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**HOUSE BILL 1362**

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**State of Washington 65th Legislature 2017 Regular Session**

**By** Representatives Manweller, Hargrove, Haler, Van Werven, Holy, Shea, and Stambaugh

AN ACT Relating to creating an academic bill of rights; adding a new chapter to Title 28B RCW; creating a new section; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  The legislature finds that free speech is one of the most important values protected by the federal and state Constitutions. The legislature also finds that free expression on the campuses of Washington's public colleges and universities is particularly important for fostering a true marketplace of ideas, where students can be exposed to a variety of ideas and learn tolerance for those ideas with which they disagree. The history of university life has been to introduce students to ideas, concepts, and values they may object to or even be offended by. The legislature finds that speech on Washington's campuses has been chilled by increasing regulations that are not viewpoint neutral. It is the intent of the legislature to afford campus speech the highest level of judicial protection.

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

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

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

(3) A person who wishes to engage in noncommercial expressive activity on the campus of an institution of higher education must be permitted 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) For the purposes of calculating the one-year limitation period in cases alleging unlawful disciplinary action for expression protected under this section, the cause of action is deemed to accrue on the date that the student receives final notice of disciplinary action from the institution of higher education.

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

(8) This section does not apply to:

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) In an action brought under this section, if the court finds that the protected expression, as defined in subsection (2) or (3) of this section, was a significant motivating factor behind the institution of higher education's decision to take an adverse personnel action against a faculty or staff member or a disciplinary action against a student, the court shall award the aggrieved person: (i) Compensatory damages; (ii) reasonable court costs; (iii) attorneys' fees, including expert fees; (iv) and any other relief in equity or law deemed appropriate, unless the institution demonstrates that it would have taken the same personnel action in the absence of the protected expression.

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

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

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

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

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

NEW SECTION. **Sec.**  DISCIPLINARY PROCEEDINGS. (1) A student enrolled at an institution of higher education who is accused of a violation of the institution's disciplinary or conduct rules that carries a potential penalty of expulsion has the right to be represented, at the student's expense, by a licensed attorney or, if the student prefers, a nonattorney advocate, who, in either case, may fully participate during the disciplinary proceeding or other procedure adopted and used by the institution. When disciplinary proceedings subject to this section arise from a complaint by a student against another student, the complaining student has the right to be represented, at the student's expense, by a licensed attorney, or, if the student prefers, a nonattorney advocate.

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

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

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

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

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

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

(b) If the court finds a violation of this section, the court shall award the aggrieved student: (i) Compensatory damages; (ii) reasonable court costs; (iii) attorneys' fees, including expert fees; (iv) monetary damages of not less than the cost of tuition paid by the student, or on the student's behalf, to the institution of higher education for the academic term during which the violation of this section occurred; (v) monetary damages of not less than the amount of any scholarship funding lost as a result of the disciplinary proceeding; and (vi) any other relief in equity or law deemed appropriate including a de novo rehearing at the institution of higher education in accordance with this section.

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

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

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

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

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

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

NEW SECTION. **Sec.**  Sections 1 through 6 of this act constitute a new chapter in Title 28B RCW.

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