

**SUMMARY OF PUBLIC COMMENTS ON ADMINISTRATIVE CODE SCOPE STATEMENT FOR
PROPOSED CHANGES TO CHAPTER UWS 17****Introduction**

The Board received thirty-eight written comments from the public on the scope statement of the Board's proposed rule change to UWS Chapter 17. In addition, nine speakers voiced their opinion on the scope statement at the public hearing held on August 13, 2019. While some of the speakers and commenters expressed support for the intention of the scope statement, everyone who spoke at the hearing ultimately opposed the scope statement, and all but one of the commenters did as well. One speaker at the hearing requested an in-person meeting with the Board of Regents.

Concerns about Chilling Free Speech

By far the biggest concern that the speakers and commenters had about the scope of the proposed rule is the fear that it would punish, rather than protect, the free speech rights of students. In particular, many commenters and speakers stated that they thought that the language of "disrupting the free expression of others" is vague and will lead to selective enforcement. For example, Timothy Yu, a professor of English and Asian-American Studies at UW-Madison questioned what specifically qualified as such disruption. He asked whether conduct such as holding hostile signs, publicly criticizing a speaker to the extent that a speaker cancels his or her visit, or arguing with a speaker constitutes a disruption of free expression. The ACLU had similar concerns.

Similarly, many of the commenters and speakers expressed their view that the rule would silence dissent on campus by threatening students with mandatory punishments.

Several commenters and speakers discussed specific students that have been punished at various UW System institutions over the years for exercising their free speech rights. These speakers and commenters were concerned that this rule, once in final form, would cause many students to be similarly punished. Some speakers and commenters also expressed the view that the rule would inhibit professors from teaching effectively by stifling participation.

Other commenters and speakers made suggestions on the scope that they believe could improve the rule when it is in its final form. The free-speech group FIRE proposed that a provision should be added to make clear that the policy only applies to disruptions of events taking place in reserved locations. Adding this provision, according to FIRE, would establish protections against a so-called “heckler’s veto”—in which hecklers do not allow a speaker to talk—while at the same time allowing for peaceful protest in a manner that does not drown out the speaker. Several commenters also suggested that the Board add a provision requiring that a student *intentionally* disrupt the free speech of others so that only students acting in bad faith are subject to discipline. In addition, FIRE recommended that the Board add a provision that would define what conduct is encompassed by the phrase “materially and substantially disrupts.” Finally, the Wisconsin Institute for Law and Liberty (WILL) suggested adding a provision that would clarify that constitutionally protected speech would not be punished.

Concerns about Impact on Oppressed Groups

A related concern that many of the commenters and speakers had was that the rule would have a disproportionate impact on oppressed groups such as racial and ethnic

minorities, people with disabilities, and the LGBTQ+ community. Several commenters and speakers voiced their concern that oppressed groups often rely on the acts of protesters to effectuate social change. These commenters stated that the mandatory penalties from the rule would cause students to stop protesting, which would end up harming these traditionally disadvantaged communities. Some commenters and speakers opined that the rule would ultimately further entrench control of the universities in the hands of the rich and white.

Concerns about Punishment Scheme

Besides concerns about the rule's impact on free speech, the most commented on aspect of the scope statement was the mandatory punishment scheme contemplated by the scope. Several commenters and speakers noted that no form of nonacademic misconduct in UWS Chapter 17 requires a specific punishment nor does Chapter 17 state that when a student is found guilty of the same offense on more than one occasion, his or her punishment should be harsher. These commenters and speakers wondered why a finding of guilt for disrupting free speech would potentially carry with it a more severe sentence than physical or sexual assault.

Additionally, several commenters expressed concern that instituting mandatory penalties would lead to a form of jury nullification in which students who have egregiously violated the code would be found to be innocent because the hearing committee would not want to impose the harsh punishments on the student. Many speakers and commenters stated that they thought this punishment scheme will take power away from the campuses because they would not be able to fashion punishments as they see fit. Jordan Ellenburg, a

professor of mathematics at UW-Madison, also noted that while the scope statement has a mandatory penalty for students, it is silent on the consequences for administrators or Regents who disrupt free speech. FIRE proposed a system that would make the punishment proportional to the specific offense. Finally, one commenter stated that the final rule should make clear that students charged disrupting free speech have the same appeal rights as students charged with other forms of nonacademic misconduct.

Legal Concerns

At the hearing, Steph Tai, a professor of administrative law at the UW Law school, addressed concerns she had about the legality of the rule. Professor Tai stated that there were constitutional law as well as administrative law problems with the rule, regardless of the form it ultimately takes. Professor Tai noted that she is the faculty advisor for the Law School's moot court team and that two of the national competitions last year focused on this exact issue. According to Professor Tai, the judges at these competitions—who are actual judges—found two constitutional problems with similar rules: 1. The rules were impermissibly vague and 2. Constitutional concerns arise when intervening parties who are not students of a UW System institution arguably infringe on the free speech rights of others. Professor Tai also commented that there may be no “rational basis” for this rule, and so it may be problematic from an administrative law standpoint.

The ACLU had similar legal concerns as Professor Tai, noting that, when the rule takes its final form, it could potentially be held unconstitutional on First Amendment grounds. A lawyer named Gary Grass commented that the scope statement contains no “analysis of alternatives” as required by Wis. Stat. § 227.135(1)(b).

Concerns about the Politics of the Scope

Another issue that several commenters and speakers had with the scope was that they viewed it as highly partisan. Some of the commenters stated that the policy document that the scope statement is based off had its origins in model legislation created by a conservative group called the Goldwater Institute. A number of the commenters and speakers went as far as to say that the scope statement represented a part of a nationwide partisan policy agenda. Others said that the scope was a reaction to headlines. A few commenters stated that a similar policy had recently been rejected by the state legislature, and that this rule was an attempt to revive that legislation. One commenter said that, if the rule is promulgated in a final form, it will lead to the spread of right-wing ideology on campus. All of these commenters and speakers opined that it is not the role of the university system to favor a political party.

Miscellaneous Concerns

Many of the commenters and speakers had miscellaneous concerns about the scope statement as well. Several UW-Madison professors submitted a written comment in which they stated that, when the rule is in final form, it should specifically note the harms of a “heckler’s veto.” These professors also said that the final rule should require the universities to give students a “primer” on free speech on campus to introduce new students to the subject. At the hearing, Professor Timothy Yu expressed frustration that the Board of Regents Policy on which the scope statement is based was developed without consultation with university faculty. Another commenter suggested that *speakers* who incite disruptive behavior from students should be punished.

Commenter Gary Grass had several miscellaneous concerns with the scope statement. Mr. Grass stated that the rule is duplicative because there are already rules that punish the targeted conduct. Thus, Mr. Grass suggested that, when the rule is drafted, it should add text to UWS §§ 17.10-.12 rather than § 17.09. Mr. Grass also proposed several alternatives to the rule. He suggested that the Regents could mandate that campuses provide free expression programming—similar to PSAs—to its students. He also said that campuses could propose their own free speech policies.

Statement in Support

A commenter named Nancy Suitor supported the scope statement, saying that it will help protect conservatives and Christians on campus.

Appendix: List of Written Commenters

- Organizations
 - Defending Rights and Dissent
 - Foundation for Individual Rights in Education
 - One Wisconsin Institute
 - Student Government Association at the University of Wisconsin-Stevens Point
 - Unnamed Group of UW-Madison Professors
 - UW-Madison Academic Staff Assembly
 - Wisconsin Conference of the American Association of University Professors
 - Wisconsin Institute for Law and Liberty
- Individuals
 - Martha Alibali
 - Joe Austin
 - Joel Berkowitz
 - Kathryn "K.C." Cayo
 - Amy Dean
 - Jordan Ellenberg
 - Christine Evans
 - Nicholas Fleisher
 - William Fry
 - Gary Grass
 - W Lee Hanson
 - Michael Hill
 - Robert Jeske
 - Silas Johnson
 - Jennifer Jordan
 - Joyce Latham
 - Leslie LaMuro
 - Katherine Lavelle
 - Jennifer Nelson
 - Chukwudi Nnacheta
 - Mary Rendall
 - Apporv Saraogee
 - Jeffrey Sommers
 - Cheryl Soref
 - Michael Steele
 - Nancy Sutor
 - Eric Sullivan
 - Tristan Tully
 - SA Welch
 - Dang Yang