

# Free Expression Legislation at Colleges and Universities

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The First Amendment and the protection of free expression at post-secondary institutions has always been an important topic. However, in the last few years free expression in colleges and universities has received more attention and scrutiny, with state governments initiating legislation in the name of protecting the free expression of students, faculty and staff on campuses across the country. More than a third of states have passed free expression laws and others have proposed similar legislation. This memorandum looks at common trends in the statutes, in addition to their origins, to provide insights into future legislation and what colleges and universities can expect.

To help campuses understand this trend, we have also created two charts, which can be downloaded [here](#). The first compares key themes within free expression legislation, looking at the affirmative duties that the laws place on public colleges and universities in their state. It also identifies any specific language that must be included in campus policies. The second chart looks at whether these laws create private causes of action based on any free speech rights guaranteed under the state law, with consideration of their statutes of limitation and potential damage awards.

## Overview

The content of this “free expression” legislation exists on spectrum from simply affirming the protections already guaranteed by the First Amendment to requiring public colleges and universities within the state to implement specific policies and procedures. These mandates include new duties to create free expression committees and publish annual reports. Within this wide range, every statute has common language and policies affirming existing First Amendment rights, such as:

- The affirmation of reasonable time, place and manner restrictions on expressive activity.
- The requirement to adopt policies that affirm protections of free speech and the First Amendment.
- The requirement to make the policies available to students, faculty and staff.

The affirmation of reasonable time, place and manner restrictions on expressive activity and the requirement to make the policies available should place no additional burden on the colleges and universities. These restrictions simply reflect existing First Amendment protections defined by the U.S. Supreme Court; as a result, schools will mostly likely already describe these rules within their the code of conduct or handbook. Additionally, institutions are already required to share their codes of conduct with students, faculty and staff upon matriculation and throughout the year.

Depending on the state, however, a public institution may have to adopt certain verbatim affirmations within their policies, while others may paraphrase the statutory language to reflect

their content and spirit. For example, in North Carolina, institutions are required to adopt the policies exactly as stated in the statute, whereas in Georgia the institutions are only required to adopt policies that reflect the statements made within the statute.

Going beyond a recitation of basic First Amendment principles, some state laws now require postsecondary institutions to create reports, committees, and trainings protecting student free expression, and clarify student rights regarding where they may speak on campus and what they can do if such rights are denied.<sup>1</sup> These laws:

- Allow students to bring a cause of action against postsecondary institutions for violating their First Amendment freedom of expression and define the statute of limitations for claims;
- Declare public areas on campuses (not necessarily limited to outdoor spaces) as traditional public forums;
- Prohibit the creation of “free speech zones” where students would be required to locate to engage in protected expression;
- Require the creation of “Free Expression Committees”;
- Require publication of annual reports on free expression;
- Require student training on free expression during first year orientation.

### **Private Causes of Action**

Laws creating a state law cause of action for free speech violations pose litigation risk for campuses, but differ in terms of the statute of limitations. Some states have included a statute of limitations for the cause of action, while others have placed no limits on such action.<sup>2</sup> These laws also vary in the amount of damages that can be awarded if a violation has been found. Five states (Arizona, Florida, Montana, Oklahoma, and Utah) go into even further detail by explaining who would serve as the defendant. Due to the varying nature of each state’s statutes, a chart about the details of each cause of action is attached.

### **Definition of Public Forum**

Colleges and universities will need to be up-to-date on the protections afforded to traditional public forums and determine how it will affect their campus based on the definition provided in their state statute.

The state statutes take three different approaches to defining a public forum:

- (1) maintaining generally accessible, open outdoor areas of its campus as the traditional public forum;
- (2) applying the outdoor area designation in conjunction with any building, facility or part of a building that the institution has opened to students or student organizations for expression; and
- (3) lastly, merely stating that access to campus for the purpose of freedom of expression should be consistent with first amendment jurisprudence.

### Methods of Defining Public Forum

| Outdoor Designation                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Outdoor + other spaces available to students for expression                                               | Traditional Jurisprudence                                                       |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>• Alabama<sup>3</sup></li> <li>• Arkansas<sup>4</sup></li> <li>• Florida<sup>5</sup></li> <li>• Iowa<sup>6</sup></li> <li>• Kentucky<sup>7</sup></li> <li>• Louisiana<sup>8</sup></li> <li>• Missouri<sup>9</sup></li> <li>• Montana<sup>10</sup></li> <li>• Ohio<sup>11</sup></li> <li>• Oklahoma<sup>12</sup></li> <li>• South Dakota<sup>13</sup></li> <li>• Tennessee<sup>14</sup></li> <li>• Texas<sup>15</sup></li> </ul> | <ul style="list-style-type: none"> <li>• Arizona<sup>16</sup></li> <li>• Colorado<sup>17</sup></li> </ul> | <ul style="list-style-type: none"> <li>• North Carolina<sup>18</sup></li> </ul> |
| Georgia and Utah made no mention of public forums in their statute.                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                           |                                                                                 |

### Free Expression Committees and Campus Educational Programs

These laws may also require the creation of free expression committees and appropriate training on their roles, including the creation of an annual report. The creation of free expression committees and the requirement to create an annual report on the status of free expression are intrinsically tied, because in most circumstances the committee on free expression is tasked with creating the annual report. The statutes are mostly silent as to how to create the free expression committee with little information to assist colleges and universities. However, the statutes are clear about the information that should be included in the report, who should receive the report and how to publish it.<sup>19</sup>

In many of the statutes the colleges and universities are required to include programming during freshmen orientation to inform the students about the policies and their freedom of expression on campus. This element, although included in multiple statutes, is not explicitly clear on the meaning of “inclusion in orientation programs,” raising questions if providing pamphlets and other informational handouts is enough or if campuses need to dedicate an entire program during the orientation schedule to the freedom of expression.

### Prohibition on “Free Speech Zones”

Additionally, a majority of the states (Alabama, Arkansas, Colorado, Florida, Iowa, Kentucky, Ohio, Oklahoma, Montana, South Dakota and Tennessee) have prohibited the creation of “free speech zones” where students are required to locate if they wish to protest or engage in an

expressive activity. The rationale for its prohibition came from instances where students were restricted in the freedom expression beyond a reasonable time, place, and manner restriction which prevented them from expressing their views.<sup>20</sup>

Unlike most legislation passed, Tennessee included a provision on “student-on-student harassment,” which includes a definition and how it should be applied. This legislation is a reminder that campuses should take care when drafting student-on-student harassment policies to balance the goal of protecting students from harassment while preserving their freedom of expression.

### **Conclusion**

As the conversation of free expression on campuses continues, states have revisited their current statutes and in some cases are in the process of passing additional legislation. Most notably, Florida has passed new legislation that will add additional affirmative duties, require students, faculty and staff to complete annual survey on free expression and places prohibitions on the internal procedures of student governments. Ultimately, whether legislation has already been passed in your state or not, colleges and universities should be prepared to implement new policies and practices and adapt their current practices for compliance.

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<sup>1</sup> The Foundation for Individual Rights in Education (FIRE), the American Legislative Exchange Council (ALEC) and the Goldwater Institute have all created model policies for state legislatures to use in the creation of their policies. For example, in Montana the legislature has relied on the ALEC model policy “Forming open and robust University Minds” (FORUM) as the foundation for their legislation.

<sup>2</sup> Arizona, Colorado, and Kentucky have included a one-year limitation that begins the day after the cause of action occurred. Florida, North Carolina, and Montana include no mention of a limit.

<sup>3</sup> Code of Ala. § 16-68-3(a)(4)

<sup>4</sup> A.C. A § 6.60.1005(a)

<sup>5</sup> Fla. Stat. § 1004.097(3)(c)

<sup>6</sup> Iowa Code § 261H.4(1)

<sup>7</sup> KRS § 164.348(2)(j)

<sup>8</sup> La. R.S. § 17:3399.31(2)

<sup>9</sup> § 173.1550 R.S. Mo.

<sup>10</sup> H.B. 218, 67<sup>th</sup> Leg., Reg. Sess. (Mt. 2021). P. 2 and 3

<sup>11</sup> ORC Ann. § 3345.0213(A)(1)

<sup>12</sup> 70 OKC. St. § 2120(C)(1)

<sup>13</sup> S.D. Codified law § 13-53-51

<sup>14</sup> Tenn. Code Ann. § 49-7-2405 (11)

<sup>15</sup> Tex. Educ. Code. § 51.9315(c)(1)

<sup>16</sup> A.R.S. Title 15. Ch. 14, Art 6 § 15-1861

<sup>17</sup> C.R.S. 23-5-144(2)(d)

<sup>18</sup> N.C. Gen. Stat. § 116-300 (5)

<sup>19</sup> North Carolina has a deadline for submission of the annual report every year of September 1<sup>st</sup>. North Carolina

<sup>20</sup> See Uzuegbunam v. Preczewski, No. 19-968 (U.S. Mar. 8, 2021).

[https://www.supremecourt.gov/opinions/20pdf/19-968\\_8nj9.pdf](https://www.supremecourt.gov/opinions/20pdf/19-968_8nj9.pdf)