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CORRECTING COMMON MISTAKES IN CAMPUS SPEECH POLICIES

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Introduction

Most college students and faculty members are justified in expecting the right to freedom of speech on their campuses. After all, as government entities, all public colleges and universities are legally bound by the First Amendment to the Constitution. And while private universities are outside the scope of the First Amendment, the overwhelming majority of them make explicit commitments to free expression to students and faculty in promotional materials and official policies—promises by which they are morally (and, in many jurisdictions, legally) bound.

Despite these binding obligations to protect free speech, the Foundation for Individual Rights in Education (FIRE) has found that the vast majority of our nation's colleges and universities violate students' and faculty members' right to freedom of expression. Too many of these institutions maintain unconstitutional or restrictive speech codes—that is, policies prohibiting speech that, outside the bounds of campus, would be protected by the First Amendment. Many of them maintain particularly severe restrictions that FIRE refers to as “red light” speech codes.



FIRE's annual report is based on a comprehensive annual analysis of the policies restricting speech maintained by colleges and universities. In analyzing such policies every year, FIRE attorneys have found that nearly every speech code is an example of one of several commonly made mistakes in policy language or application. After finding the same types of mistakes at school after school, year after year, FIRE catalogues and addresses these common mistakes directly in this publication to help university administrations avoid them.

There are several reasons why administrators must take seriously their legal and moral obligation to uphold students' and faculty members' free speech rights. The first is that the liberal arts university should be a haven for unencumbered intellectual exploration, and policies that punish or even simply chill free speech undermine that traditional purpose. As the Supreme Court of the United States has stated: "For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."¹

Another reason universities must reform their speech codes is to avoid potential liability for First Amendment violations. Speech codes have been and continue to be

¹ *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 835 (1995).

successfully challenged in courts around the country.² Unfortunately, because too many schools continue to maintain unconstitutional codes, more litigation in the future is certain. As the weight of legal precedent against speech codes grows even stronger, the risk of liability—not only to universities, but also to individual administrators in their personal capacity—increases. Thus, undertaking these reforms benefits students at the university while also protecting the university and its administrators.

In addition to the legal and academic problems they present, speech codes tend to be invoked to punish expression that is merely unpopular or inconvenient. Speech codes allow colleges and universities far too much discretion to selectively punish speech—and once a speech code is used to silence one instance of unpopular speech, administrators will likely feel pressure from students to use it again every time an individual claims to be offended. Finally, speech codes teach students the wrong lesson about how best to answer speech with which one disagrees, emphasizing censorship over dialogue. Allowing students to choose censorship over engagement robs them of the chance to understand on a practical level how participation in our liberal democracy relies on the marketplace of ideas and academic freedom to determine which ideas have merit.

² See, e.g., *Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio Jun. 12, 2012) (invalidating unconstitutional “free speech zone” policy).



Common Mistakes

Substantive and Administrative

We divide this discussion into two general categories of mistakes: mistakes in the substance of university policies and mistakes in their administration.

Put another way, substantive mistakes are restrictions on campus speech stemming from the actual language of the policies themselves. Administrative mistakes are restrictions on campus speech that are created by the way campus policies are maintained or published.

Substantive Mistakes

1. Harassment Policies

Pursuant to federal anti-discrimination law, every college or university that accepts federal funding—the vast majority of institutions nationwide—must maintain a policy prohibiting discriminatory harassment on the basis of protected class statuses like sex and race.³ Harassment is not protected by the First Amendment. For speech to

³ See U.S. Dep't of Educ., *About OCR*, www2.ed.gov/about/offices/list/ocr/aboutocr.html. For example, the Department of Education's Office for Civil Rights (OCR) notes that "[d]iscrimination on the basis of race, color, and national origin is prohibited by Title VI of the Civil Rights Act of 1964; sex discrimination is prohibited by Title IX of the Education Amendments of 1972; discrimination on the basis of disability is prohibited by Section 504 of the Rehabilitation Act of 1973; and age discrimination is prohibited by the Age Discrimination Act of 1975." *Id.*



constitute harassment, however, it must meet a specific definition. In the educational context, student-on-student (or peer) hostile environment harassment must be conduct “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”⁴

Properly understood, “discriminatory harassment” is conduct that is (1) unwelcome; (2) discriminatory; (3) on the basis of gender or another protected status, like race; (4) directed at an individual; and (5) “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” To be subject to disciplinary action for discriminatory harassment, therefore, a student must be far more than simply rude or offensive.⁵ Rather, they must be actively engaged in a specific type of discrimination, as defined by law.

In 2003, the Department of Education’s Office for Civil Rights (OCR) wrote an open letter to university presidents nationwide affirming that federal harassment regulations “are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution.”⁶

Nonetheless, too many universities maintain harassment policies that infringe upon their students’ and faculty

⁴ *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999).

⁵ See Dep’t of Educ., *First Amendment: Dear Colleague*, (July 28, 2003), www2.ed.gov/about/offices/list/ocr/firstamend.html. “Harassment, however, to be prohibited by the statutes within OCR’s jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.” *Id.*

⁶ See *First Amendment: Dear Colleague*, *supra* note 5.

members' free speech rights. Unfortunately—and in contradiction of its 2003 letter—OCR has exacerbated the problem in recent years by promulgating a broad, subjective definition of sexual harassment. In May 2013, OCR issued a letter to the University of Montana that proclaimed itself to be a “blueprint” for colleges and universities around the country.⁷ In that letter, OCR stated that “sexual harassment should be more broadly defined as ‘any unwelcome conduct of a sexual nature,’” including “verbal conduct” (i.e., speech). As a result, many colleges and universities have revised their sexual harassment policies to adopt the broad “blueprint” definition, which contains three of the serious problems discussed in more detail below.⁸

The following are the most common mistakes FIRE finds in university harassment policies.

a. Lack of a “Reasonable Person” Standard

Whether conduct constitutes harassment must be evaluated not only from the complainant's perspective (was the conduct subjectively perceived as harassing?), but also from the perspective of a “reasonable person” in the complainant's position (was the conduct objectively harassing?). Only if the conduct is both subjectively and objectively harassing may it be prohibited without infringing on student and faculty speech rights.

⁷ See Anurima Bhargava, Chief, Civil Rights Div., U.S. Dep't of Justice & Gary Jackson, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., *Letter to President Engstrom, Univ. of Mont. and Lucy France, Univ. Counsel, Univ. of Mont.* (May 9, 2013), www2.ed.gov/documents/press-releases/montana-missoula-letter.pdf.

⁸ See Found. for Individual Rights in Educ., *Spotlight on Speech Codes 2016: The State of Free Speech on Our Nation's Campuses* (Dec. 10, 2015), www.thefire.org/spotlight-on-speech-codes-2016.



However, too many colleges and universities have promulgated policies that ignore this principle, a problem made worse by the 2013 federal “blueprint” for sexual harassment on campus. For instance, Clemson University defines sexual harassment as “unwelcome conduct of a sexual nature,” including “verbal” conduct—thus completely neglecting to incorporate an objective element into the standard.⁹

Harassment policies must include an objective, “reasonable person” standard. Otherwise, the most hypersensitive and easily offended members of the campus community wield veto power over all speech, no matter how unreasonable their claim of feeling harassed may be.

*b. Lack of Severity and Pervasiveness
Elements*

As discussed above, the Supreme Court held in *Davis v. Monroe County Board of Education* that, in the educational context, peer harassment is conduct that is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”¹⁰ Many university harassment policies, however, contain no such elements of severity and pervasiveness, instead requiring only that conduct “have the purpose or effect of interfering with an individual’s educational opportunities,” to take a common example.

Again, the federal “blueprint” for campus sexual harassment has made this problem worse. For example, Penn-

⁹ Clemson University, *Anti-Harassment and Non-Discrimination Policy*, available at www.clemson.edu/campus-life/campus-services/access/anti-harassment-policy.html.

¹⁰ *Davis*, 526 U.S. at 633.

sylvania State University defines sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwanted, inappropriate, or unconsented to.”¹¹ This standard fails to include the threshold elements of severity and pervasiveness.

To track the Supreme Court’s governing definition, harassment policies must specify that peer harassment entails severe *and* pervasive conduct.

c. Problematic “Examples” Lists

Many university policies employ a definition of harassment that meets (or comes close to meeting) the legal standard discussed above, but then err by providing a list of purported “examples of harassment” that include protected expression.

Tennessee State University’s harassment policy is a good illustration of this problem. The policy defines harassment as follows:

Harassment is conduct that is based on a person’s race, color, religion, creed, ethic or national origin, sex, sexual orientation/gender identity/expression, disability, age, as applicable, status as a covered veteran, genetic information, or any other category protected by federal or state civil rights law, that. . . [h]as the purpose or effect of unreasonably interfering with an individual’s employment or academic performance or creating an intimidating, hostile, offensive or abusive environment of the individual.¹²

¹¹ Pennsylvania State University, *Policy AD-85: Discrimination, Harassment, Sexual Harassment and Related Inappropriate Conduct*, available at <https://guru.psu.edu/policies/ad85.html>.

¹² Tennessee State University, *Guideline P-080: Discrimination and Harassment- Complaint and Investigation Procedure*, available at www.tnstate.edu/eeoaa/documents/P-080.pdf.



While lacking a severity and pervasiveness requirement, this policy otherwise comes fairly close to tracking the legal standard for harassment. However, the policy then provides examples of harassment that include, among other things, “offensive or derogatory jokes,” “offensive graffiti, cartoons or pictures,” and “[h]umor and jokes about sex that denigrate men or women.”¹³

Lists of examples like this one are highly misleading. While it is possible that such examples could be components of sexual harassment if they were part of a pattern of conduct that rose to the necessary level of severity and pervasiveness, most offensive or derogatory comments are, in fact, protected speech. As courts have continuously held in cases dating back decades, the mere fact that expression is offensive does not strip it of constitutional protection.¹⁴ To actually constitute harassment, speech must go far beyond causing offense; it must genuinely interfere with a reasonable person’s ability to participate in the educational process.

d. Failure to Track Legal Standard

Too often, university harassment policies simply fail to track the legal standard at all, providing their own definitions of harassment that have little or nothing to do with the term’s actual legal meaning. Unmoored from the actual meaning of harassment, these policies typically prohibit broad swaths of protected speech. A good example of this problem comes from Jackson State University, which states that “the use of verbally abusive language by

¹³ *Id.*

¹⁴ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”)

any person on University-owned or controlled property or while on the premises of, or while in attendance of University-sponsored or supervised events is considered to be harassment and is prohibited,” and further states that harassment includes language that “degrades” or “challenges” another person, the “use of profanity,” and “derogatory comments or remarks.”¹⁵

It is crucial that university harassment policies prohibit only that conduct which falls outside the scope of First Amendment protection. To ensure this, policies should follow the precise legal definition of harassment provided by the Supreme Court, as discussed above.

e. Importing Workplace Standards

Many institutions mistakenly import harassment language from the Equal Employment Opportunity Commission’s (EEOC’s) guidelines regarding gender discrimination. The EEOC guidelines define sexual harassment as conduct that “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”

However, the EEOC guidelines apply to harassment in the employment setting; hence the focus on “work performance” and the “working environment.” The guidelines are not applicable in the educational setting, which differs tremendously from the employment context in terms of speech rights. Students at public col-

¹⁵ Jackson State University, *Student Code of Conduct*, available at www.jsu.edu/studentlife/files/2012/08/2015-2016-STUDENT-HANDBOOK-1.pdf.



leges and universities enjoy robust speech rights under the Constitution in order to contribute to the marketplace of ideas, learn from each other, and freely discuss and debate a wide range of issues. Students at private institutions that commit themselves to free speech can reasonably expect the same rights. The same is not true for employees in a workplace, particularly a private workplace, who are subject to the restrictions of their employer in the interest of promoting workplace efficiency and meeting company goals and deadlines.

Employment harassment standards fail to provide the necessary breathing room for campus speech. For example, the EEOC's "purpose or effect" standard, when instituted on a public campus, allows for a finding of sexual harassment based solely on the alleged harasser's intentions, without regard to the actual impact of his or her speech or conduct. Further, EEOC-based policies do not require a threshold showing of severity, pervasiveness, or objective offensiveness, as required by the Supreme Court. Failing to meet this precise legal standard means protected speech that does not rise to the level of true harassment may be unduly subject to punishment.

In recent years, federal courts have found campus harassment policies that closely tracked the EEOC guidelines to be unconstitutional because they did not sufficiently protect First Amendment rights.¹⁶ It is important for administrators to be aware that EEOC

¹⁶ See, e.g., *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (holding sexual harassment policy unconstitutional in part because of overbreadth introduced by "purpose or effect" prong).

language regarding harassment cannot be directly imported into the campus setting without risking constitutional challenges.

f. Use of Undefined Terminology

Another problem in university harassment policies is the use of vague, undefined terms. For example, policies frequently prohibit “demeaning” or “degrading” conduct (including “verbal conduct”—*i.e.*, speech) or conduct that causes “emotional harm” or “mental harm.” In addition to the fact that these policies in all likelihood encompass protected speech, they are also impermissibly vague because students will necessarily have to guess at what is prohibited. Without further explanation, no one can be certain precisely what a university means by “emotional harm”: Is it substantial emotional distress of the sort that genuinely interferes with an individual’s education, or could it be applied to mere offense or hurt feelings?

Most students want to avoid anything that could result in disciplinary action, which can have disastrous consequences for their futures. Therefore, if there is any doubt as to whether a policy prohibits particular speech, students will rationally err on the side of caution and refrain from any expression they believe could lead to punishment. This produces an unacceptable chilling effect on campus speech.



2. Expressive Activity Policies

FIRE often encounters university policies that quarantine rallies, demonstrations, speeches, and other expressive activity to a tiny sliver of campus grounds. Even at universities that don't restrict expressive activity to defined areas of campus, policies governing expressive activity often require students to obtain prior approval before protesting or distributing literature. Such policies also frequently impose extra security costs on controversial speech, deterring or preventing such speech from taking place.

These policies generally stem from a misunderstanding of “time, place and manner” restrictions. University administrators frequently believe that all time, place, and manner restrictions are permissible. In reality, however, time, place, and manner restrictions must be “narrowly tailored to serve the government’s legitimate, content-neutral interests”¹⁷ Further, any such restriction cannot be “substantially broader than necessary to achieve the government’s interest.”¹⁸

While universities have the right to maintain rules prohibiting genuine disruption of the educational process, policies that restrict free speech to just one or two areas of a large campus, or that require significant advanced registration, are undoubtedly “substantially broader than necessary” to protect the educational process.

¹⁷ *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

¹⁸ *Id.* at 800

Note: This section addresses only those regulations governing expressive activity by members of the campus community—that is, students, student groups, and faculty. While the law varies by jurisdiction, universities generally have greater leeway to regulate the use of university property by persons unaffiliated with the university.

a. Free Speech Zones

Many universities delineate one or more specific areas of campus for students and student groups to engage in expressive activity. While the intent of these policies is generally to prevent disruption, this objective can and should be achieved by far less restrictive means. Universities already have the power, through existing rules, to prevent and punish the type of disruptive conduct they might fear would take place.

Generally speaking, members of the campus community should be permitted to engage in non-disruptive expressive activity on all traditionally public areas of campus, such as lawns, quads, and green spaces. Mississippi State University’s Free Speech and Assembly Policy, for example, provides: “Traditional public forums include the university’s public streets, sidewalks, parks, and similar common areas. . . . These areas are generally available for expressive activity, planned or spontaneous, for the individual or small group at any time without the need for reservation or prior approval.”¹⁹

¹⁹ Mississippi State University, *Free Speech and Assembly Policy*, available at www.policies.msstate.edu/policypdfs/91304.pdf.



Rather than assuming before the fact that student expressive activity will be disruptive, campus regulations should narrowly prohibit disruption and impose after-the-fact penalties for violating those regulations. Purdue University's Speech and Expression Policy, for example, permits non-disruptive expressive activities to take place in any public spaces on campus, and states, "Obstructing building entrances, walkways, and rights-of-way; obstructing vehicular or pedestrian traffic on or adjacent to campus; or interfering with classes, meetings, events or ceremonies or with other essential processes of the University will generally be considered to be disruptive of University activities and functions."²⁰

b. Prior Registration Requirements

Some universities couple free speech zones with requirements that students register in advance to use those areas. Other schools do not establish specific free speech zones, but require all expressive activity to be registered with, or even approved by, the university in advance. These requirements are impermissibly restrictive of free speech. As the Supreme Court has held, "[i]t is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."²¹

²⁰ Purdue University, *Speech and Expression Policy*, available at www.purdue.edu/odos/osrr/resources/documents/speech_and_expression.html.

²¹ *Watchtower Bible and Tract Soc'y of NY, Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002).

There is no problem with *encouraging* students to provide advanced notice where possible, and universities can require that certain activities, such as those necessitating security or expected to draw a large crowd, be scheduled in advance. However, universities must make some allowance for unscheduled expressive activity on campus, so that students can engage in spontaneous expression, particularly in response to immediate or still-unfolding developments. Further, any provisions requesting advanced notice of the sort discussed above must be viewpoint-neutral.

c. Security Fees

While universities may charge a reasonable fee for events requiring security presence, that fee may not in any way depend on the content of the speech. So, for example, a university could permissibly charge extra for security for events with an anticipated audience over a certain size, but it could not charge extra for security because a particular speaker is controversial or espouses dissenting viewpoints. The Supreme Court addressed this precise issue in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992), when it struck down an ordinance that permitted a local government to set varying fees for events based upon how much police protection the event would need. The Court wrote that the ordinance impermissibly allowed government officials to “examine the content of the message that is conveyed” and held that “[l]isteners’ reaction to speech is not a content-neutral-basis for regulation. . . . Speech cannot be financially bur-



dened, any more than it can be punished or banned, simply because it might offend a hostile mob.”

Too often, security policies for student organization events impose extra fees on groups for hosting controversial speakers. The Student Events Policy at the State University of New York at New Paltz, for example, provides that one of the factors for determining security costs will be “[t]he various elements/controversial factors to your event,” and that “the sponsoring student group will be expected to cover these expenses.”²²

The bottom line is that while there may be certain instances in which student groups partially or fully cover the costs of security, any administrative imposition of security fees upon a student group must be guided by narrowly drawn, viewpoint- and content-neutral, reasonable, definite, and published standards.

d. Distribution Policies

Just as students must have the right to engage in orderly protest and demonstration, so must they have the right to distribute noncommercial literature in a non-disruptive manner. As with policies governing protests and demonstrations, policies regulating the distribution of noncommercial literature on campus should allow students to engage in such distribution in public areas of campus without prior approval, particularly on lawns, quads,

²² State University of New York at New Paltz, *Student Events Policy*, available at www.newpaltz.edu/media/student-activities-and--union-services/Student%20Events%20Policy%20UPDATED%209.24.09.pdf.

green areas, and other campus spaces that are well-suited for this purpose.

To ensure order is maintained, such policies may include a list of content- and viewpoint-neutral guidelines with penalties for violation. These guidelines may provide, for example, that students are not allowed to distribute literature inside of classrooms while class is in session; that students face limitations on such activity inside of libraries, residence halls, and academic buildings; and that students must obtain administrative approval before distributing commercial pamphlets and soliciting for commercial purposes on campus.

3. Bias Reporting Policies

Many universities maintain extensive protocols for the reporting of what are commonly called “bias incidents” on campus. While some of these protocols do not specify whether bias incidents alone can form the basis for disciplinary action, they typically promise to investigate all reports of such incidents. Given that the definition of a bias incident almost always includes protected speech, a promise to investigate all such complaints necessarily means that protected expression will be subject to investigation.

These policies thus have a harmful chilling effect on free speech on campus, since students and faculty will almost certainly wish to avoid the negative effects of being subjected to any sort of disciplinary investigation. Moreover, giving students the power to subject their fellow students



to a chilling investigation—often via an anonymous complaint—provides a tool for silencing speech that they simply dislike or find offensive, even if it is clearly protected by the First Amendment. Finally, bias reporting sites give administrators too much discretion to determine what can or cannot be said on a college campus.

Central Michigan University, for example, defines bias incidents to include “expressions of hate or hostility,” whether through “words, signs [or] symbols.” The same policy goes on to state, “Anytime anyone in the CMU community feels belittled, disrespected, threatened, or unsafe because of who they are, the entire university community is diminished. That’s why it’s important to report all bias incidents – even those intended as jokes.”²³ Similarly, the bias reporting protocol at Williams College includes such examples of bias incidents as “[t]elling jokes based on a stereotype,” “[n]ame-calling,” “[a]voiding or excluding others,” and even “[d]isplaying a sign that is color-coded pink for girls and blue for boys.”²⁴

Universities would better serve their students and faculty members by refraining from maintaining policies and protocols that encourage the reporting of constitutionally protected speech. Instead, they may use existing policies aimed at speech and conduct falling outside the protection of the First Amendment—such as harassment, true threats, and intimidation—to address unlawful conduct, whether of a biased nature or not.

²³ Central Michigan University, *Bias Incident Response Team*, available at www.cmich.edu/office_provost/OID/campus_resources/Pages/Bias_Incident_Response_Team.aspx.

²⁴ Williams College, *Questions About Bias and Bias Reporting*, available at <http://speakup.williams.edu/faq>.

If a university does wish to maintain a bias incident protocol, it should clarify that the policy is intended solely to make administrators aware of possible student issues and the general campus climate, and will not be used to pursue disciplinary action. For example, the University of Virginia's bias incident policy states that its definition of a "bias complaint" is "used for reporting and statistical purposes only" and "carries no independent sanctioning weight or authority."²⁵ Likewise, the University of Florida provides, "It is not the purpose of the Bias Education and Response Team to investigate, adjudicate, or to take the place of other University of Florida processes or services; rather, the aim is to complement and work with campus entities to connect impacted parties and communities with appropriate support and resources."²⁶

4. Restrictions on Political Speech

Unfortunately, censorship of political expression on campus is a frequent occurrence due to misunderstanding of institutional obligations under Section 501(c)(3) of the Internal Revenue Code. The University of Oklahoma, for instance, states that its information technology resources may not be used for "partisan political purposes," such as "using electronic mail to circulate advertising . . . for political candidates."²⁷

²⁵ University of Virginia, *Bias Incident Reporting*, available at www.virginia.edu/justreportit/bias/what-is-bias.

²⁶ University of Florida, *Bias Education and Response Team*, available at www.umatter.ufl.edu/stopbias/team.

²⁷ University of Oklahoma, *Interim Policy on Acceptable Use of Information Technology Resources*, available at www.ou.edu/committees/itc/policy/Acceptable_Use_of_Information_Resources.html.



Colleges and universities that are tax-exempt under Section 501(c)(3) of the Internal Revenue Code are prohibited from participating in political campaigns as institutions. However, individual students, student groups, and faculty members do not endanger their institution's tax-exempt status by engaging in partisan political speech when such speech is clearly separate and distinct from the institution's views or opinions. The presumption is that such speech does not represent the views of the university as an institution. Moreover, this presumption applies with particular vigor when speakers clearly indicate that they are not speaking for the university. The risk of appearance of institutional endorsement may be greater when the speaker is a high-level university administrator, but it decreases as one moves down the chain of command to lower-level administrators. Additionally, this risk does not apply to students or student groups, or to faculty who do not hold a position as an administrator or department head.

At public universities, partisan student groups may use institutional resources and facilities for partisan political expression and activities when the use of such resources and facilities is obtained in the same way that nonpartisan student groups obtain such use. Similarly, students and student organizations at private institutions committed to freedom of speech are not prohibited by IRS regulations from using student activity fees to engage in political speech and activity. They may also use institutional resources and facilities for such speech, again provided that these resources are made available to all speakers and student groups, and they follow the same procedures

observed by all other student groups seeking to obtain use of university resources.

In determining policy regarding political speech on campus, colleges and universities must heed Internal Revenue Service (IRS) regulations, as well as state and federal law. However, correctly interpreted, none of these legal authorities are in conflict with the equally crucial duty to uphold the First Amendment and basic principles of free expression. For more information about political expression on campus and institutional IRS requirements, please see FIRE's *Policy Statement on Political Speech on Campus 2016*.²⁸

5. Posting Policies

Many universities maintain policies that restrict the ability of students to post written materials on campus. Posting policies often require prior approval but do not provide specific, content-neutral criteria by which student postings will be approved or denied. American University's posting policy, for example, provides that "[a]ll materials must be approved before posting," but does not provide any details about the approval process.²⁹ Policies like this one grant administrators unfettered discretion to refuse permission to students who wish to engage in expression deemed to be offensive, controversial, or otherwise unwanted. Other

²⁸ *Policy Statement on Political Speech on Campus 2016*, Found. for Individual Rights in Educ., available at www.thefire.org/policy-statement-on-political-speech-on-campus-2016.

²⁹ American University, *Policy on Posting Materials*, available at www.american.edu/loader.cfm?csModule=security/getfile&pageid=3929206.



policies simply ban certain types of content outright. For example, Washington University in St. Louis' posting policy prohibits "any references to alcoholic beverages or other drugs" as well as "[s]exist and discriminatory materials."³⁰

Allowing administrators to prohibit protected expression without explaining their decisions to students who might be denied permission to post materials is unconstitutional (in the case of public universities) and in violation of basic guarantees of freedom of expression (in the case of most private universities). Students who wish to post written materials on campus should be free to do so regardless of their political, religious, or ideological beliefs. Any "license" or "pre-approval" process must be guided by narrow, objective, viewpoint-neutral, previously published, and definite standards to guide the administrator making the decision.

6. Electronic Communications Policies

A great deal of student expression takes place online, whether over university networks or on social media platforms. Universities often maintain impermissible restrictions on speech in their policies governing such electronic communications. These policies tend to cover communications made using university email accounts, but they may also extend to all communications made on devices connected to the university's network. Some

³⁰ Washington University in St. Louis, *Advertising and Promotions*, available at <https://wustl.edu/about/compliance-policies/university-space-facilities/advertising-promotions>.

policies are so broad as to potentially include all online communications made by university-affiliated individuals, including those that take place off campus and without the use of a university network (such as a student's post on Twitter or Facebook).

FIRE suspects that at some institutions, electronic communications policies are formulated by different administrators and departments than other conduct policies, resulting in confusing disparities. In order to prevent such contradictions and the chilling effect that the resulting vague or uncertain policies have on campus speech, FIRE recommends that all policies that regulate expressive activity—including email, Internet, and social media use—be carefully vetted by those with knowledge of the relevant law, such as the university's general counsel. All electronic communications policies must be in compliance with the First Amendment at public colleges and consistent with stated commitments to freedom of expression at private colleges.

Typically, FIRE encounters two recurring problems with electronic communications policies. First, many contain content-based restrictions on speech occurring online. For example, Boston University prohibits the transmission of “offensive” or “annoying” messages,³¹ while the University of Texas at Austin bans “rude” correspondence and requires students to be “civil.”³² By banning protected speech, these policies clearly violate the First Amend-

³¹ Boston University, *University Conditions of Use and Policy on Computing Ethics*, available at www.bu.edu/dos/policies/lifebook/computing-ethics.

³² University of Texas at Austin, *Acceptable Use Policy*, available at <https://security.utexas.edu/policies/aup>.



ment. Instead, universities should seek to limit only those categories of speech that are recognized exceptions to the protections of the First Amendment, such as harassment, obscenity, and true threats.

Second, universities often maintain poorly written “spam” or “bulk email” policies that, in seeking to regulate unwanted mass email, prohibit protected expression. For example, Columbia University provides that no user of university email will “send unsolicited email messages to a large number of users.”³³ While this policy may be intended to address spam, it could be applied against virtually any mass communication, such as an email to a list of students in a particular class or an email from a student government member to the other representatives. In FIRE’s experience, even seemingly innocuous, content-neutral policies can be abused to silence student speech.

Therefore, we recommend that bulk email guidelines be carefully drafted so as not to allow for abuses of discretion, by (a) setting forth an email quantity limit per day that users will not be permitted to exceed in order to prevent degradation of network functions and (b) making explicit that in determining whether a violation of the policy has occurred, the viewpoint of the email in question will not be considered.

³³ Columbia University, *Email Usage Policy*, available at http://policylibrary.columbia.edu/files/policylib/imce_shared/Email_Usage_Policy_0.pdf.

7. Bullying and Cyberbullying Policies

Over the past several years, FIRE has noted that more and more universities have adopted policies on “bullying” and “cyberbullying.” While the aim of many of these policies is laudable—to protect students from harassing or threatening conduct that prevents them from enjoying the educational opportunities available at their institution—these policies are too often impermissibly broad and vague.

For example, Wake Forest University maintains a policy on “Bullying/Cyberbullying” that lists such examples as “name-calling,” “teasing,” “leaving people out on purpose,” and “using the Internet, mobile phones or other digital technologies to harm others.”³⁴ Likewise, McNeese State University’s “Anti-Bullying Policy” prohibits “ridiculing or maligning a person or his/her family,” “remarks that would be viewed by others in the community as abusive and offensive,” and “engaging in verbal bullying via mail, email, text message, phone, or voicemail.”³⁵

These and similar policies prohibit a wide swath of expression protected by the First Amendment. While such speech may be offensive to some or even many individuals, it may not be proscribed on that basis alone at a public university or at a private university committed to free speech. Furthermore, by virtue of their amorphous

³⁴ Wake Forest University, *Student Code of Conduct*, available at <http://static.wfu.edu/files/pdf/students/judicial-handbook.pdf>.

³⁵ McNeese State University, *Anti-Bullying Policy*, available at www.mcneese.edu/policy/anti-bullying_policy.



and undefined terminology, these policies leave students unsure about the extent of their speech rights on campus, and provide administrators with unfettered discretion to determine what students are and are not allowed to say. After all, bullying and cyberbullying—unlike hostile environment harassment, true threats, and intimidation—are not legal terms of art with well-established and consistent legal definitions.

In lieu of adopting vague policies aimed at bullying and cyberbullying, colleges would be better served by sharpening their existing policies on hostile environment harassment, threats, disruption, and other conduct falling outside of the protection of the First Amendment. In so doing, colleges would address the conduct that truly interferes with the ability of students to obtain an education without regulating campus expression in an overbroad and vague manner. In other words, such appropriately narrow regulations would allow schools to reach all of the conduct that they currently seek to address with bullying and cyberbullying policies, while fully respecting students' free speech rights.

8. Civility Policies

Many university policies require campus discourse to be “civil” or “respectful.” Georgetown University, for example, prohibits “incivility,” which it defines as “[e]ngaging in behavior, either through language or actions, which disrespects another individual.”³⁶ While this may seem uncontroversial and well-intentioned, it is inappropriate for a university that claims to value free speech to require

³⁶ Georgetown University, *Code of Student Conduct*, available at <https://studentconduct.georgetown.edu/code-of-student-conduct>.

all expression to be civil. One of the best explanations of why such a requirement violates the First Amendment comes from a court case in which a federal judge struck down a civility policy at San Francisco State University. In his opinion, the judge wrote:

[A] regulation that mandates civility easily could be understood as permitting only those forms of interaction that produce as little friction as possible, forms that are thoroughly lubricated by restraint, moderation, respect, social convention, and reason. The First Amendment difficulty with this kind of mandate should be obvious: the requirement “to be civil to one another”... reasonably can be understood as prohibiting the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause. Similarly, mandating civility could deprive speakers of the tools they most need to connect emotionally with their audience, to move their audience to share their passion.³⁷

Thus, while a university may *encourage* its students to respect institutional values such as tolerance and civility, it cannot *prohibit* all expression inconsistent with those values. If a “civility statement” or similar policy is actually intended as an aspirational statement of values—a statement of what the university would ideally like its campus environment to be like—its aspirational nature must be clear from the language of the policy. At North Carolina State University, for instance, a civility

³⁷ *College Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007).



statement for the university's residence halls is prefaced by the following language: "University Housing is strongly committed to freedom of expression. Our Civility Statement is not intended to interfere in any way with an individual's academic or personal freedoms. We hope that individuals will voluntarily endorse the expectations outlined below, creating a residential environment helping all students achieve their academic goals."³⁸

Administrative Mistakes

1. Problematic Auxiliary Materials

Too often, a university will maintain an acceptable official harassment policy that is undermined by supplementary materials that directly contradict the official policy. This discrepancy leads reasonable students to believe that constitutionally protected expression is prohibited. These auxiliary materials can often be found on the websites of individual offices or departments such as student health services or public safety.

When confronted about these auxiliary materials, universities frequently respond that they do not constitute official university policy. However, this does not prevent these materials from having an impermissible "chilling effect" on campus speech. When materials on official university websites contain proscriptive language ("examples of harassment include ..."; "the university will not tolerate"; etc.), students reading them will reasonably believe

³⁸ North Carolina State University, *University Housing: Our Values*, available at <https://housing.dasa.ncsu.edu/about-us/who-we-are>.

they are statements of policy and will self-censor accordingly. As one federal judge wrote in striking down a university's speech code: "We must assess regulatory language in the real world context in which the persons being regulated will encounter that language. The persons being regulated here are college students, not scholars of First Amendment law."³⁹

In other words, it is unreasonable to expect students to sort through various conflicting or proscriptive materials issued by the university and its offices dealing with a subject like harassment and determine, without guidance, which constitute official statements of university policy and which are merely pseudo-policy. Any statement on an official university website that certain types of speech are prohibited must be treated as a statement of policy in terms of the university's obligation to uphold the right to free speech.

2. Inconsistent Policies

Another common administrative mistake is that while official university-wide policies may have gone through extensive review and been approved by the university's legal department, other departments (such as residence life or student activities) may maintain their own manuals with policies that have not been through such an extensive vetting process. The result is restrictive policies that curtail free speech in specific areas such as university housing or in student activities, even on

³⁹ *Reed*, 523 F. Supp. 2d at 1021



campuses where the university's overarching policies are appropriately protective of free speech.

For instance, Michigan State University's Residence Hall Regulations provide that "emotional harassment will not be tolerated in a residence hall community."⁴⁰ Yet the policy does not define the term "emotional harassment," nor does it explain or illustrate what type of speech or behavior would fall under this vague, amorphous language. To avoid this common problem, it is imperative that all policies that impact student and faculty speech rights be carefully vetted by people with knowledge of the relevant law to ensure that those rights are upheld.

3. Failure to Update Website

Another common problem occurs when a university revises a policy to provide appropriate protections for speech, but nevertheless leaves outdated versions on its website. Students attempting to access the current policy from URLs where an outdated policy remains published will mistakenly believe that protected speech is still prohibited, and act accordingly.

Believe it or not, this mistake happens frequently. For example, FIRE named a policy on "cultural intolerance" at Southwest Minnesota State University (SMSU) as our Speech Code of the Month in November 2015. The SMSU administration then informed FIRE that the policy was outdated and no longer in effect—despite the fact that it still appeared on the university's judicial affairs website.

⁴⁰ Michigan State University, *Residence Hall Regulations – Undergraduate Halls*, available at <http://splife.studentlife.msu.edu/regulations/residence-hall-regulations-undergraduate-halls-student-group-regulation>.

While FIRE was able to resolve the matter quickly once SMSU removed the policy from its website, it is unfortunate that until then, students were given the impression that the policy's restrictions on protected speech applied to them. The chilling effect created by the erstwhile policy could have been avoided by simply removing the policy in a timely manner.

4. Hidden Policies

In recent years, FIRE has been dismayed to note that a few colleges and universities, both public and private, have begun to hide policies previously published online from public view. Typically, those colleges that choose to hide their policies either condition access to the policies on entry of a password, or take the policies offline altogether and rely on interested parties to obtain printed copies.

Unfortunately, hiding policies in this manner poses a unique threat to student rights. If policies are not published or easily accessible online, students are less likely to have been apprised of their content. This lack of notice is problematic in terms of the basic considerations of due process that schools should afford their students. Students have a right to be treated fairly, with full knowledge of the policies and procedures they are expected to follow.

In addition to the lack of notice and the simple inconvenience of being unable to access school policies online, restricting access to student policies also presents a fundamental consumer information problem.



If prospective students and their families cannot easily ascertain which policies the students are to be governed by upon arrival on campus, it is all but impossible for students to make informed choices about the institution's values and priorities. Further, it is possible that policies students learn about only upon arriving on campus may be of dubious legal enforceability, given the fact that they may fairly be deemed a type of bait and switch, contradicting the promise of freedom and tolerance that may be found in recruitment materials.

FIRE suspects that rather than maintain acceptable policies, some schools have decided to hide them. This is a deeply troubling development, but it is easily reversible.

Conclusion

While censorship on campus is a serious problem, and there sadly are those administrators who truly believe that student and faculty speech should be restricted, there are also many administrators who wish to protect student rights. We know this from the many administrators who have, over the years, responded to FIRE letters by making the necessary changes to university policy, and from yet more proactive administrators who have reached out to FIRE for assistance in revising speech-related policies. This guide is for those administrators who truly wish to understand the boundaries of free speech on campus and uphold their students' rights. We hope that this report provides the necessary guidance. Of course, FIRE staff members are always available to discuss specific issues with university administrators, faculty, students, or members of the general public.



Most colleges and universities have legal and/or moral obligations to protect students' free speech rights on campus. Despite these obligations, the Foundation for Individual Rights in Education (FIRE) has found the same pattern of errors recurring in university policies and regulations since its establishment in 1999. As a result of these mistakes, speech on campus is unconstitutionally and impermissibly restricted.

This guide analyzes these frequent errors and identifies ways to correct them, helping college administrators understand why their policies are flawed and what they can do to fix them. Armed with these strategies, administrators and concerned students alike can pursue the reform of their policies and the protection of freedom of expression at their college or university.



510 WALNUT STREET, SUITE 1250
PHILADELPHIA, PA 19106

T: 215.717.3473
WWW.THEFIRE.ORG