

AGENDA ITEM

A-4. Policy on Free Speech and Free ExpressionSteve Long

Situation: The North Carolina General Assembly has passed legislation related to restoring and preserving campus free speech (the “campus free speech act” or “act”), which became law (S.L. 2017-96) on July 31, 2017. The act requires the Board of Governors to develop and adopt a policy on free speech and free expression that incorporates the relevant statutory provisions. This policy will be in addition to other policies and protections already recognized by the University through *The Code* and the UNC Policy Manual.

Background: The act applies to the University of North Carolina and its constituent institutions. The Board of Governors must adopt a policy on free speech and free expression that includes at least the following provisions:

- Recognition of the primary educational mission of the constituent institutions and the commitment to the fullest degree of intellectual freedom and free expression;
- The role of the institution with respect to free expression in public policy controversies;
- The First Amendment protections of and limits on the freedom of students and faculty to discuss issues on campus;
- Access to campuses for purposes of free speech and expression;
- Assuring that there is a range of disciplinary sanctions for any student or employee who substantially disrupts the functioning of his/her constituent institution or substantially interferes with the protected free expression rights of others; and
- Providing certain procedural safeguards for any student disciplinary cases involving expressive speech or conduct.

The act includes other requirements as well. Each constituent institution must provide information about its free expression policies to incoming first-year students. The Board must also develop a policy that requires each constituent institution to designate an officer, office, or department with responsibilities for ensuring compliance with the law and Board policy and for answering any related questions or concerns. All responsible officers will receive training in ensuring compliance with the act.

The Governance Subcommittee on the Free Expression Policy has met on both October 11, 2017 and October 25, 2017 to discuss the policy. Members of the subcommittee also have met with the Association of Student Governments, the

Staff Assembly, and the Faculty Assembly to solicit their input. The draft policy incorporates feedback from these groups.

Assessment:

The committee will consider the attached draft policy on free speech and free expression for recommendation to the Board for approval.

Action:

This item requires a vote by the committee, with a vote by the full Board of Governors through the consent agenda at the next meeting.

Free Speech and Free Expression Within the University of North Carolina

I. Purpose

Consistent with Article 36 of Chapter 116 of the North Carolina General Statutes, the Board of Governors adopts this policy to support and assist the constituent institutions of the University of North Carolina¹ in their continuing efforts to embrace the free speech and free expression rights of the members of their campus communities, and balance those rights with protections against unlawful activity. This policy supplements other University policies, regulations, and guidelines related to free speech and free expression.²

II. Statement of Commitment

As the nation's first public university, the University of North Carolina affirms its long-standing commitment to free speech and free expression for its students, faculty members, staff employees, and visitors under the First Amendment of the U.S. Constitution and Article 1, Section 14 of the North Carolina Constitution. The University and its constituent institutions protect and promote these freedoms, consistent with First Amendment jurisprudence.

The University's mission includes the transmission and advancement of knowledge and understanding, the pursuit of which is dependent upon the ability of our faculty and students to remain free to inquire, to study and to evaluate, to gain new maturity and understanding.³ The University supports and encourages freedom of inquiry for faculty members and students, to the end that they may responsibly pursue these goals through teaching, learning, research, discussion, and publication, free from internal or external restraints that would unreasonably restrict their academic endeavors.⁴ The University has explicitly stated that faculty and students of the University share the responsibility for maintaining an environment in which academic freedom flourishes and in which the rights of each member of the academic community are respected.⁵ Academic freedom has indeed been acknowledged by the Supreme Court as "of transcendent value to all of us" and "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."⁶ Through its policies, the University has expressly established that no employment decision or academic decision shall be based on the exercise of these constitutional rights.⁷

The General Assembly has recognized the University's commitment to upholding free speech and free expression, and has reinforced the importance of these rights as well.⁸ Through N.C.G.S. § 116-300, the General Assembly has affirmed that the primary function of the University of North Carolina and each of its constituent institutions is the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate. To fulfill this function, each constituent institution must strive to ensure the fullest degree of intellectual freedom and free expression. It is not the proper role

¹ Because of the additional protections afforded to K-12 institutions under the First Amendment, the policy does not apply to the North Carolina School for Science and Math or to the University of North Carolina School of the Arts for its high school students or to any lab schools operated by a constituent institution. Even so, these institutions are expected to comply with Article 36 of Chapter 116 to the extent there is not a conflict with relevant First Amendment jurisprudence applicable to K-12 institutions.

² See, e.g., Sections 101.3.1, 300.1.1, 300.2.1, 700.4.2 of the UNC Policy Manual. See also Sections 601, 604, and 608 of *The Code*.

³ See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

⁴ Section 600(1) of *The Code*. See also Section 700.4.2 of the UNC Policy Manual.

⁵ Section 600(3) of *The Code*. See also Section 700.4.2 of the UNC Policy Manual.

⁶ *Keyishian v. Board of Regents, State Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

⁷ See Sections 101.3.1, 300.1.1, 300.2.1, 700.4.2 of the UNC Policy Manual. See also Sections 601, 604, and 608 of *The Code*.

⁸ Article 36 of Chapter 116 of the North Carolina General Statutes.

of any constituent institution to shield individuals from speech protected by the First Amendment, including, without limitation, ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.

III. University's Role in Public Policy Controversies

The University's role in supporting and encouraging freedom of inquiry requires assuring opportunities for differing views regarding many issues in multiple areas of study, research, and debate, including current political and social issues. The constituent institutions serve an essential role in encouraging and broadly protecting the freedom of thought and expression. In support of the essential role universities hold, the constituent institutions may not take action, as an institution, on the public policy controversies of the day in such a way as to require students, faculty, or administrators to publicly express a given view of social policy.

IV. Free Expression at UNC Constituent Institutions, Including Access to Campus

Students, staff and faculty have the freedom to discuss any problem that presents itself, as the First Amendment permits and within the limits of viewpoint- and content-neutral restrictions on time, place, and manner of expression that are necessary to achieve a significant institutional interest. The constituent institutions must assure that any such restrictions are clear, published, and provide ample alternative means of expression.

Students, staff and faculty shall be permitted to assemble and engage in spontaneous expressive activity as long as such activity is lawful and does not materially and substantially disrupt the functioning of the constituent institution, subject to the requirements of this policy. A "material and substantial disruption" encompasses any or all of the following:

- A. Any action that qualifies as disorderly conduct under N.C.G.S. § 14-288.4;
- B. Any action that qualifies as a disruption under N.C.G.S. § 143-318.17;
- C. Any action in violation of a chancellor's designation of a curfew period pursuant to N.C.G.S. § 116-212;
- D. Any action that results in the individual receiving a trespass notice from law enforcement.

Access to campus for purposes of free speech and expression shall be consistent with First Amendment jurisprudence regarding traditional public forums, designated public forums, and nonpublic forums. Consistent with First Amendment jurisprudence, including any reasonable time, place, and manner restrictions adopted by a constituent institution, campuses of the constituent institutions are open to any speaker whom students, student groups, or members of the faculty have invited.

Even so, all real property on the campus of any constituent institution or UNC General Administration, including without limitation all campus grounds, buildings, facilities, stadiums, or other improvements, that is owned, leased, used, or otherwise controlled by the University or one of its constituent institutions ("University Property"), is dedicated for the specific purpose of furthering the educational, research, and/or service missions of the institution. Consistent with the First Amendment, many areas of University Property are not open for general public use. University Property is routinely utilized for institutional activities and events which can present safety and security issues for the institution. Therefore, all persons on University Property must abide by all applicable laws and regulations as well as policies of the constituent institution and the Board in order to further the missions of the institution and for the protection of the students, faculty members, staff employees and guests of the institution. Thus, a constituent institution may deny or condition entrance onto or into University Property or remove from the same, any person whose presence substantially interferes with or materially and substantially disrupts the institution's missions, including interfering with or disrupting the classroom environment, laboratory or research environments, or patient care environments, or any person who violates or refuses to comply with

any Board or institutional policy or applicable law or regulation. Under no circumstances shall University Property be utilized to carry out unlawful activity.

V. Speech and Expression Not Protected by Policy

Except as further limited by this policy, constituent institutions shall be allowed to restrict speech and expression for activity not protected by the First Amendment under State or federal law, including but not limited to all of the following:

- A. Expression that a court has deemed unprotected defamation.
- B. Unlawful harassment.
- C. True threats, which are defined as statements meant by the speaker to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.
- D. An unjustifiable invasion of privacy or confidentiality not involving a matter of public concern.
- E. An action that substantially disrupts the functioning of UNC General Administration, a constituent institution, or any other unit or entity of the University, or that substantially interferes with the protected free expression rights of others.
- F. Reasonable time, place, and manner restrictions on expressive activities, consistent with N.C.G.S. § 116-300(4).
- G. Speech that interferes with the treatment of patients.

VI. Dissemination of Information About Institutional Policies

A. Information for Students. All constituent institutions of the University of North Carolina shall include in any new student orientation programs a section describing their institutional policies regarding free speech and free expression consistent with this policy and with Article 36 of Chapter 116 of the North Carolina General Statutes. Any information provided also should include the name and contact information of the institutional officer, office, or department with responsibility for ensuring compliance with this policy and for answering any related questions or concerns.⁹

The constituent institutions are required to periodically provide this same information to all students, including returning undergraduate students, transfer students, and graduate and professional students.

B. Information for Faculty and Staff. All constituent institutions of the University of North Carolina are required to periodically provide to faculty and staff information describing their institutional policies regarding free speech and free expression consistent with this policy and with Article 36 of Chapter 116 of the North Carolina General Statutes. Any information provided should also include the name and contact information of the institutional officer, office or department with responsibility for ensuring compliance with this policy and for answering any related questions or concerns.

C. Information for Outside Parties. All constituent institutions of the University of North Carolina are encouraged to make available to outside parties information describing their institutional policies regarding free speech and free expression consistent with this policy and with

⁹ The additional duties of the identified responsible officer, office, or department are set forth in section VIII of this policy.

Article 36 of Chapter 116 of the North Carolina General Statutes. Any information provided should also include the name and contact information of the institutional officer, office, or department with responsibility for ensuring compliance with this policy and for answering any related questions or concerns.

VII. Consequences for Violation of Policy

The right to dissent is the complement of the right to participate in expressive activity, but these rights need not occupy the same forum at the same time. The constituent institutions are encouraged to work with students, faculty members, and staff employees to develop alternative approaches so as to minimize the possibility of disruptions and support the right to dissent.

A. **Disciplinary Sanctions.** Each constituent institution shall implement and enforce a range of disciplinary sanctions, up to and including dismissal or expulsion, for anyone under the jurisdiction of the constituent institution who substantially disrupts the functioning of the constituent institution or substantially interferes with the protected free expression rights of others.

A “substantial disruption” or “substantial interference” is any action that qualifies under Section IV of this policy. Such actions include protests and demonstrations that materially infringe upon the rights of others to engage in and listen to expressive activity when the expressive activity (1) has been scheduled pursuant to this policy or other relevant institutional policy, and (2) is located in a nonpublic forum. In determining whether an action is a “substantial disruption” or “substantial interference,” the constituent institution may consider the degree to which the disruptive activity impedes access to or from any scheduled institution events or the degree to which the activity impedes an audience’s ability to see and hear the expressive activity.

For example, when an expressive activity event is closed to the public, dissent by non-attendees should be limited to activity outside the event that does not impede access or departure from the meeting or substantially interfere with communication inside. When the event is open to the public, whether the dissenters’ actions constitute a substantial disruption or interference will depend upon whether the dissenter is inside or outside the event, and on whether the dissenter is acting before or after the speech event or during the event. However, it is a substantial disruption or interference for such dissent to interfere substantially with the free flow of traffic into or out of the event or to interfere substantially with the speaker’s expressive activity.

Anyone who substantially interferes with acceptable forms of dissent is also considered in violation of this policy in the same way as a dissenter who violates the rights of the speaker or the audience.

1. Any University student, faculty member, or staff employee who is found to have substantially disrupted the functioning of UNC General Administration, a constituent institution, or any other unit or entity of the University, or substantially interfered with the protected free expression rights of others shall be subject to a full range of disciplinary sanctions according to the appropriate disciplinary procedures for misconduct, including suspension, or, as appropriate, expulsion or dismissal. Any second finding of a substantial disruption or substantial interference shall presumptively result in at least a suspension as provided by the appropriate disciplinary procedures; however, the institution may impose a different sanction if warranted. Any third finding of a substantial disruption or substantial interference shall presumptively result in an expulsion of the student or dismissal from employment of the faculty member or staff employee; however, the institution may impose a different sanction if warranted.

2. Any guest or other individual on the campus who is alleged to have substantially disrupted the functioning of UNC General Administration or the constituent institution or substantially interfered with the protected free expression rights of others may be temporarily or permanently barred from all or part of the campus along with facing any other criminal charges, as determined by appropriate law enforcement authorities.

3. Any individual who disrupts a meeting of a public body, including University boards, may be temporarily or permanently barred from all or part of the campus or from future meetings of that public body, and/or may face criminal charges. If such individual is a student or faculty member or staff employee of the University, he or she shall also be subject to discipline according to the appropriate disciplinary procedures for misconduct by his or her constituent institution even if the disruption occurs at a meeting of a public body of a constituent institutions other than the institution which the individual is affiliated.¹⁰

B. Procedural Safeguards for Students Involved in Expressive Speech or Conduct Disciplinary Cases.¹¹ In all student disciplinary cases where disciplinary action is proposed for disrupting the functioning of UNC General Administration, a constituent institution, or any other entity or unit of the University, or substantially interfering with the protected free expression rights of others, students are entitled to a disciplinary hearing under published procedures and UNC Policy Manual, Section 700.4.1, including, at a minimum:

1. The right to receive advance written notice of the charges;
2. The right to review the evidence in support of the charges;
3. The right to confront witnesses against them;
4. The right to present a defense;
5. The right to call witnesses;
6. A decision by an impartial arbiter or panel;
7. The right of appeal; and
8. The right to active assistance of counsel, consistent with N.C. G.S. § 116-40.11.

C. Procedural Safeguards for Faculty Members Involved in Expressive Speech or Conduct Disciplinary Cases. In all faculty disciplinary cases where a demotion, suspension, or dismissal is proposed for disrupting the functioning of UNC General Administration, a constituent institution, or any other entity or unit of the University, or substantially interfering with the protected free expression rights of others, faculty members are entitled to the procedural protections provided by Sections 603, 604, and 609 of *The Code*.

D. Procedural Safeguards for EHRA Non-Faculty Employees Involved in Expressive Speech or Conduct Disciplinary Cases.¹² In all EHRA non-faculty disciplinary cases where a demotion, suspension, or dismissal is proposed for disrupting the functioning of UNC General Administration, a constituent institution, or any other entity or unit of the University, or substantially interfering with the protected free expression rights of others, EHRA non-faculty employees are entitled to the procedural protections provided by Sections 300.1.1, 300.2.1 of the UNC Policy Manual and any additional protections established by the constituent institution's relevant disciplinary and grievance policies.

¹⁰ Any complaint about an outside disruption should be communicated to the relevant campus administrator or disciplinary panel for review by the Chair of the Board of Governors, the Chair of the Board of Trustees, or the presiding officer of the meeting, as appropriate. This expectation does not limit or supersede the constituent institution's ability to independently initiate any disciplinary review.

¹¹ See also Sections 700.4.1 and 700.4.1.1[R] of the UNC Policy Manual.

¹² Discontinuation of an at-will position is not considered disciplinary action under this policy, but may separately be covered by a constituent institution's grievance policy.

E. Procedural Safeguards for SHRA Employees Involved in Expressive Speech or Conduct Disciplinary Cases. In all SHRA employee disciplinary cases where a demotion, suspension or dismissal is proposed for disrupting the functioning UNC General Administration, a constituent institution, or any other entity or unit of the University, or substantially interfering with the protected free expression rights of others, SHRA employees are entitled to the procedural protections provided by the University SHRA Employee Grievance Policy and any State or campus disciplinary policies.

VIII. Designation and Duties of Responsible Officer and/or Office or Department

A. Designation. Each constituent institution must identify the officer(s), office, or department with responsibilities for ensuring compliance with this policy and Article 36 of Chapter 116 of the North Carolina General Statutes (“Responsible Officer” or “Responsible Officers”), and for answering any related questions or concerns from students, faculty members, staff employees, or others. The president or a chancellor of a constituent institution may choose to designate more than one Responsible Officer or to designate a Responsible Officer with Deputy Responsible Officers in other offices or departments as may best assist the constituent institution.

B. Training. Any officer(s) with these responsibilities will receive training on ensuring compliance. Such training will be developed and provided by the University of North Carolina School of Government.

C. Duties. Any officer(s) with these responsibilities shall be the primary point of contact for any student, faculty member, staff employee, or other individual’s questions or concerns about compliance with the law or policy or to assist with interpretation of the law or policy. The Responsible Officer(s) shall also coordinate any additional campus-based training or educational opportunities for students, faculty members, staff employees, or others on issues related to free speech and free expression.

In addition, the Responsible Officer(s) and/or appropriate office or department also may be designated by the chancellor to be the primary point of contact for any institutional information requested by the UNC Board of Governors Committee on Free Expression to meet its annual reporting requirements, including information related to:

1. Any barriers to or disruptions of free expression within the constituent institution;
2. The administrative handling and discipline relating to these disruptions or barriers, consistent with the federal and state confidentiality protections for personnel information and student education records¹³;
3. Any substantial difficulties, controversies, or successes in meeting the requirements of this policy, as described in Section III, above; and
4. Any assessments, criticisms, commendations, or recommendations the committee sees fit to include.

Each chancellor or chancellor’s designee shall notify the senior vice president and general counsel of the Responsible Officer(s) and/or appropriate office or department and provide prompt notification of any changes in this designation.

¹³ See 20 U.S.C. §1232g, 34 CFR Part 99, and Article 7 of Chapter 126 of the North Carolina General Statutes.

IX. Other Matters

A. **Effective Date.** The requirements of this policy shall be effective on the date of adoption by the Board of Governors.

B. **Relation to State Laws.** The foregoing policies as adopted by the Board of Governors are meant to supplement, and do not purport to supplant or modify, those statutory enactments which may govern the activities of public officials.

C. **Regulations and Guidelines.** These policies shall be implemented and applied in accordance with such regulations and guidelines as may be adopted from time to time by the president.