

# SENATE BILL REPORT

## SB 5832

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As of February 22, 2017

**Title:** An act relating to creating an academic bill of rights.

**Brief Description:** Creating an academic bill of rights.

**Sponsors:** Senator Wilson.

**Brief History:**

**Committee Activity:** Higher Education: 2/16/17 [DP, DNP].

**Brief Summary of Bill**

- Creates the Academic Bill of Rights, which addresses: (1) free expression on campus; (2) trigger warnings; (3) disciplinary harassment; (4) retaliation for expression and whistleblowing; and (5) student rights in disciplinary proceedings.

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### SENATE COMMITTEE ON HIGHER EDUCATION

**Majority Report:** Do pass.

Signed by Senators Wilson, Chair; Bailey, Vice Chair; Baumgartner.

**Minority Report:** Do not pass.

Signed by Senator Palumbo, Ranking Minority Member.

**Staff:** Evan Klein (786-7483)

**Background:** Free Speech. In broad terms, academic freedom is used to refer to the right to free expression for faculty and students. For faculty, the focus is generally on the faculty member's discretion in researching, publishing, and teaching in the classroom. For students, academic freedom generally refers to the student's right to scholarly discourse and the right to be free from a hostile learning environment. The sources of academic freedom generally stem from constitutional law; however, statutes, institutional policies, and contracts are also involved.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

Freedom of expression for faculty and students is protected by the First Amendment of the U.S. Constitution, which applies to public institutions. The level of protection varies depending on the content and context. For example, speech that occurs in "traditional public forums," such as public parks and town squares, are given more protection than speech occurring on other types of property. Courts strictly scrutinize restrictions imposed on speech in traditional public forums. Any restrictions must be content-neutral, serve a compelling government interest, and be narrowly tailored to achieve that interest.

First Amendment principals apply to academic communities, but courts have also recognized that these communities are "special environments" with their own unique interests. In legal challenges, those interests become a factor in balancing an individual's rights and the institution's interest in effectively educating its students and precluding disruption in the classrooms.

Speech that is generally not protected include speech that is intended to incite imminent violence or illegal acts—sometimes referred to as "fighting words," libel, and obscenity.

Federal law provides that schools receiving federal funds may not deny students access to meet in certain areas of a school based on the political, philosophical, or religious nature of the students' speech.

Institutions of higher education have their own policies and rules addressing the use of campus facilities and the code of conduct for students, including procedures for disciplining students.

Disciplinary Proceedings. Student disciplinary proceedings undertaken by institutions of higher education are subject to the procedural requirements of the Washington Administrative Procedures Act.

**Summary of Bill:** The Act is called the Academic Bill of Rights, and it creates provisions to address: (1) free expression on campus; (2) trigger warnings; (3) disciplinary harassment; (4) retaliation for expression and whistleblowing; and (5) student rights in disciplinary proceedings.

Campus Free Expression. Outdoor areas of an institution of higher education must be considered traditional public forums. The institution may impose content-neutral and viewpoint-neutral time, place, and manner restrictions on the use of the outdoor area that are necessary to serve a compelling state interest and narrowly drawn to achieve that interest. The restrictions must allow members of the institution community to spontaneously and contemporaneously assemble. Any restrictions must be well-defined and published.

A person wishing to engage in noncommercial expressive activity on the campus must be allowed to do so freely, as long as the person's conduct is not unlawful and does not materially and substantially disrupt the orderly operation of the institution.

Trigger Warnings. An institution must allow faculty to use trigger warnings at the faculty's discretion. The institution may not take, or have a policy that allows it to take, punitive action against faculty with respect to tenure, promotion, or disciplinary action, for not using

trigger warnings. A trigger warning includes a warning provided by faculty in advance of assigning material that contains content that might trigger a difficult emotional response for a student.

Discriminatory Harassment. An institution of higher education may not take disciplinary action against student speech that does not constitute actionable discriminatory harassment. Speech constitutes actionable discriminatory harassment when directed at an individual, and:

- is part of a pattern of targeted, unwelcome conduct that is discriminatory based on race, color, national origin, disability, religion, age, sex, sexual orientation, gender, or gender identity;
- is severe, pervasive, and objectively offensive; and
- undermines and detracts from the victim's educational experience to the point it effectively denies them equal access to the institution's resources and opportunities.

An institution must take immediate action to eliminate any actionable discriminatory harassment and address its effects. An institution may be held liable for being deliberately indifferent to known actionable discriminatory harassment. Discriminatory harassment provisions do not apply to institutions run by religious organizations or military institutions.

Academic Freedom and Whistleblower Protection. An institution may not take adverse personnel action, or maintain a policy that allows it take adverse personnel action, against faculty in retaliation for: (1) expression related to scholarship, academic research, or teaching—including social media posts, letters to the editor, blogs, and memberships in private organizations; or (2) 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.

An institution may not take adverse action against a student in retaliation for expression or other communication that, when engaged in outside the institution, is protected by state or federal constitutional law. In addition, an institution may not take adverse personnel action against a faculty solely for acting to protect a student engaged in conduct authorized under this provision, or for refusing to infringe upon conduct that is constitutionally protected.

Disciplinary Proceedings. If a student is accused of violating the institution's disciplinary or conduct rules and the violation carries a penalty of possible expulsion, the student has the right to be represented, at the student's expense, by an attorney or advocate during the disciplinary proceedings. The student must be advised of these rights before the institution or its agent may question the student. For violations that could also be a crime, the institution must immediately notify the student in writing of any exculpatory evidence related to the investigation.

Remedies. A person aggrieved by a violation of any of the provisions in the Act may bring an action in court. The person has one year from the time the violation occurred in which to bring the action. For violations of the open forum provision, the Attorney General may also bring an action for an injunction. Damages include compensatory damages, reasonable costs, attorneys' fees, and any other appropriate relief. In cases involving the open forum provision, trigger warnings, and disciplinary harassment, minimum monetary damages are provided—\$500 for an initial violation, plus \$50 for each day the violation continues.

In actions for violating the student's rights under the disciplinary proceedings, the damages include monetary damages of not less than the cost of tuition paid by the student for the term during which the violation occurred and damages of not less than the amount of any scholarship funding lost as a result of the disciplinary proceedings.

**Appropriation:** None.

**Fiscal Note:** Requested on February 15, 2017.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony on Draft Bill:** PRO: Americans have always embraced the marketplace of ideas. A noble endeavor of bringing respect to college campuses has transitioned to a modern day version of McCarthyism. The free exchange of ideas has been replaced by the notion of safe spaces and unconstitutional concepts of free speech zones. The rights of due process have been replaced by Dear Colleague letters that remove the rights to cross exam during student disciplinary proceedings. Universities should be a place where you may have to run into an idea that you disagree with.

CON: There should be a clear line between free speech and hate speech. This bill upends civil rights protections. There should be an ability to determine that certain speech on a college campus will not be protected.

OTHER: There is a delicate balance to dealing with forums for free expression. Parts of this bill conflict with federal civil rights law and current constitutional protections for free speech. The definition of discriminatory harassment is not compatible with Title IX. It would be useful to look at all of the current provisions at public universities. There is a need for free and open debate of controversial issues. There is an issue in Section 4, which requires a pattern of discriminatory harassment for an institution to be able to take action. The university should be able to take action based on a single instance of discriminatory harassment.

**Persons Testifying:** PRO: Representative Matt Manweller, 13th Leg. District.

CON: Elissa Goss, citizen.

OTHER: JoAnn Taricani, University of Washington Faculty Senate; Sara Singleton, Faculty - Western Washington University.

**Persons Signed In To Testify But Not Testifying:** No one.