryland Constitution; or
- prohibit an institution from adopting rules or regulations that are designed to prevent hate crimes from being directed at students in a manner that denies any student full participation in the education process, provided the rules conform to standards established for citizens generally under the First Amendment of the U.S. Constitution or the Maryland Constitution.

Current Law: As state agents, all public colleges and universities are legally bound to respect the constitutional rights of their students. Private universities are not directly bound by the First Amendment, which limits only government action.

The Maryland Higher Education Commission (MHEC) administers funding to eligible nonprofit independent college and universities through the Joseph A. Sellinger funding formula.

Background:

Speech Codes

During the 1980s and 1990s many colleges and universities, both public and private, sought to combat discrimination and harassment on campus by enacting policies and regulations known as speech codes. According to the Foundation for Individual Rights in Education, many of the codes directly borrowed language from the Equal Employment Opportunity Commission statutes prohibiting workplace harassment. However, the codes often had the result of prohibiting expression that would be protected by the First Amendment in society at-large; therefore, the courts have generally found the codes to be unconstitutional at public institutions. The courts have even found codes that included a clause stating that the policy does not apply to speech protected by the First Amendment to be unconstitutional because as one California federal judge explained, “[the clause] communicates virtually nothing [to college students].”

Private institutions are not prohibited from having speech codes because they are not bound by the First Amendment, and some private institutions put a particular set of moral, philosophical, or religious teachings above a commitment to free expression. Nevertheless, many private institutions consider themselves strongholds of free expression and promise such an environment to their faculty and students.

In *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568,572, the U.S. Supreme Court found that not all speech is protected under the First Amendment including “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words – those by which their very utterance inflict injury or tend to incite an immediate breach of the peace.” Over the years the Court’s position on free speech has been modified, for example, in *Cohen v. California* (1971) 403 U.S. 15, 91, the U.S. Supreme Court ruled that simple profanity when not accompanied by ‘fighting’ words is protected speech.

California passed a law similar to this bill in 1992 known as the Leonard Law. In *Corry v. Stanford* (1995), a California Superior Court found that the Leonard Law applied to Stanford University, and therefore the institution’s speech code violated its students’ rights to free expression. The court also found that the Leonard Law did not impinge on Stanford’s First Amendment rights because the law in no way restricted Stanford’s ability to express disapproval of harassing speech.

Sellinger Funding Formula

In fiscal 2011, this aid is calculated by multiplying the number of full-time equivalent students (FTES) enrolled at independent institutions by 13% of the current year State general fund appropriation per FTES at selected public four-year institutions (Chapter 487 of 2009). The Governor’s proposed fiscal 2011 budget includes \$30.0 million for the Sellinger funding formula, which assumes a contingent reduction of \$22.0 million is enacted as proposed in the Budget Reconciliation and Financing Act of 2010. The 17 independent colleges and universities that receive aid through the Sellinger funding formula are:

- Baltimore Hebrew University;
- Baltimore International College;
- Capitol College;
- College of Notre Dame;
- Columbia Union College;
- National Labor College;
- Goucher College;
- Hood College;
- Johns Hopkins University;
- Loyola College;
- Maryland Institute of Art;
- McDaniel College;
- Mount St. Mary’s University;

- St. John's College;
- Sojourner-Douglass College;
- Villa Julie College; and
- Washington College.

Additional Information

Prior Introductions: None.

Cross File: SB 805 (Senator Pipkin) – Education, Health, and Environmental Affairs.

Information Source(s): Maryland Higher Education Commission, Judiciary (Administrative Office of the Courts), Foundation for Individual Rights in Education, First Amendment Center, Department of Legislative Services

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