

From: Lugo, Gabriel

Sent: Tuesday, October 10, 2017 9:52 PM

To: 'Steven Long' <slong@bog.northcarolina.edu>; Brown, Dawn H. <brownmd@uncw.edu>;
pdbartlett@ecsu.edu

Cc: William Webb <wwebb@bog.northcarolina.edu>; Tyler Hardin <thardin@bog.northcarolina.edu>;
David Powers <dpowers@bog.northcarolina.edu>; Thomas C. Shanahan
<tcschanahan@northcarolina.edu>; Andrea R. Poole <arpoole@northcarolina.edu>; Lugo, Gabriel
(lugo@uncw.edu) <lugo@uncw.edu>

Subject: RE: BOG Draft Policy for Review - Free Speech & Free Expression within the University of North Carolina

Dear Steve,

I have read the draft of the Free Speech Policy and for the most part, it appears to be consistent SL217-96 .

I do have a question/concern about the section titled

OPTIONAL LANGUAGE ABOUT SANCTIONS FOR UNIVERSITY STUDENTS AND EMPLOYEES:

...that any student or employee who is arrested and convicted of a criminal violation in connection with such activity may be suspended, expelled, or dismissed even upon a first violation...

This section would amount to implementing a system-wide policy on disciplinary sanctions and thus it appears to go beyond the requirements of the law that states

Each constituent institution shall implement 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.

I understand this is being offered as "optional language," but that does not diminish my concern.

Thanks to the UNC legal team for putting together the draft of this policy.

Kind regards,
gabriel

Gabriel Lugo, PhD

Chair of Faculty Assembly
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From: James Martin [mailto:martinjd@ncsu.edu]

Sent: Tuesday, October 10, 2017 10:11 PM

To: Lugo, Gabriel <lugo@uncw.edu>

Cc: Alton Banks <alton_banks@ncsu.edu>; Ashton Powell <powell@ncssm.edu>; David Green <dgreen@nccu.edu>; Fred Parker <fred_parker@ncsu.edu>; Tran, Kimberly <ktran@uncfsu.edu>; Kimberly Cogdell Grainger <kcogdell@nccu.edu>; Pursuit, Jeanne <persuitj@uncw.edu>; Ralph Barrett <rbarrett5@nccu.edu>; Till Dohse <dohse@unca.edu> <dohse@unca.edu>; Tim Ives <Timothy_Ives@med.unc.edu>

Subject: Re: FW: BOG Draft Policy for Review - Free Speech & Free Expression within the University of North Carolina

FAEC colleagues,

I have reviewed this policy on Free Speech with my policy writing lens and have a number of concerns/suggestions. One seriously must question the intent, particularly because of the latter part of the policy. Is the intent really to protect free speech? Or to have a chilling impact?

I hope this policy won't read and comments on the proposed policy can be helpful. I know for sure this policy as written would not get through my Wake County Public Schools policy committee.

Best,

Jim

The first several sections are reasonable definitions of the scope and rights to free speech. These are well written and should reasonably be supported. I would recommend a slight rearrangement of the last sentence in section III to make it clear that the University may not take actions on faculty or student expression, rather than the original syntax which could be misread to imply institutions may not take actions on current issues. I recommend the following for the last sentence:

In support of the essential role universities hold, the constituent institutions may not take action, as an institution, in such a way as to require students, faculty, or administrators to publicly express a given view of social policy on the public policy controversies of the day.

In section V, I am always concerned about language such as point H. “speech by public employees pursuant to their official duties.” It is not a problem for example to not protect a chemistry professor for teaching religion when they are supposed to be teaching chemistry. However, the Garcetti standard can and has been misused in silencing employees for speaking out against significant issues under the guise that the issue was “pursuant to their official duties.” While I don’t like this clause, because of Garcetti, I am not sure we should try to fight it.

I question what is actually meant in section VI.C when instructed to be “...encouraged to make available...” “Encouraged” is not useful policy language. It is non-enforceable, subjective language. And what constitutes “make available?” Do they really mean that this and any related University policies will be publically accessible through the University’s website? It is important to figure out what the intent of this section actually is, and then be explicit in the language.

My biggest concern with this policy is the entire section VII Consequences for Violation of Policy. This entire section reads as though someone wants to punish someone else because they don’t like the way things are being done. (Sounds like King George not wanting the Colonies to protest a few years back.) Consequences for violation of a free speech policy are virtually impossible to enforce unless the action violated some other law or policy. If the sole issue is dissent to someone else’s free speech, you open a minefield of who violated who’s rights? The decisions become completely subjective and are open to significant challenge should anyone choose to fight it.

That, for example is why the language in the proposed policy, section VII states “constituent institutions are encouraged to work with students and employees to develop alternative approaches so as to minimize the possibility of disruptions and support the right to dissent.” There is no requirement in the first amendment that requires the minimization of disruptions. To the contrary, protests, by their very definition are disruptive. Furthermore, as noted above “encouraged” is not useful policy language. It is unenforceable. I believe “encouraged” is used here because requiring such action would likely be challengeable. Since it is unenforceable language as policy, it is hard to read it other than to be an effort to “chill” unwanted protest.

Under section A, What qualifies as an “expressive event closed to the public?” Regularly scheduled classes? Maybe scholarship-groups, clubs or discrete membership meetings? But are those “expressive events?” Isn’t an expressive event externally focused? Thus, the very act of creating an expressive event closed to the public could likely be challenged as a way to circumvent public discourse...which is what is protected in the first place.

The last paragraph in that section also introduces an interesting concept of “acceptable forms of dissent.” Who gets to define acceptable? Acceptable is generally defined by the majority, or those in power. However, the intent of the first amendment is to ensure the minority voice is not silenced. Arguably, either “acceptable forms of dissent” includes all forms of dissent that do not violate the law, or the concept itself is unconstitutional.

Overall I would contend that this entire section on Consequences for Violation could be challengeable as to its very intent being to chill free speech. The four bullets under section IV already stipulate the only legal grounds to challenge free speech, which each have their own consequences stipulated by their legal definition. I would have to argue that any consequences more than those for unlawful activity could rightly be considered suppression of free speech and thus against the first amendment.

If the Optional Language section is used, the due process list under B needs to be extended to employees not just students.

In section VIII, the paragraph after section C, is unnecessary policy language. Chancellor's always have the right to designate such responsibility without it being defined in policy. Thus, this statement seems almost an indirect way to allow this BOG subcommittee to specify what is required in the annual reporting. It would seem quite unusual to give a sub-committee such broad ranging authority in areas that normally would be reserved for the president and chancellors.

From: Steven Long [<mailto:slong@bog.northcarolina.edu>]

Sent: Tuesday, October 10, 2017 1:15 PM

To: Brown, Dawn H. <brownmd@uncw.edu>; pdbartlett@ecsu.edu; Lugo, Gabriel <lugo@uncw.edu>

Cc: William Webb <wwebb@bog.northcarolina.edu>; Tyler Hardin <thardin@bog.northcarolina.edu>;

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Subject: Fw: BOG Draft Policy for Review - Free Speech & Free Expression within the University of North Carolina

Dear Gabriel, Dawn, and Pernell: Please find attached a draft Free Speech Policy that the UNC GA legal staff has prepared. This is to comply with the recent legislation adopted by the Legislature. Our Governance Committee subcommittee will discuss this draft on a conference call tomorrow at 1:30pm and will likely have other discussions about it before the November BOG meeting. We would be interested in your comments, as representatives of the Faculty Assembly and Staff Assembly, particularly with regard to the disciplinary provisions. There is no need to send comments by tomorrow as this policy will stay in draft until presented to the Governance Committee in November. I look forward to hearing your thoughts. Best regards, Steve Long

From: Thomas C. Shanahan

Sent: Friday, October 6, 2017 6:50 PM

To: Steven Long; David Powers; William Webb; Tyler Hardin

Cc: Joanna Carey Cleveland; Ruth A. Brill; Lou Bisette; Margaret Spellings; Andrea R. Poole; Meredith B. Didier

Subject: BOG Draft Policy for Review - Free Speech & Free Expression within the University of North Carolina

Dear Steve, David, Bill, and Tyler,

Attached for your review is a draft policy on Free Expression, as required by the Restore/Preserve Campus Free Expression Act, adopted by the General Assembly as Article 36 of Chapter 116 of the General Statutes. This draft has been prepared after considerable work and review by Joanna Carey

Cleveland (VP/Deputy GC) and a team of lawyers from across the UNC System. In addition to including all elements required by the new State law, this draft incorporates language from a variety of other sources, including the [Chicago Statement of Principles on Free Expression](#), and strong policy language from other public institutions. We have prepared the attached memorandum to draw your attention to the key points for review and further discussion. You will also note that the policy contains some options that your subcommittee will need to consider.

Joanna and I are prepared to join you for a meeting to discuss the draft and get your comments and guidance. We can also take comments from you in writing or over the phone. If you would like to meet, we recommend sometime between 1:30 p.m. and 5:00 p.m. on Wednesday, October 11, if that is workable, although that will be up to our chairman to decide. Our meeting will need to be publicly noticed, as this will be a meeting of a subcommittee of Governance. Ruth Brill can help arrange call-in information and a physical location, in coordination with the Secretary's Office.

Have a great weekend.

Tom

Thomas C. Shanahan
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