

SSB 5064 - H AMD TO JUDI COMM AMD (H-4920.2/18) **1242**
By Representative Manweller

WITHDRAWN 03/02/2018

1 On page 4, after line 20 of the striking amendment, insert the
2 following:

3 "NEW SECTION. **Sec. 3.** CAMPUS FREE EXPRESSION. (1) This
4 section may be known and cited as the campus free expression act.

5 (2)(a) The outdoor area of a campus of an institution of higher
6 education must be considered a traditional public forum.

7 (b) The governing board of the institution of higher education
8 may impose content-neutral and viewpoint-neutral time, place, and
9 manner restrictions on the use of the outdoor area of the campus for
10 expressive activities that are necessary to serve a compelling state
11 interest and narrowly drawn to achieve that interest. These
12 restrictions must allow members of the institution community to
13 spontaneously and contemporaneously assemble. In addition, the
14 restrictions must be well-defined and published, at a minimum, on
15 the web site of the institution and as part of any printed materials
16 covering the rules and policies of the institution.

17 (3) A person who wishes to engage in noncommercial expressive
18 activity on the campus of an institution of higher education must be
19 permitted to do so freely, as long as the person's conduct is not
20 unlawful and does not materially and substantially disrupt the
21 orderly operation of the institution.

22 (4) Nothing in this section may be construed as narrowing a
23 student's rights of expression under the First Amendment to the
24 United States Constitution or Article I, section 5 of the Washington
25 state Constitution.

26 (5)(a) The attorney general or a person whose rights under this
27 section have been violated may bring an action in a court of

1 competent jurisdiction against the institution of higher education,
2 members of the institution's governing board, deans, chairs, or
3 faculty or staff members.

4 (b) In an action brought under this section, if the court finds
5 a violation of this section, the court shall take the following
6 actions:

7 (i) For the first established violation, issue an injunction
8 against continued violation of this section; and

9 (ii) For subsequent violations, award the aggrieved person: (A)
10 Compensatory damages of no less than five hundred dollars for the
11 initial violation, plus fifty dollars for each day the violation
12 remains ongoing; (B) reasonable court costs; (C) attorneys' fees,
13 including expert fees; and (D) any other relief in equity or law
14 deemed appropriate.

15 (c) An action to enforce a right or obligation arising under
16 this section must commence within one year after the cause of action
17 accrues. A cause of action accrues when the section is violated.
18 Each day that a violation of this section persists, and each day
19 that a policy or rule in violation of the section remains in effect,
20 is a new violation of the section, and therefore, another day that a
21 cause of action accrues.

22 (6) As used in this section, "expression," "expressive
23 activity," or "expressive activities" includes all forms of peaceful
24 assembly, protest, speech, distributing literature, carrying signs,
25 and circulating petitions. The term does not include fighting words,
26 libelous statements, or obscene material, as defined by the United
27 States supreme court.

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29 NEW SECTION. **Sec. 4.** TRIGGER WARNINGS. (1) An institution of
30 higher education must allow a faculty or staff member to use trigger
31 warnings at the faculty or staff member's discretion.

32 (2) An institution of higher education may not take, or maintain
33 a policy or rule that allows it to take, punitive action against a
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1 faculty or staff member, with respect to tenure, promotion, or
2 disciplinary action, for not using trigger warnings.

3 (3)(a) A person whose rights under this section have been
4 violated may bring an action in a court of competent jurisdiction
5 against the institution of higher education, members of the
6 institution's governing board, deans, chairs, or faculty or staff
7 members.

8 (b) If the court finds a violation of this section, the court
9 shall award the aggrieved person: (i) Compensatory damages of no
10 less than five hundred dollars for the initial violation, plus fifty
11 dollars for each day the violation remains ongoing; (ii) reasonable
12 court costs; (iii) attorneys' fees, including expert fees; and (iv)
13 any other relief in equity or law deemed appropriate.

14 (c) An action to enforce a right or obligation arising under
15 this section must commence within one year after the cause of action
16 accrues. A cause of action accrues when the section is violated.
17 Each day that a violation of this section persists, and each day
18 that a policy or rule in violation of the section remains in effect,
19 is a new violation of the section, and therefore, another day that a
20 cause of action accrues.

21 (4) As used in this section, "trigger warning" includes a
22 warning provided by a faculty or staff member in advance of
23 assigning material that contains content that might trigger a
24 difficult emotional response for a student.

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26 NEW SECTION. **Sec. 5.** ACTIONABLE DISCRIMINATORY HARASSMENT AND
27 PROTECTING FREE SPEECH. (1) This section may be known and cited as
28 the campus antiharassment act.

29 (2) An institution of higher education may not take disciplinary
30 action against student speech that does not constitute actionable
31 discriminatory harassment as described in this section.

32 (3) As used in this section, speech constitutes actionable
33 discriminatory harassment when it is directed at an individual and:

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1 (a) Is part of a pattern of targeted, unwelcome conduct that is
2 discriminatory on the basis of race, color, national origin,
3 disability, religion, age, sex, sexual orientation, gender, or
4 gender identity; and

5 (b) Is so severe, pervasive, and objectively offensive; and

6 (c) So undermines and detracts from the victim's educational
7 experience that the victim-student is effectively denied equal
8 access to the institution's resources and opportunities.

9 (4) An institution of higher education is not liable for failing
10 to take disciplinary action for speech that does not meet the
11 requirements of subsection (3) of this section.

12 (5)(a) When speech meets the requirements of actionable
13 discriminatory harassment, an institution of higher education must
14 take immediate action to eliminate the actionable discriminatory
15 harassment and address its effects.

16 (b) An institution of higher education may be held liable for
17 violations of this section if it is deliberately indifferent to
18 known acts of actionable discriminatory harassment.

19 (6)(a) The attorney general or an aggrieved person whose rights
20 were infringed upon through a violation of this section may bring an
21 action in a court of competent jurisdiction against the institution
22 of higher education, members of the institution's governing board,
23 deans, chairs, or faculty or staff members.

24 (b) If the court finds a violation of this section, the court
25 must award the aggrieved person: (i) Compensatory damages of no less
26 than one thousand dollars; (ii) reasonable court costs; (iii)
27 attorneys' fees, including expert fees; and (iv) any other relief in
28 equity or law deemed appropriate.

29 (7)(a) An action under this section must commence within one
30 year after the cause of action accrues. A cause of action accrues
31 when this section is violated.

32 (b) For the purposes of calculating the one-year limitation
33 period in cases alleging unlawful disciplinary action for expression
34 protected under this section, the cause of action is deemed to

1 accrue on the date that the student receives final notice of
2 disciplinary action from the institution of higher education.

3 (c) For purposes of calculating the one-year limitation period
4 in cases alleging deliberate indifference by the institution of
5 higher education of actionable discriminatory harassment, the cause
6 of action accrues on the date the institution of higher education
7 received actual knowledge of the actionable discriminatory
8 harassment. The statute of limitations period must be reset for each
9 instance of actionable discriminatory harassment that is known to
10 the institution and that involves the same parties to the
11 harassment.

12 (8) This section does not apply to:

13 (a) An institution of higher education that is controlled by a
14 religious organization if the application of this section would not
15 be consistent with the religious tenets of the organization; or

16 (b) An institution of higher education whose primary purpose is
17 the training of individuals for the military services of the United
18 States or the merchant marine.

19 (9)(a) The state is not immune under the Eleventh Amendment of
20 the United States Constitution from suit in federal court for a
21 violation of this section.

22 (b) In a suit against the state for a violation of this section,
23 remedies, both at law and in equity, are available for such a
24 violation to the same extent as such remedies are available for such a
25 violation in a suit against any public or private entity other than
26 the state.

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28 NEW SECTION. **Sec. 6.** ACADEMIC FREEDOM AND WHISTLEBLOWER
29 PROTECTION. (1) This section may be known and cited as the academic
30 freedom and whistleblower protection act.

31 (2) An institution of higher education may not take adverse
32 personnel action, or maintain a policy or rule that allows it to
33 take adverse personnel action, against a faculty or staff member in
34 retaliation for:

1 (a) Expression related to scholarship, academic research, or
2 teaching, including posts on social media, letters to the editor,
3 personal blogs, and memberships in private organizations; or

4 (b) Disclosure, whether formal or informal, of information the
5 faculty or staff member reasonably believes evidences:

6 (i) A violation of law, rule, or policy; or

7 (ii) Gross mismanagement, gross waste of funds, abuse of
8 authority, or substantial and specific danger to public health or
9 safety.

10 (3)(a) An institution of higher education may not take, or
11 maintain a policy or rule that allows it to take, disciplinary
12 action against a student in retaliation for expression or other
13 communication that, when engaged in outside the institution, is
14 protected from governmental restriction by the First Amendment to
15 the United States Constitution or Article I, section 5 of the
16 Washington state Constitution.

17 (b) An institution of higher education may not take adverse
18 personnel action against a faculty or staff member solely for acting
19 to protect a student engaged in conduct authorized under this
20 section, or for refusing to infringe upon conduct that is protected
21 by this section, section 2 of this act, the First Amendment to the
22 United States Constitution, or Article I, section 5 of the
23 Washington state Constitution.

24 (4)(a) A person whose rights under this section have been
25 violated may bring an action in a court of competent jurisdiction
26 against the institution of higher education, members of the
27 institution's governing board, deans, chairs, or faculty or staff
28 members.

29 (b) In an action brought under this section, if the court finds
30 that the protected expression, as defined in subsection (2) or (3)
31 of this section, was a significant motivating factor behind the
32 institution of higher education's decision to take an adverse
33 personnel action against a faculty or staff member or a disciplinary
34 action against a student, the court shall award the aggrieved

1 person: (i) Compensatory damages; (ii) reasonable court costs; (iii)
2 attorneys' fees, including expert fees; (iv) and any other relief in
3 equity or law deemed appropriate, unless the institution
4 demonstrates that it would have taken the same personnel action in
5 the absence of the protected expression.

6 (c) An action to enforce a right or obligation arising under
7 this section must commence within one year after the cause of action
8 accrues. A cause of action accrues on the date that the aggrieved
9 person receives final notice of discipline from the institution of
10 higher education or the date that the act of retaliation occurs,
11 whichever is later.

12 (5) The definitions in this subsection apply throughout this
13 section unless the context clearly requires otherwise.

14 (a) "Adverse personnel action" includes dismissal, suspension,
15 discipline, reassignment, transfer, denial of promotion, or other
16 retaliation against a student, or faculty or staff member.

17 (b) "Expression" has the definition in section 2 of this act.

18 (c) "Faculty" or "faculty member" means a person, whether or not
19 compensated by an institution of higher education, tasked with
20 providing scholarship, academic research, or teaching. The term
21 includes tenured and nontenured professors, adjunct professors,
22 visiting professors, lecturers, graduate student instructors, and
23 those in comparable positions however titled. The term does not
24 include a person whose primary responsibilities are administrative or
25 managerial.

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27 NEW SECTION. **Sec. 7.** DISCIPLINARY PROCEEDINGS. (1) A student
28 enrolled at an institution of higher education who is accused of a
29 violation of the institution's disciplinary or conduct rules that
30 carries a potential penalty of expulsion has the right to be
31 represented, at the student's expense, by a licensed attorney or, if
32 the student prefers, a nonattorney advocate, who, in either case,
33 may fully participate during the disciplinary proceeding or other
34 procedure adopted and used by the institution. When disciplinary

1 proceedings subject to this section arise from a complaint by a
2 student against another student, the complaining student has the
3 right to be represented, at the student's expense, by a licensed
4 attorney, or, if the student prefers, a nonattorney advocate.

5 (2) This section does not apply to an allegation of academic
6 dishonesty as defined by the institution of higher education.

7 (3) This section does not create a right of a student to be
8 represented at public expense.

9 (4) This section does not require an institution of higher
10 education to use formal rules of evidence in a disciplinary
11 proceeding. The institution, however, must make good faith efforts
12 to include relevant evidence and exclude evidence that is neither
13 relevant nor probative.

14 (5) Before a student may be questioned by an institution of
15 higher education, or by an agent of the institution of higher
16 education, about an allegation of a violation of the institution's
17 disciplinary or conduct rules that carries a potential penalty of
18 expulsion, the institution must advise the student of the student's
19 rights under this section.

20 (6) Upon discovering exculpatory evidence related to a student
21 under investigation for a violation of the institution's
22 disciplinary or conduct rules that also constitutes a crime under
23 Title 9A RCW, the administration or the law enforcement component of
24 the institution of higher education must immediately notify, in
25 writing, the accused student of the exculpatory evidence.

26 (7)(a) A student whose rights under this section have been
27 violated may bring an action in a court of competent jurisdiction
28 against the institution of higher education, members of the
29 institution's governing board, deans, chairs, or faculty or staff
30 members.

31 (b) If the court finds a violation of this section, the court
32 shall award the aggrieved student: (i) Compensatory damages; (ii)
33 reasonable court costs; (iii) attorneys' fees, including expert
34 fees; (iv) monetary damages of not less than the cost of tuition

1 paid by the student, or on the student's behalf, to the institution
2 of higher education for the academic term during which the violation
3 of this section occurred; (v) monetary damages of not less than the
4 amount of any scholarship funding lost as a result of the
5 disciplinary proceeding; and (vi) any other relief in equity or law
6 deemed appropriate including a de novo rehearing at the institution
7 of higher education in accordance with this section.

8 (c) An action to enforce a right or obligation arising under
9 this section must commence within one year after the cause of action
10 accrues. A cause of action accrues on the date that the student or
11 student organization receives final notice of discipline from the
12 institution of higher education.

13 (8) The definitions in this subsection apply throughout this
14 section unless the context clearly requires otherwise.

15 (a) "Disciplinary proceeding" includes an investigatory
16 interview or hearing or any other procedure conducted by the
17 institution of higher education relating to the alleged violation
18 that the student or student organization reasonably believes may
19 result in disciplinary action against the student or student
20 organization.

21 (b) "Fully participate" includes the opportunity to make opening
22 and closing statements, to examine and cross-examine witnesses, and
23 to provide the accuser or accused with support, guidance, and
24 advice.

25 (9) This section applies to all disciplinary proceedings beginning
26 on or after the effective date of this section.

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28 NEW SECTION. **Sec. 8.** CHAPTER TITLE. The chapter created in
29 section 9 of this act may be known and cited as the academic bill of
30 rights.

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32 NEW SECTION. **Sec. 9.** Sections 3 through 7 of this act constitute
33 a new chapter in Title 28B RCW."
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1 Renumber the remaining sections consecutively and correct any
2 internal references accordingly.

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4 Correct the title.

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EFFECT: Creates the Academic Bill of Rights, which addresses the following:

- Free expression on campus - Designates the outdoor area of a campus of an institution of higher education as a traditional public forum.
- Trigger warnings - Provides that an institution of higher education must allow faculty or staff to use trigger warnings at the faculty or staff member's discretion.
- Disciplinary harassment - Except for institutions run by religious organizations or military institutions, provides that an institution of higher education may not take disciplinary action against student speech that does not constitute actionable discriminatory harassment. Defines speech constituting discriminatory harassment.
- Retaliation for expression and whistleblowing - Prohibits disciplinary action against faculty for expression related to academic matters or disclosure of information that the faculty member reasonably believes evidences a violation or gross mismanagement, gross waste of funds, abuse of authority, or substantial danger to public health or safety. Prohibits adverse action against a student in retaliation for expression, when engaged in outside the institution, is protected by federal or state law.
- Student's rights in disciplinary proceedings.
- Provides that remedies for the violation of the Academic Bill of Rights includes injunctive relief, compensatory damages, reasonable court costs, attorneys' fees and any other relief in equity or law deemed appropriate.

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