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# OHIO LEGISLATIVE SERVICE COMMISSION

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S.B. 40  
133<sup>rd</sup> General Assembly

## Bill Analysis

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**Version:** As Reported by House Higher Education

**Primary Sponsor:** Sens. Brenner and McColley

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### SUMMARY

#### Regulation of expression on college campuses

- Generally prohibits a state institution of higher education from taking any action or enforcing any policy that limits or restricts the free expression rights of its students, student groups, faculty, staff, employees, and invited guests in public areas of campus.
- Requires each state institution to report and publish the courses of action implemented in accordance with the bill's provisions, and to update that report whenever a cause of action is brought against the state institution for a violation of free expression.
- Requires each state institution to adopt a policy on harassment consistent with the bill's provisions.
- Requires each state institution to make public the policies, regulations, and expectations of students regarding free expression in its handbook, on its website, and in its student orientation programs.

#### Regulation of use of campus facilities

- Declares that outdoor areas of campuses of state institutions of higher education are public forums for campus communities and prohibits institutions from creating "free speech zones" or designating other outdoor areas where expression is restricted.
- Prohibits a state institution of higher education from charging security fees to a student or student group based on the content of expression or the anticipated reaction to that content.

#### In-state residency status for tuition purposes

- Expands residency status for in-state college tuition rates to qualifying individuals who received a certificate of high school equivalence while residing in Ohio but subsequently relocated out of state.

## Title

- Entitles the bill the “Forming Open and Robust University Minds Act” (or “FORUM Act”).

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## DETAILED ANALYSIS

### REGULATION OF EXPRESSION ON COLLEGE CAMPUSES

In accordance with the 1<sup>st</sup> and 14<sup>th</sup> Amendments of the U.S. Constitution, private citizens in public places are entitled to speak freely, express opposing viewpoints, and peacefully assemble. This protection extends to professors and students of state-funded colleges and universities (generally referred to as “state institutions of higher education” in Ohio law).<sup>1</sup> Likewise, Ohio’s Constitution and laws generally prohibit state institutions of higher education from restricting freedom of speech or the right to peacefully assemble. However, the right to free expression on a public campus is not absolute and depends on “where, when, and how” the expression is made. For example, a content-based restriction might be permitted when it is narrowly tailored to serve a compelling government interest, whereas most other restrictions must be reasonable and content-neutral.

The bill prescribes the manner in which state institutions of higher education must comply with these constitutional principles and addresses “where, when, and how” they may restrict expression.

### Restrictions or limitations on expression prohibited

The bill generally prohibits a state institution of higher education, or any of its administrators acting in their official capacity, from taking any action or enforcing any policy that limits or restricts the constitutional right of a member of the campus community to engage in noncommercial expressive activity. The bill further states that its prohibition applies only so long as that activity is lawful and does not disrupt the functioning of the state institution.<sup>2</sup>

For purposes of its prohibition the bill specifies that:

- “Campus community” includes students, student groups, faculty, staff, and employees of a state institution and their invited guests; and
- “Expressive activity” includes any lawful verbal, written, audiovisual, or electronic communication of ideas, including all forms of peaceful assembly, protests, or speeches, distribution of literature, carrying and displaying signs, and circulating petitions.

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<sup>1</sup> See for example, *Sweezy v. New Hampshire*, 345 U.S. 250 (1957) and *Healy v. James* 408 U.S. 180 (1972).

<sup>2</sup> R.C. 3345.0212(A).

## **Exclusions, exceptions, and permissible restrictions**

### **Generally**

Under the bill, an institution may lawfully prohibit, limit, or restrict expressive activities that are not protected under the U.S. Constitution. It also states that an individual may not engage in conduct that intentionally and substantially disrupts another individual's expressive activity occurring in a campus space reserved for exclusive use of a particular group.

### **Time, place, and manner restrictions**

A state institution also may maintain and enforce reasonable time, place, and manner restrictions, provided that each restriction:

1. Is developed in service of a "significant" institutional interest;
2. Employs clear, published, viewpoint- and content-neutral criteria;
3. Provides for ample means of expression by members of the campus community; and
4. Allows members of the campus community to assemble spontaneously and contemporaneously and to distribute literature.<sup>3</sup>

## **Policy making and reporting requirements**

### **Policy on harassment**

The bill requires each state institution of higher education to adopt a policy on harassment that is consistent and strictly adheres to the bill's definition, which specifies that harassment is unwelcome conduct that is so severe, pervasive, and objectively offensive that it effectively denies an individual equal access to the individual's education program or activity.<sup>4</sup>

### **Distribution of policy on free expression**

The bill requires each state institution of higher education to make public the policies, regulations, and expectations of students regarding free expression in its handbook, on its website, and in its student orientation programs. Each institution also must develop and distribute materials, programs, and procedures on free expression for its administrators, campus police, residence life officials, and professors, and any other employees or agents responsible for student discipline or education.<sup>5</sup>

### **Report on policy**

Within 180 days after the bill's effective date, and to the extent it complies with federal privacy laws, each state institution must submit to the Governor, the Speaker of the House of Representatives, and the President of the Senate a report detailing the courses of action

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<sup>3</sup> R.C. 3345.0213(A)(3).

<sup>4</sup> R.C. 3345.0211(A) and 3345.0212(C).

<sup>5</sup> R.C. 3345.0212(C).

implemented in accordance with the bill's free speech provisions. The report must contain all of the following information:

1. A description of any barriers to or incidents of disruption of free expression occurring on campus, including, but not limited to, attempts to block or prohibit speakers and any investigation of students or student groups on the basis of expression; and
2. Any other information the institution finds necessary and appropriate for the public to evaluate whether the free expression rights of members of the campus community have been adequately protected.

The bill requires each institution to publish the report on its website. The report must be accessible from an institution's main webpage within three links, be word-searchable, and be accessible to the public without requiring any kind of user registration.

If an action is brought against a state institution for an alleged violation of expression rights, the institution must submit an additional supplementary report containing the information outlined above and a copy of the complaint, within 30 days after commencement of that action.<sup>6</sup>

## **Other provisions**

The bill expressly states that its free speech provisions "supersede" any rule, policy, action, communication, or requirement of any institution of higher. Accordingly, it specifies no rule, policy, action, communication, or requirement may contradict or diminish the effect of those provisions and requirements.<sup>7</sup>

## **REGULATION OF USE OF CAMPUS FACILITIES**

### **Prohibiting use of facilities by certain persons**

The bill declares that outdoor areas of state university and college campuses are public forums for all members of the campus community. The bill prohibits state institutions from creating "free speech zones" or designating other outdoor areas where expressive activities are restricted.<sup>8</sup> For purposes of this prohibition, "outdoor areas" are the generally accessible outside areas of a campus where members of the campus community are commonly allowed, such as grassy areas, walkways, and common areas. It does not include restricted areas where a majority of the campus community generally is not allowed.<sup>9</sup>

The bill also removes a provision of law that permits a state institution of higher education to prohibit the use of facilities for meeting or speaking purposes by any of the following:

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<sup>6</sup> R.C. 3345.0214.

<sup>7</sup> R.C. 3345.0211(B).

<sup>8</sup> R.C. 3345.0213(A)(1) and (2).

<sup>9</sup> R.C. 3345.0211(A)(6).

1. Members of the Communist Party;
2. Persons who advocate for, hold membership in, or support organizations which advocate the overthrow of the U.S. government and its institutions by force or violence; or
3. Persons whose presence is not conducive to high ethical and moral standards or the primary educational purposes and orderly conduct of the institution.<sup>10</sup>

## Collection of security fees

The bill prohibits a state institution of higher education from charging security fees to a student or student group based on the content of expression, the content of expression of an invited guest, or the anticipated reaction to an invited guest's expression.<sup>11</sup>

## IN-STATE RESIDENCY STATUS FOR TUITION PURPOSES

The bill requires the Chancellor of Higher Education to grant residency status, for purposes of in-state tuition, to students who, while residing in Ohio and meeting the requirements for in-state residency, officially withdrew from school, passed a high school equivalency test, and received a certificate of high school equivalence, but who subsequently moved out of state and then relocated back to Ohio. Additionally, the student must not have received a high school diploma in Ohio or another state or country.<sup>12</sup>

The bill's extension of residency status expands a provision of continuing law commonly known as the Forever Buckeye program.<sup>13</sup> Under the existing program, a student who graduated from an Ohio high school or who finished the final year of homeschooling in Ohio, and was eligible for in-state tuition at that time, may reestablish domicile in Ohio *at any time* to qualify for in-state tuition.<sup>14</sup> The program essentially exempts eligible students from the usual 12-month waiting period necessary to establish Ohio residency.<sup>15</sup> Under the bill, students who received a certificate of high school equivalency in Ohio also may qualify for the program.

Under current law, the Chancellor must define residency status for tuition purposes at state institutions of higher education. Statutory law specifies that the rules must generally prevent individuals living in Ohio primarily to attend state institutions from being treated as residents of Ohio for the purposes of in-state tuition.<sup>16</sup>

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<sup>10</sup> R.C. 3345.021.

<sup>11</sup> R.C. 3345.0212(B).

<sup>12</sup> R.C. 3333.31(E)(1)(b).

<sup>13</sup> <https://www.ohiohighered.org/forever-buckeyes>.

<sup>14</sup> R.C. 3333.31(E)(1)(a).

<sup>15</sup> Ohio Administrative Code 3333-1-10.

<sup>16</sup> R.C. 3333.31(A).

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## HISTORY

Action	Date
Introduced	02-12-19
Reported, S. Education	01-28-20
Passed Senate (33-0)	01-28-20
Reported, H. Higher Education	11-24-20

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