

To: UNC Board of Governors
From: Gabriel Lugo, Chair of Faculty Assembly
Re: UNC Faculty Assembly Resolution 2018-2. Adopted unanimously on October 20, 2017
Date: October 21, 2017

Resolution 2018-2. On Free Speech and Free Expression within the University of North Carolina

Whereas, In accordance with section 600 of the Code of the Board of Governors of the University of North Carolina, the University supports “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; and

Whereas, In accordance with section 600 of the Code of the Board of the University of North Carolina, “the University and each constituent institution shall protect faculty and students in their responsible exercise of the freedom to teach, to learn, and otherwise to seek and speak the truth”; and

Whereas, In accordance with section 600 of the Code of the Board of Governors of the University of North Carolina, “faculty and students of the University of North Carolina shall share in 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”;

Resolved, The UNC Faculty Assembly strongly endorses the “Response to the Board of Governors’ Draft of the policy Free Speech and Free Expression within the University of North Carolina,” and the” Letter to Accompany the Changes” enclosed herein.

Letter to Accompany Changes

Thank you for the opportunity to provide feedback on the draft policy on Free Speech and Free Expression within the University of North Carolina. As faculty of the University of North Carolina, we affirm that the education of our students is our highest priority. As institutions of higher education, we are committed to the common good, which depends on the free search for truth and its expression.

While we have concerns with SL2017-196 (HB 527), we recognize that this Board of Governors policy is attempting to address the requirements of the legislation. In that context, our review has primarily focused on ensuring that the Board of Governors policy aligns tightly with the legislation. The intent of our policy revisions is to make the policy as consistent as possible with the legislation and to reinforce institutional procedures related to disciplinary procedures and discipline.

Specifically, we recommend:

- Removal of content extending the policy beyond the scope of the law.
- Removal of de novo concepts (such as: “acceptable forms of dissent” and “an expressive activity event closed to the public”).
- Ensure that the disciplinary process is managed by the existing disciplinary procedures for misconduct as defined by constituent institutions according to the UNC Code.
- Ensure that all aspects of this policy address students, staff, faculty, and outside parties.

The Faculty Assembly supports the presentation of differing viewpoints on the campuses of the University of North Carolina. The Faculty Assembly, in its advisory capacity, is appreciative of the opportunity to provide feedback on a policy that will have major implications on our institution. Please continue to engage us as the Board moves forward with various policies for the common goal of seeking that our students and the citizens of our state have access to the best education possible. If there are additional questions, please do not hesitate to reach out to us to provide more detailed feedback.

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, 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 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 of any constituent institution to shield individuals (students, staff, faculty, visitor and invited speakers) from speech protected by the First Amendment.

Commented [K1]: Individuals should include students, staff, faculty and external speakers.

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. 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 of The University of North Carolina*. 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.

including, without limitation, ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.

Commented [2]: Language required by §116-300(1) and (2),

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 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.

Commented [3]: Language required by §116-300(3),

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, as defined by each campus.

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:

Commented [4]: Language required by §116-300(4)

1. any action that qualifies as a disruption under [N.C.G.S. §143-318.17](#);
2. any action in violation of a chancellor's designation of a curfew period pursuant to [N.C.G.S. §116-212](#);
3. any action that results in the individual receiving a trespass notice from law enforcement.

Commented [K5]: A criminal statute should not be used to define material and substantial disruption. Each campus has its own policies to address these. The legislation does not define material and substantial disruption. This was added by the BOG.

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.

Commented [6]: Language required by §116-300(5)

Commented [7]: Language required by §116-300(6)

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 institution ("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, 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 with the function of the constituent institutions.**
- F. **Reasonable time, place, and manner restrictions on expressive activities, consistent with G.S. 116-300(4).**
- G. **Speech that interferes with the treatment of patients.**

Commented [8]: Language required by §116-303. Note that the statute is specific to “student” speech, but these restrictions are applicable to students and employees (with an additional reference to the Garcetti standard).

Commented [K9]: Subsection E includes the language substantially interferes which is not included in the law. Subsection H. is not included in the law and the policy should directly track the law.

Commented [10]: We did not include “violations of State or federal law” here since that seemed duplicative to the introductory paragraph. We can discuss though, since that is language included in the statute.

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

Commented [11]: Language required by §116-302 for freshman orientation.

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.

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

C. Information for Outside Parties

All constituent institutions of The University of North Carolina are required to make available (for example on the public university website or via individual email to an invited guest) to outside parties 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. Prior to engagement on campus, outside parties are responsible to be aware of the university's free speech policies. 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.

Commented [K12]: Encouraged is deleted and replaced by required to be consistent with both the student and faculty staff sections.

Commented [K13]: Speakers and other invited guests should be provided information and are responsible for being aware of the policies.

VII. Consequences for Violation of Policy

A. Disciplinary Sanctions

Each constituent institution is required to implement a range of disciplinary sanctions, up to and including dismissal or expulsion, for anyone under its jurisdiction who substantially disrupts the functioning of the constituent institution or substantially interferes with the protected free expression rights of others.

Commented [K14]: The first paragraph of this section does not address consequences and should not be included in this section.

Commented [K15]: Information from Section A. Disciplinary Sanctions is covered by individual institutional policies.

Violations of this policy shall be considered misconduct and therefore subject to disciplinary policies and actions of the constituent institutions. Any student or employee who engages in misconduct may be subject to disciplinary action ranging from counseling, warnings, suspensions, and dismissals or expulsions. Any such action imposed invokes the constituent institution's grievance or appeal process. Any violation of this policy is a type of misconduct that is adjudicated on a case-by-case basis at the constituent institution taking into account the totality of the circumstances.

B. Disciplinary Process and Procedural Safeguards for Students Involved in Expressive Speech or Conduct Disciplinary Cases¹⁰

In all student disciplinary cases involving expressive speech or conduct, students are entitled to a disciplinary hearing under published procedures and UNC Policy 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 G.S. 116-40.11.

Commented [I16]: Language required by §116-300(8)

C. Disciplinary Process and Procedural Safeguards for Faculty Involved in Expressive Speech or Conduct Disciplinary Cases

In all faculty disciplinary cases involving expressive speech or conduct, faculty are entitled to a disciplinary hearing under published procedures and UNC Policy

¹⁰ See also Sections 700.4.1 and 700.4.1.1[R] of The UNC Policy Manual.

Section 603 Due Process Before Discharge or the Imposition of Serious Sanctions and 604 Appointment, Nonreappointment and Requirements of Notice and Review for Tenure Track Faculty.

D. Disciplinary Process and Procedural Safeguards for Staff Involved in Expressive Speech or Conduct Disciplinary Cases

E. Procedural Safeguards for Outside Parties Involved in Expressive Speech or Conduct Disciplinary Cases

Any guest or other individual on the campus who is alleged to have substantially disrupted the functioning of 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.

Commented [K17]: We defer to the Staff Assembly to provide the appropriate inclusion.

Commented [LG18]: This is language from the original BOG draft that we recommend moving to this section

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, 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.

Commented [19]: Section 2 of S.L. 2017-196

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.

Commented [20]: Section of S.L. 2017-196

C. Duties

Any officer(s) with these responsibilities shall be the primary point of contact for any student, employees, 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, 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;
3. Any substantial difficulties, controversies, or successes in maintaining a posture of administrative and institutional neutrality with regard to political or social issues; 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.

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.