

Kremer, Jesse

From: Joe Cohn <joe@thefire.org>
Sent: Monday, April 24, 2017 8:44 PM
To: Kremer, Jesse
Subject: Re: FW: Wisconsin Legislation

Representative Kremer:

I hope this message finds you well. I apologize for the delay in getting back to you. With the Berkley situation unfolding and our Campus Free Expression Act having multiple hearings (including one tomorrow) in the California legislature, I've been spread thinner than I prefer.

The bill draft is in pretty good shape, but definitely has room for improvement.

On p. 5 paragraph 4 the bill states:

That any person lawfully present on campus may protest or demonstrate there. This statement shall make clear that protests and demonstrations that interfere with the rights of others to engage in or listen to expressive activity shall not be permitted and shall be subject to sanction. This statement shall not prohibit professors or other instructors from maintaining order in the classroom.

I think it should be changed to:

That any person lawfully present on campus may protest or demonstrate there. This statement shall make clear that protests and demonstrations that

materially and
substantially
interfere with the rights of others to engage in or listen to expressive activity

or materially and substantially disrupt the functioning of an institution

shall

not be permitted and shall be subject to sanction. This statement shall not prohibit professors or other instructors from maintaining order in the classroom.

FIRE is still not particularly enthusiastic about sections 7 and 7(b)1, and note that it was those sections that brought out the opposition in North Carolina and led that state's bill to its defeat. The bill becomes way less controversial if those sections are cut. If they are kept in they really need to be tweaked.

Paragraph 7(b) pp.5-6 currently states (emphasis added):

7. That each institution shall 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.
(b) Discipline. The policy required under par. (a) shall satisfy all of the following:

1. Include a range of disciplinary sanctions for anyone under the jurisdiction of the institution who engages in violent, abusive, **indecent, profane, boisterous**, obscene, **unreasonably loud**, or other disorderly conduct that interferes with the free expression of others.

At a minimum it should be changed as follows:

7. That each institution shall 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,
(b) Discipline. The policy required under par. (a) shall satisfy all of the following:

1. Include a range of disciplinary sanctions for anyone under the jurisdiction of the institution who engages in violent or other disorderly conduct that materially and substantially disrupts the free expression of others or the operations and functioning of the institution.

Such changes makes the provisions far less controversial and with respect to section 7(b)1 makes the provision constitutional. "Indecent, profane, and boisterous" speech/conduct is generally protected speech in most contexts, and "unreasonably loud" is too subjective for the statute. The real key is that protests and counter protests are protected unless the conduct materially or substantially interferes with or disrupts the expression of others or the functioning of the institution. Courts interchangeably use the terms "substantial" or "material" and "interference" or "disruption," but the term "disruption" is used more often than the term "interference."

7.(b) 3 states:

Require suspension for a minimum of one semester or expulsion of any student who has twice been found responsible for interfering with the expressive rights of others.

FIRE is not convinced that the legislature should statutorily set various punishments, but I would recommend that at a minimum, that be changed to:

Require suspension for a minimum of one semester or expulsion of any student who has twice been found responsible for materially and substantially interfering with the expressive rights of others.

The last thing I note is in the cause of action:

(10) ENFORCEMENT. (a) A person whose expressive rights are violated by a violation of this section or the policy adopted under sub. (4) (a) may bring an action to enjoin the violation of this section or the policy.

(b) In an action brought under par. (a), if the court finds that a violation of this subsection occurred, the court shall award injunctive relief for the violation, and, notwithstanding s. 814.04 (1), reasonable attorney fees and costs. The court shall also award the actual damages caused by the violation or \$1,000, whichever is greater

My concern here is that it is unclear whether the plaintiff can get the \$1,000 if it isn't actual damages. I would make that a strict liability. I would also add language allowing the school to recover attorney's fees if the case is deemed frivolous or initiated in bad faith. Here is my proposed language:

10) ENFORCEMENT. (a) A person whose expressive rights are violated by a violation of this section or the policy adopted under sub. (4) (a) may bring an action to enjoin the violation of this section or the policy.

(b) In an action brought under par. (a), if the court finds that a violation of this subsection occurred, the court shall award injunctive relief for the violation, and, notwithstanding s. 814.04 (1), reasonable attorney fees and costs. The court shall also award a minimum of \$1,000 or the actual damages caused by the violation, whichever is greater. The defendants in a action filed under this section shall be awarded reasonable attorney fees and costs if the court finds that the action was frivolous and initiated in bad faith.

Allowing institutions to recover for frivolous suits may ease some of their concerns. It could also be proposed as a compromise further along in the process.

The rest of the bill looks great. FIRE is so happy to be working with you on this!

Thank you for your attention to our input and thank you again for your patience. I'm happy to discuss our rationales with you further if you'd like. I look forward to working with you on this legislation.

Many thanks,

Joe Cohn
Legislative & Policy Director
Foundation for Individual Rights in Education
510 Walnut Street, Suite 1250
Philadelphia, PA 19106
(215) 717-3473
(215) 717-3440 fax
twitter: @JoeatFIRE

Help FIRE Defend and Promote Free Speech on Campus with a Tax Deductible Donation Today.
www.thefire.org/donate

On Thu, Apr 20, 2017 at 8:14 AM, Kremer, Jesse <Jesse.Kremer@legis.wisconsin.gov> wrote:

Joe,

This is a draft that the Speaker's office melded with ours. Unfortunately, they did remove the technical college system. This would cover the entire four year system though.

Please let me know if you see any glaring errors that need repair. We did incorporate some of your suggestions.

Thank you again!

To: Representative Jesse Kremer, Assembly District 59
From: Donald Downs, Emeritus Professor, University of Wisconsin-Madison
Re: Campus Free Speech Act

Dear Representative Kremer:

FIRE has asked me to offer you some thoughts on your bill addressing campus free speech. In recent weeks I have also provided some thoughts and concerns to President Ray Cross and others, but I have not touched base with you. Below are my thoughts, for what they are worth, that you may consider at your discretion. I pretty much agree with what I have read of FIRE's concerns, and I applaud you for reaching out to them in order to draft a better bill. I also strongly believe that protecting speakers and free speech on campus is imperative for the fate of higher education and the constitutional republic. I have dedicated a large portion of my career to this end, and am working on the national level to promote it in my "retirement."

I offer these points in the spirit of cooperation with the legislature and in the hope that the legislature can improve the bill from my perspective if it moves forward. I make no claim to infallibility, and I appreciate the fact that there will be disagreements, and that everyone must deal with different constraints.

FIRE and I also respect the need for appropriate institutional autonomy, which is also an aspect of academic freedom. We do part ways to some extent when it comes to the present need for actual legislation. I know that UW-Madison has been working hard to address the problem of speaker protection, and personally would prefer that we be given a chance to get our own house in order before resorting to state legislation. We have an obligation to uphold our end of the social contract that led to us being granted significant institutional governing autonomy in the first place, and the protection of academic freedom, free speech, and the principles of the "Open University" is a central responsibility in that contract and moral charter. If we fail in this regard, we are not worthy of such autonomy. But I would prefer we be given a chance to get our own house in order before moving forward. I owe this position to the institution that I revere and which I have never hesitated to criticize in the past when it has failed to protect the freedoms that I revere even more.

For what it is worth, I do think the bill would be substantially improved if revised in the following respects. You will see that my views and FIRE's views are parallel for the most part, though not entirely.

1. Paragraph 4 on page 5 would punish protests that "interfere with" others' rights to speak or listen. In my estimation, this language is too broad and

vague, and likely to infringe or chill protected protest. The language I have seen in First Amendment cases that I have taught draws a line at speech that “materially and substantially” interferes with others’ rights or valid institutional functions.

2. I have harbored concerns about the “neutrality” provision since the first draft of a bill was introduced a few weeks ago. I am glad to see that your draft eliminates the mandatory language of previous drafts. I would encourage a further statement that this provision should not be construed to prohibit individuals and groups from expressing their own views regarding public policy, so long as they do not claim such views speak for the institution *qua* institution. I also think it should be appropriate for the institution to speak publicly about policy that directly affects it as an institution.
3. The discipline language addressing “abusive, indecent, profane, boisterous” expression is vague, and could readily apply to speech that is protected by the First Amendment. For example, the Supreme Court has explicitly protected profanity when it conveys a political message, and limited the regulation of “indecent” to limited domains. “Boisterousness” is a feature of many typical protests that are spirited in nature. FIRE recommends the “materially disrupts” language here, and I think that makes sense. This language could also suffice instead of the language about “unreasonably loud.” Expression becomes “unreasonably loud” when it “materially disrupts,” so why not use the latter language rather than the former? “Material disruption” of the speech of others or the proper functioning of the institution is the key.
4. Student penalties. I agree with FIRE’s emphasis upon the “material disruption” standard for penalties, and that penalties should be tailored to the level of harm. Violence is one thing; noise disruption another thing.

Personally, I also harbor genuine reservations about requiring schools to mete out certain penalties for reasons I mentioned earlier. A question I ask is whether the state has ever required the University to apply a particular penalty in misconduct cases? If not, is not this move of precedential significance? Is not the nature of punishment of students a core institutional function? Note, however, that there is nothing inherently wrong with the state making such material disruption a state crime in its own right, consistent with the application of state laws against such things as rape, robbery, assault, and other crimes that may be applied to campus acts as well as acts outside of campus. But such laws do not mandate how the University should treat offenders in relation to its own rules, if I am not mistaken.

This concern points to the principle of institutional autonomy to which I

refer above. My concern here is balanced by my recognition that material disruption of others' free speech is a very serious matter that speaks to the very heart of what an Open University must be; and, as I have written in a recent short essay on this problem, meaningful sanctions are necessary in order to effectuate the goal of protecting speakers. And far too many schools have shied away from such sanctions for various reasons, thereby weakening the deterrent effect that is so necessary in these and related matters. Again, my concern as far as the UW-System is concerned is institutional autonomy and giving us a chance to get our own house in order. Is there evidence that we are as bad as, say, Middlebury?

5. Enforcement: legal action to enjoin. I am in line with FIRE's suggestions here. Requiring plaintiffs to pay for frivolous suits is reasonable given the emotions at stake in the campus politics of free speech. I have long thought of how to engage in constructive legal action in cases of speech disruption, and this is something that seems to me to be an appropriate form of state law, similar to a 1983 action for violations of constitutional rights under color of state law. If institutions have a fiduciary duty under the social contract to protect academic freedom and free speech, then being liable for violations that they could have prevented is appropriate so long as appropriate guidelines and safeguards are present.

Once again, I offer these thoughts in the spirit of reaching out to the other end of State Street about an important matter. I have striven to be honest about my concerns about both the draft bill and the problem of free speech on campus. It is in everyone's interest to protect free speech in a manner that honors the historic principles of academic and institutional freedom.

Thank you for your time and consideration, and all best.

Donald Downs
Emeritus Professor, UW-Madison
Sarasota, Florida
608-692-6221