

Department of Legislative Services
Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 796

(Delegate Grammer)

Appropriations

Higher Education - Freedom of Speech on Campus - Protection (Forming Open and Robust University Minds (FORUM) Act)

This bill specifies a number of requirements for a public institution of higher education regarding freedom of speech on campus, including requiring any outdoor area located on any campus of a public institution of higher education to be considered a public forum. Any person aggrieved by a violation of specified requirements may bring an action against an institution or an employee acting in their official capacities. If a court finds that a public institution or an employee violated specified requirements, the court must award the aggrieved person at least \$5,000 and any other appropriate relief. There is a one-year statute of limitation on filing a complaint. If the alleged violation is a policy of the institution, each day that the policy is in effect is considered a day in which the violation occurs. A public institution may not raise the defense of sovereign immunity; in a disciplinary or civil proceeding brought by the institution against a student, the student may raise a violation of the bill as a defense to the disciplinary action or civil proceeding. **The bill takes effect July 1, 2020.**

Fiscal Summary

State Effect: To the extent security costs increase, higher education expenditures increase, potentially significantly, as explained below; other expenditures for public institutions of higher education are likely minimal and absorbable. Higher education revenues are not affected. The bill does not materially affect the workload or finances of the Judiciary.

Local Effect: To the extent security costs increase, expenditures increase for local community colleges, potentially significantly, as explained below; other expenditures for local community colleges are likely minimal and absorbable. Revenues are not affected.

Small Business Effect: None.

Analysis

Bill Summary:

Public Institution of Higher Education – Freedom of Speech Requirements

Specifically, the bill establishes that any outdoor area located on any campus of a public institution of higher education must be considered a public forum. Further, public institutions of higher education *may not* create designated areas of a campus outside which expressive activities are prohibited.

However, a public institution of higher education *may* maintain and enforce reasonable time, place, and manner restrictions on expressive activities that are narrowly tailored in service of a significant institutional interest. Any restriction authorized by the bill must (1) employ clear, published, content-neutral, and viewpoint-neutral criteria; (2) provide for ample alternative means of expression; and (3) allow for members of the campus community to spontaneously assemble and distribute literature.

A public institution of higher education may not deny a religious, political, or ideological student organization any benefit available to another student organization based on the expressive activities of the organization, including any requirement of the organization that members adhere to beliefs, comply with standards of conduct, or further the organization's mission or purpose.

Training

Each public institution of higher education must develop materials, programs, and procedures to ensure that employees or contractors who are responsible for education or discipline understand the policies, regulations, and duties of the institution regarding free expression on campus. Each institution must publish the policies in its student handbook and on its website as well as include a discussion of its free expression policies in its student orientation program.

Reporting

By December 1 each year, each public institution of higher education must submit to the Governor and the General Assembly a report detailing the institution's compliance with the requirements of the bill. The report must be posted on the institution's website in a conspicuous manner and publicly accessible. The report must include specified information.

If any public institution of higher education is sued for an alleged violation of the right to free speech under the First Amendment of the U.S. Constitution or the Maryland Declaration of Rights, the institution must, within 30 days after receiving the complaint, submit to the Governor and the General Assembly a report detailing the allegations and containing a copy of the complaint.

Severability

The bill's provisions are severable.

Current Law/Background: The First Amendment to the U.S. Constitution and the Maryland Declaration of Rights protect the rights of freedom of speech, freedom of the press, freedom of religion, and freedom of association as well as the right to petition the government. The applicability of these rights is often established in court cases. This is particularly true with regard to institutions of higher education, as they have traditionally been treated as special cases.

The U.S. Supreme Court has defined three types of public forums: traditional public forums; designated or limited public forums; and nonpublic forums (*Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983)). And specifically, in 2005, the Fourth Circuit of the U.S. Court of Appeals held that the University of Maryland, College Park Campus is a limited public forum, a “special type of enclave” that is devoted to higher education (*Am. Civil Liberties Union v. Mote*, 423 F.3d 438 (4th Cir. 2005)). Thus, outsiders may be treated differently than members of the community in regard to free speech. In that case, the plaintiff was an outsider. An outsider was defined as “persons or groups other than students, faculty, and staff, and not otherwise sponsored by a department or registered student organization.”

Thus, under current law, campuses are permitted to maintain policies that limit non-affiliated individuals' or entities' access to use of campus facilities. For example, outsiders are required to reserve space in advance to engage in public speaking or distribute materials on campus, and priority is given to groups located on campus.

Not expressly addressed by the court's opinion was the use of a “free speech zone” in general on a public college campus. A “free speech zone” is defined as when a college designates a certain area for students and outsiders for expressive activity, generally speeches, protests, or literature distribution. According to *Inside HigherEd*, “free speech zones” on college campuses were originally developed during the civil rights era as a positive reaffirmation of the value of free speech. During the 1970s and 1980s, the interpretations of these policies shifted to be restrictions of where students and others were allowed to protest. As explained in more detail below, these zones have failed to withstand

recent legal scrutiny with regard to students and other campus insiders; however, restrictions on campus outsiders in a content-neutral manner has generally been permitted. According to the University System of Maryland, the degree of legal scrutiny of “time, place, and manner” restrictions is different for a “public forum” versus a “limited public forum.” With respect to a traditional public forum, the government can restrict speech based on time, place, and manner only, if the restriction is content-neutral, is narrowly drawn to serve a significant State interest, and leaves open ample alternative channels of communication. In a limited public forum, the scrutiny given to restrictions on outside groups requires only that the restriction be “viewpoint neutral and reasonable in light of the objective purposes served by the forum.”

According to the U.S. Supreme Court in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), even in a limited public forum such as a public university campus, the government may not discriminate against a given point of view. In that case, the university denied payments from its student activities fund for the printing costs of a student religious magazine. The student activities fund being a limited public forum “more in a metaphysical sense than in a spatial or geographic sense” did not limit the requirement not to discriminate against a point of view. Thus, while the public university is not required to provide funding to student publications, it cannot selectively withhold funding from particular student publications simply because they advocate a controversial point of view. Further, according to the American Civil Liberties Union, if a university generally allows students to use campus resources to entertain guests, the university cannot withdraw those resources simply because students have invited a controversial speaker to campus.

Inflammatory speech is also protected speech. The U.S. Supreme Court held, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), that the government cannot punish inflammatory speech unless it intentionally and effectively provokes a crowd to immediately carry out violent and unlawful action. Very few cases have reached the U.S. Supreme Court to test these limits, and it remains a very high bar to meet. What many consider “hate speech” is also generally protected.

In recent years, outside controversial speakers on college campuses have made national news. In addition to the controversial topics themselves and the applicability of free speech on the campuses of public universities, the news reports have cited the costs associated with providing security at these events. For the most controversial speakers, security costs have been in the hundreds of thousands, totaling millions of dollars annually, for some campuses.

For example, in one month in 2017 as reported by *The Daily Californian*, the University of California, Berkeley spent nearly \$4 million in security costs for controversial speakers for Free Speech Week for three events. Security costs for similar events have risen in recent years due to increased violence at events and the fear of such violence. These events often

attract protests and counter protest rallies that include both campus insiders and outsiders, and they raise significant security concerns that views on both sides may be expressed violently.

According to a 1991 U.S. Supreme Court case (*Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1991)), local governments are restricted from charging differing fees to different groups without any objective standards to prevent the government from basing the fee on the political views that a group sought to express on the basis of the First Amendment. That restriction also applies to public universities.

On March 21, 2019, President Trump signed an [executive order on Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities](#), which links federal research funding to institutions agreeing to promote free inquiry.

Other States

According to the Foundation for Individual Rights in Education and the National Conference of State Legislatures, at least 19 other states have recently passed some form of free speech on college campuses legislation: Alabama; Arizona; Arkansas; California; Colorado; Florida; Georgia; Iowa; Kentucky; Louisiana; Missouri; North Carolina; North Dakota; Oklahoma; South Dakota; Tennessee; Texas; Utah; and Virginia. Although all this legislation addresses the issue of freedom of speech on campus, the bills are not identical. Of note, Virginia legislation, which passed in 2019, has many similarities to this bill.

In addition, 16 states (including Maryland) are considering legislation (additional legislation in six cases) that addresses the freedom of speech on college campuses: Alaska; California; Florida; Georgia; Hawaii; Illinois; Iowa; Maryland; New Hampshire; New York; Ohio; South Carolina; Tennessee; Utah; Washington; and Wisconsin. The Florida legislation requires a study of intellectual freedom and viewpoint diversity.

State Expenditures: To the extent security costs increase, higher education expenditures increase, potentially significantly. Declaring that a college campus is a “public forum” rather than a “limited public forum” may result in additional outsiders (those not from the campus or sponsored by a campus) having events on the outdoor areas of public campus, thereby resulting in additional security costs. In addition, the bill categorizes the entire outdoor area of a public campus as a public forum, which may increase the size of a required security force.

As discussed above, public universities are restricted from charging differing fees to different groups without any objective standards to prevent the government from basing the fee on the political views that a group sought to express under the First Amendment.

Therefore, it is often difficult for public universities to recoup security costs. Although not directly comparable, as explained above, the University of California, Berkeley spent nearly \$4 million on security in one month in 2017. Thus, any increase in security costs cannot be reliably estimated, but they may be significant.

Higher education expenditures may increase to develop materials, programs, and procedures to ensure that employees or contractors of each institution who have responsibility for the education or discipline of students understand the policies, regulations, and duties of public institutions of higher education regarding free speech on campus; however, these costs are likely minimal and absorbable. Public institutions of higher education can produce the required reports using existing resources.

Local Expenditures: As explained above, expenditures for local community colleges may increase, potentially significantly, due to security costs. Most other duties for local community college can be absorbed with existing resources or only result in minimal expenditures.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts); Maryland Higher Education Commission; University System of Maryland; Morgan State University; American Civil Liberties Union; Foundation for Individual Rights in Education; National Conference of State Legislatures; *Inside HigherEd*; *The Daily Californian*; Department of Legislative Services

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