

# Georgia State University Law Review

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Volume 35  
Issue 1 Fall 2018

Article 6

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12-1-2018

## SB 339 - Education

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### Recommended Citation

Daniel F. Barrett & Alexander Hegner, *SB 339 - Education*, 35 GA. ST. U. L. REV. (2018).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol35/iss1/6>

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## EDUCATION

***Postsecondary Education: Amend Article 2 of Chapter 3 of Title 20 of the Official Code of Georgia Annotated, Relating to the Board of Regents and University System, so as to Require the Board of Regents to Develop a Policy Providing for Free Speech or Free Press to be Implemented at All Institutions of the University System; Provide Requirements for Such Policy; Provide for Reports and the Content of Reports; Provide for Disciplinary Measures; Provide for Exceptions; Provide for Related Matters; Repeal Conflicting Laws; And For Other Purposes***

CODE SECTIONS:	O.C.G.A. §§ 20-3-48, -48.1, -48.2 (amended)
BILL NUMBER:	SB 339
ACT NUMBER:	557
GEORGIA LAWS:	2018 Ga. Laws 1086
SUMMARY:	The Act amends the statutes in the Georgia Code applicable to the University System and Board of Regents statutes in the Georgia Code. It adds new sections that place affirmative requirements on the Board of Regents to adopt and publish new policies, which aim to encourage the dissemination of free speech across university campuses. Further, the Act directs that universities must implement disciplinary sanctions for anyone subject to the jurisdiction of the University System who interferes with the free speech of invited speakers and others on campus. Finally, the Board of Regents must publish annual reports regarding any barriers to free speech on university campuses and any

disciplinary actions taken to remedy those barriers.

EFFECTIVE DATE: July 1, 2018

### *History*

In passing Senate Bill (SB) 339, Georgia joined a growing number of states across the country to address a pressing question regarding free speech. Universities and the cities that host them have increasingly faced issues in determining whether they place greater value in the dissemination of speech and ideas or in the maintenance of order and the prevention of violence. Georgia demonstrated, through its introduction of SB 339, its willingness to risk hostility on the campuses of its public colleges and universities to ensure free speech rights remain a priority.

Free speech on college campuses has been and remains a topic of vigorous debate across the country. The Charlottesville, Virginia, riots that broke out in August 2017 reflect the gravest fears of college and university administrators. There, white nationalist demonstrations led to counter-protests and culminated in numerous injuries and even a death.<sup>1</sup> On the other side of the issue, however, many fear the results of some measures to prevent the offensive and violent results of controversial speech. There exists no better example than at the University of California, Berkley, when conservative speakers Milo Yiannopoulos and Ann Coulter scheduled speeches on campus. Students' threats of protest and even violence in response to the scheduled speeches sparked outrage among conservative commentators and fierce proponents of free speech and added more fuel to the national debate. On a national scale, the topic of free speech remains a vibrant one both on and off college campuses. The Cato Institute, a Libertarian think tank, the Cato Institute, published a story in 2017 explaining that "[n]early three-fourths (71%) of Americans believe that political correctness has done more to silence important discussions our society needs to have" and that 66% of

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1. Maggie Astor, Christina Caron & Daniel Victor, *A Guide to the Charlottesville Aftermath*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-virginia-overview.html> [<https://perma.cc/UDW9-PCYQ>].

Americans believe colleges and universities are not sufficiently teaching the values of free speech.<sup>2</sup>

Georgia's own controversies regarding speech suppression did nothing to quell these same beliefs among many Georgians, including lawmakers. The University System of Georgia has faced numerous incidents of student resistance to policies and even lawsuits against it for those policies. For example, the Philadelphia-based Foundation for Individual Rights in Education targeted the University of North Georgia in October 2017 for its code of conduct, which the Foundation asserted allowed the University to restrict or even discipline speech "simply because someone finds it subjectively demeaning or degrading."<sup>3</sup>

Moreover, Kennesaw State University recently faced a firestorm of criticism and even legal action in response to two separate events. The first incident occurred when the university president took steps to prevent a group of cheerleaders from kneeling during the national anthem before university football games.<sup>4</sup> More recently, the university encountered a lawsuit filed by a group of students associated with conservative activist group, Young Americans for Freedom.<sup>5</sup> The student group alleged that the university intentionally sabotaged its efforts to invite conservative speaker Katie Pavlich to campus by charging additional "security" costs and refusing "activity fee funding" that would help the group cover those costs.<sup>6</sup>

Finally, Alliance Defending Freedom (ADF), an Arizona-based Christian non-profit, has been very active in pursuing legal action against Georgia colleges and universities since 2006. In 2006, ADF

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2. Emily Ekins, *The State of Free Speech and Tolerance in America: Attitudes About Free Speech, Campus Speech, Religious Liberty, and Tolerance of Political Expression*, CATO INST. (Oct. 31, 2017), <https://www.cato.org/survey-reports/state-free-speech-tolerance-america> [https://perma.cc/WHA2-DSPC].

3. Eric Sturgus, *Group Criticizes Georgia University for Guidelines It Says Limits Free Speech*, ATLANTA J.-CONST. (Oct. 31, 2017, 2:42 PM), <https://www.myajc.com/news/local-education/group-criticizes-georgia-university-for-policy-says-limits-free-speech/OvriG45Rm9IKFVMbdlEKI/> [https://perma.cc/RUE7-XH6N].

4. Eric Sturgus, *KSU Didn't Follow Guidance on Cheerleader Kneeling*, ATLANTA J.-CONST. (Nov. 21, 2017, 5:05 PM), <https://www.myajc.com/news/local-education/ksu-didn-follow-guidance-cheerleader-kneeling/CDKOAKt4idekbBTeoodTwJ/> [https://perma.cc/QA5C-7269].

5. Eric Sturgus, *Student Group Files Lawsuit Against Kennesaw State*, ATLANTA J.-CONST. (Mar. 8, 2018), <https://www.ajc.com/news/local-education/student-group-files-lawsuit-against-kennesaw-state/KL0PoV1IIVNMrXFp6J3BOcN/> [https://perma.cc/BD3T-YH33].

6. *Id.*

sued the Georgia Institute of Technology, arguing that a portion of its “Safe Space” training manual contained unconstitutional directives; in 2014, it sued the University of Georgia to strike down its policy that required students to obtain a permit to demonstrate outside of two designated free speech zones.<sup>7</sup> Each policy was ultimately changed as a result of the lawsuit, and now ADF has become active again—it currently represents Chike Uzuegbunam in a dispute with Georgia Gwinnett College over his evangelization in certain areas of campus, an issue which has drawn the national spotlight and caused Attorney General Jeff Sessions to issue a statement of interest in support of the lawsuit.<sup>8</sup>

### *Bill Tracking of SB 339*

#### *Consideration and Passage by the Senate*

Senators William Ligon (R-3rd), David Shafer (R-4th), Joshua McKoon (R-29th) and Lindsey Tippins (R-37th) sponsored SB 339 in the Senate.<sup>9</sup> The Senate read the bill for the first time on January 22, 2018, and committed it to the Senate Higher Education Committee.<sup>10</sup> The Senate Higher Education Committee modified the bill and favorably reported the Committee substitute.<sup>11</sup> The Senate read the bill for the second time on February 22, 2018, and for the third time on February 26, 2018.<sup>12</sup> On February 26, 2018, the Senate successfully passed and adopted the bill by Committee substitute.<sup>13</sup>

The Committee substitute changed most of the introduced bill’s original text.<sup>14</sup> The Committee substitute changed almost all of the

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7. Eric Sturgus, *Georgia College Students Score Victories in Free Speech Battles*, ATLANTA J.-CONST. (Nov. 17, 2017 7:15 AM), <https://www.myajc.com/news/local-education/georgia-college-students-score-victories-free-speech-battles/LyIhviAMQSXZsaigdJ6jL/> [https://perma.cc/X2QD-WE9B].

8. *Id.*

9. Georgia General Assembly, SB 339, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20172018/SB/339> [https://perma.cc/9HUK-TXJL] [hereinafter SB 339 Bill Tracking].

10. State of Georgia Final Composite Status Sheet, SB 339, Apr. 5, 2018.

11. *Id.*

12. *Id.*

13. *Id.*

14. Compare SB 339, as introduced, 2018 Ga. Gen. Assemb., with SB 339 (SCS), 2018 Ga. Gen. Assemb.

language found in Section 1 of the bill, beginning at line fourteen.<sup>15</sup> The language, which required the Board of Regents of the University System of Georgia to establish “a Committee on Free Expression, consisting of no fewer than [fifteen] members” and mandated the Committee to “report to the public, the board of regents, the Governor, and the General Assembly on September 1 of every year,” was removed.<sup>16</sup> Instead, the Committee substitute provided that “[t]he board of regents shall report to the public, the Governor, and the General Assembly.”<sup>17</sup>

The Committee substitute also removed language found under the amendments to Code section 20-3-48.4, relating to instances when the University System of Georgia may restrict the expressive conduct of persons in public areas of campuses.<sup>18</sup> Yet, like many changes throughout the substitute, the edits to Code section 20-3-48.4 were not replaced with any additional language and the previous Code section remained unchanged.<sup>19</sup> The Committee substitute also removed subsection (8) for the proposed additions to Code section 20-3-48, which provided “a disciplinary hearing under published procedures” for any students charged with violating SB 339.<sup>20</sup> However, the Committee removed this requirement and replaced it with the reporting standard mentioned above.<sup>21</sup> No further amendments were proposed by the Senate, and they passed the Committee substitute of SB 339 on February 26, 2018, by a vote of 33 to 19.<sup>22</sup>

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15. *Compare* SB 339, as introduced, § 1, pp. 1–5, ll. 12–147, 2018 Ga. Gen. Assemb., *with* SB 339 (SCS), § 1, pp. 1–3, ll. 14–85, 2018 Ga. Gen. Assemb.

16. *Compare* SB 339, as introduced, § 1, p. 3, ll. 84–87, 2018 Ga. Gen. Assemb., *with* SB 339 (SCS), § 1, p. 3, ll. 69–70, 2018 Ga. Gen. Assemb.

17. SB 339 (SCS), § 1, p. 3, ll. 69–70, 2018 Ga. Gen. Assemb.

18. *Compare* SB 339, as introduced, § 1, pp. 4–5, ll. 127–47, *with* SB 339 (SCS), § 1, p. 3.

19. *Id.*

20. *Compare* SB 339, as introduced, § 1, p. 2, ll. 44–52, *with* SB 339 (SCS), § 1.

21. *Compare* SB 339, as introduced, § 1, p. 2, ll. 44–45, 2018 Ga. Gen. Assemb., *with* SB 339 (SCS), § 1, p. 2, ll. 54–59, 2018 Ga. Gen. Assemb.

22. Georgia Senate Voting Record, SB 339 Vote #524 (Feb. 26, 2018).

*Consideration and Passage by the House*

Representative Earl Ehrhart (R-36th) sponsored SB 339 in the House.<sup>23</sup> The House first read SB 339 on February 28, 2018.<sup>24</sup> The House read SB 339 a second time on March 1, 2018.<sup>25</sup> The bill was assigned to the House Judiciary Committee, which, like the Senate Higher Education Committee, chose to put forth substantial edits in the form of a substitute.<sup>26</sup>

The House Committee added language relating to free press as well as free speech.<sup>27</sup> The Committee revised subsection (a) of Code section 20-3-48, disallowing Georgia University System institutions from shielding students from free speech so long as “any invited speaker whom a student group or members of the faculty have invited . . . complies with the applicable institution’s content-neutral time, place, and manner restrictions.”<sup>28</sup> Additionally, the Committee revised subsection (b) of Code section 20-3-48 to include additional restraints on the board of regents’s ability to promulgate disciplinary sanctions by requiring “notice, hearing, and due process . . . .”<sup>29</sup>

Further, the Committee made revisions to Code section 20-3-48.1.<sup>30</sup> First, the distribution of the board of regents’s published annual report was limited to prevent public access while simultaneously expanded to include the Governor and both chambers of the General Assembly.<sup>31</sup> Additionally, the Committee gave the board of regents the discretion to publish information relating to “[a]ny assessments, criticisms, commendations, or recommendations the board of regents deems appropriate to further include in the report.”<sup>32</sup> Finally, the Committee revised Code section 20-3-48.2.<sup>33</sup> The Committee struck language that authorized the board of regents to “adopt regulations to further the purposes of the policies adopted

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23. See SB 339 Bill Tracking, *supra* note 9.

24. State of Georgia Final Composite Status Sheet, SB 339, Mar. 27, 2018.

25. *Id.*

26. *Id.* Compare SB 339 (SCS), with SB 339 (HCS), 2018 Ga. Gen. Assemb.

27. SB 339 (HCS), § 1, p. 1, l. 16, 2018 Ga. Gen. Assemb.

28. *Id.* § 1, p. 2, ll. 37–44.

29. *Id.* § 1, p. 2, l. 45.

30. *Id.* § 1, pp. 2–3, ll. 50–62.

31. *Id.* § 1, p. 2, ll. 51–53.

32. *Id.* § 1, p. 3, ll. 61–63.

33. SB 339 (HCS), § 1, p. 3, ll. 63–69.

pursuant to this part,” limiting its ability to expand regulations relating to SB 339.<sup>34</sup>

The House read the bill a third time with the revisions from the House Judiciary Committee on March 27, 2018.<sup>35</sup> The House passed the Committee substitute on March 27, 2018.<sup>36</sup> Then, the House transmitted the bill to the Senate on March 27, 2018.<sup>37</sup> The Senate agreed to the House’s version of the bill on March 27, 2018, by a vote of 35 to 17.<sup>38</sup> The Senate sent the bill to Governor Nathan Deal (R) on April 5, 2018. Governor Deal signed the bill into law on May 8, 2018, and the bill became effective on July 1, 2018.<sup>39</sup>

### *The Act*

Section 1 of the Act amends Article 2 of Chapter 3 of Title 20 of the Official Code of Georgia Annotated, relating to the University System and Board of Regents. It adds three sections to the Code, placing new, affirmative requirements on Georgia colleges and universities, as well as on the Board of Regents.

Several of the subsections contained in Code section 20-3-48 serve as aspirational provisions, including subsections (1), (2), (4), and (5). These subsections present vague language, which requires colleges and universities to “assure” that they will protect freedom of speech; “foster the discovery, improvement, transmission, and dissemination of knowledge”; refrain from shielding students from speech protected by the First Amendment; and “assure students and faculty are allowed to assemble and engage.”<sup>40</sup> The remaining provisions set concrete requirements on the University System. For example, subsection (a)(3) mandates that colleges and universities “maintain and publish policies addressing content-neutral time, place, and manner restrictions on expressive activities with the least restrictive

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34. Compare SB 339 (SCS), § 1, p. 4, ll. 100–01, 2018 Ga. Gen. Assemb., with SB 339 (HCS), § 1, p. 3, 2018 Ga. Gen. Assemb.

35. State of Georgia Final Composite Status Sheet, SB 339, Apr. 5, 2018.

36. *Id.*

37. *Id.*

38. Georgia House of Representatives Voting Record, SB 339, #767 (Mar. 27, 2018).

39. State of Georgia Final Composite Status Sheet, SB 339, Apr. 5, 2018.

40. 2018 Ga. Laws 1086, § 1, at 1086–87.



means.”<sup>41</sup> Subsection (a)(6) demands that universities assure that any speaker invited by students or faculty is allowed to speak, subject to time, place, and manner restrictions.<sup>42</sup>

Section 1 also addresses countervailing constitutional considerations raised by opponents of the bill in both the House and Senate. Namely, Section 1 addresses the possibility that the bill would infringe upon the free speech rights of protesters by ensuring that individuals are allowed to peacefully protest, subject to the same content-neutral time, place, and manner restrictions so long as the protests “[d]o not interfere with other previously scheduled events or activities on campus occurring at the same time” and do not disrupt order in classrooms.<sup>43</sup> Finally, subsection (b) implements a controversial and relatively undefined sanctions regime, whereby the Board of Regents must establish disciplinary sanctions for anyone under the jurisdiction of a college or university who violates or interferes with the free speech and expression provisions set forth in the preceding section.<sup>44</sup> Subsection (b) leaves the possible range of sanctions to the discretion of the Board of Regents, and sets no real cap on the severity of such disciplinary actions. Its only restriction lies in the mandate that the Board of Regents impose sanctions only after complying with notice, hearing, and due process requirements.<sup>45</sup>

Section 1 also adds a new provision to the Code that focuses exclusively on the Board of Regents. Specifically, the section extends to the board of regents a similar policy publication requirement to the one placed on colleges and universities in the previous section.<sup>46</sup> Under this provision, the Board of Regents must provide an annual publication to the Governor and each chamber of the General Assembly by July 1, which will reflect its oversight of the affirmative mandates implemented by Code section 20-3-48 and explain progress in encouraging the dissemination of free speech and ideas.<sup>47</sup> The Board of Regents must report on “[a]ny barriers to, or disruptions of, free expression within state institutions of higher education” and the

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41. *Id.* at 1086.

42. *Id.* at 1087.

43. *Id.*

44. *Id.*

45. *Id.*

46. 2018 Ga. Laws 1086, § 1, at 1087.

47. *Id.*

administrative responses and disciplinary actions taken to remedy those barriers.<sup>48</sup> Additionally, the Board must explain the actions taken by colleges and universities, as well as the successes and challenges they faced “in maintaining a posture of administrative and institutional neutrality with regard to political or social issues.”<sup>49</sup> Finally, the Act authorizes the Board, in its discretion, to include any other comments it may deem necessary or relevant.<sup>50</sup>

The final section of the Act serves as a limiting provision, which further defines the University System and Board of Regents’s abilities to regulate speech. This section begins by explaining that Code section 20-3-48 does not prevent colleges and universities from regulating unlawful speech and activities conducted by students.<sup>51</sup> The Act concludes with a provision stating that educational institutions may only limit student expression if those expressive activities fall outside the protection of the First Amendment.<sup>52</sup> The provision also explains that these institutions “shall be able to require reasonable time, place, and manner restrictions on expressive activities consistent with Code [s]ection 20-3-48.”<sup>53</sup>

### *Analysis*

Senator William Ligon (R-3rd) first introduced SB 339 to the Senate as a recognition of the idea “that our universities are to be places of open dialogue and discussion.”<sup>54</sup> To that end, the Act requires colleges and universities to create and publish policies addressing free speech, ensure that all invited speakers have a chance to speak uninterrupted, and institute disciplinary measures to deal with individuals who disrupt speech on campus. The Act is not the first of its kind and certainly will not be the last. Twelve states either passed or introduced campus free speech legislation from 2015 to

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48. O.C.G.A. § 20-3-48.1(1)–(2) (Supp. 2018).

49. O.C.G.A. § 20-3-48.1(3) (Supp. 2018).

50. 2018 Ga. Laws 1086, § 1, at 1087.

51. *Id.* at 1088.

52. *Id.*

53. *Id.*

54. Video Recording of Senate Proceedings at 2 hr., 34 min., 10 sec. (Feb. 26, 2018) (remarks by Sen. William Ligon (R-3rd)), <https://www.youtube.com/watch?v=TRjwukopnXw&t=2885s> [<https://perma.cc/E3SM-9VZR>] [hereinafter Senate Proceedings Video].

2017, and Georgia served as one of five states to introduce a bill in 2018.<sup>55</sup> Despite the increase in legislation on the subject, there have been no major constitutional or other legal challenges to these free speech bills. However, state legislatures must strike a delicate balance in crafting these laws. They must simultaneously decipher ways to ensure free speech for invited speakers and avoid stifling the speech of those opposing the views of that invited speaker. The effort to strike this balance will almost inevitably provoke a legal challenge in the State of Georgia, especially considering the constitutional questions raised by opposition leaders during the Senate and House floor debates.

Prior to the Act's passage, courts promoted the idea that public colleges and universities differ from venues typically considered as public forums for speech and expression.<sup>56</sup> In *Bloedorn v. Grube*, the Eleventh Circuit noted that a university maintains a different role from other, publicly-owned and operated spaces such as parks, in that "[i]ts essential function is not to provide a forum for general public expression and assembly; rather, the university campus is an enclave created for the pursuit of higher learning by its admitted and registered students and by its faculty."<sup>57</sup> This distinctive purpose of universities typically allowed them discretion to restrict the accessibility of certain speakers and types of speech, particularly when that speech implicated concerns over public safety and disruption of educational endeavors.<sup>58</sup>

The Act can be perceived as changing this presumption in favor of discretion on the part of universities to restrict speech. It also appears to rebut the premise that a university's sole mission is to provide an avenue for in-class educational pursuits, considering Senator Ligon's remarks that the "primary function of the university is to learn . . . to debate . . . to receive an education, and to exchange ideas."<sup>59</sup>

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55. AM. ASS'N OF UNIV. PROFESSORS COMM. ON GOV'T RELATIONS, CAMPUS FREE-SPEECH LEGISLATION: HISTORY, PROGRESS, AND PROBLEMS 7–8 (2018).

56. *E.g.*, *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) ("A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.")

57. *Bloedorn v. Grube*, 631 F.3d 1218, 1233–34 (11th Cir. 2011).

58. *See id.* at 1238; *see also* *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289–91 (2000); *Bowman v. White*, 444 F.3d 967, 981 (8th Cir. 2006).

59. Senate Proceedings Video, *supra* note 54, at 2 hr., 43 min., 34 sec. (remarks by Sen. William

Although this statement does not completely contradict the paradigm explained by the Eleventh Circuit, the importance of allowing access to all kinds of speech becomes even clearer through the floor dialogue on the possibility of an invited speaker preaching hate and violence. Senator Ligon, responding to concerns over the availability of student responses to such speakers, stated that “if the speaker preaches hate or violence, the students have a lot of recourse.”<sup>60</sup> Specifically, he explained students could “walk out” of the lecture hall or debate and condemn the speaker’s ideas after his presentation.<sup>61</sup> Noticeably absent from that list of options, however, is the ability of students to engage in shout-down protests. The General Assembly’s stark rejection of this method, and implementation of disciplinary sanctions for engaging in it, implicates concerns over the suppression of opposition speech in a way that may violate the First Amendment, containing the very rights that this Act seeks to preserve and protect.

#### *Disciplinary Measures*

A provision that garnered a great amount of attention, both in Committee and on the floor of the House and Senate, was the requirement that universities establish disciplinary measures, subject to notice, hearing, and due process requirements. Many opponents of the Act expressed concerns over the potential unintended consequences that could accompany this requirement. Specifically, they took issue with the notion that students could be sanctioned for exercising their First Amendment rights to speech and expression just because of the manner in which they exercised that right and the speech they were trying to oppose. This concern was only heightened by the fact that, theoretically, colleges and universities already possess the authority to implement disciplinary measures regarding individuals who disrupt invited speakers.

The Act’s sponsors asserted that the very reason for this affirmative requirement is that institutions are not taking steps to impose discipline on these students, despite their perceived discretion

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Ligon (R-3rd)).

60. *Id.* at 2 hr., 43 min., 43 sec. (remarks by Sen. William Ligon (R-3rd)).

61. *Id.*

to do so. This provision intentionally threatens sanctions as a way of discouraging shout-down protests, and thereby allows the opportunity for greater dissemination of ideas. Despite the best of intentions, however, this provision of the Act leaves little guidance for institutions regarding when and how to impose sanctions. Even the bill's primary sponsor, Senator Ligon, acknowledged that the parameters of the sanctions mandate remain relatively undefined and that the schools have a great deal of discretion in the matter. In response to Senator Lester G. Jackson (D-2nd), who posed a question asking whether a student would be punished for booing, Senator Ligon explained, "[w]ell I don't think there is a punishment for booing. It has to rise to the level where it is substantially and materially disrupting the speaker."<sup>62</sup> Even so, the university must make a "judgment call" on what rises to a substantial and material interference. Accordingly, an extrajudicial decision-making body within a college or university will be left to determine whether students properly exercised their First Amendment rights or whether they surpassed those rights to engage in conduct that violates Georgia law.

Moreover, the Act does not explicitly define the range and severity of disciplinary sanctions that colleges and universities could impose on students for violating Code section 20-3-48(a).

### *Future Outlook*

The concept of free speech on college campuses is not new to the Georgia legislature. As a response to the national conversation about free speech on college and university campuses, SB 339 compels Georgia's public colleges and universities to create guidelines that will discourage individuals from disrupting the speech of students and invited guests. Sparking significant public debate on the issue, the legislation and the ultimate scope of its coverage still remains to be determined.

*Daniel F. Barrett & Alexander Hegner*

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62. *Id.* at 2 hr., 42 min., 26 sec. (remarks by Sen. William Ligon (R-3rd)).