



Foundation for Individual Rights in Education

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February 1, 2006

Lucien Capone III, University Counsel
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Sent by U.S. Mail and Facsimile (336-256-0408)

Dear Mr. Capone:

In response to your letter of January 17, 2006, the Foundation for Individual Rights in Education (FIRE) welcomes the opportunity to work with you to “develop a free speech and assembly policy that preserves the rights we all hold dear while recognizing the legitimate needs of the University to adopt ‘reasonable regulations compatible with’ the University’s educational mission.”

UNCG’s current Facility Use Policy designates only two small areas of UNCG’s campus as “free speech and assembly” areas. Protests, demonstrations, pamphleteering, speeches, and even petitioning must all receive complex prior and official approval if they occur outside of the “free speech and assembly” areas. Even student groups planning to gather within the designated areas must provide prior notice to university officials.

We are pleased that UNCG is seeking to revise its policies to better respect the First Amendment rights of its students. While we think the best policy on speech is that which governs least—and that a university risks substantial pitfalls anytime it seeks to regulate speech—these guidelines should help UNCG in revising its speech policies.

Speech Policy Guidelines

1. The default position of any policy should be that free speech is the norm all over the campus. In general, policies should say what a university *cannot* do in specific language, and, to a lesser extent, what restrictions are permissible and when. A truly progressive policy would mirror the Bill of Rights.

2. Universities are allowed to enforce “reasonable time, place and manner restrictions” on activities that would significantly disrupt university functioning. However, there is nothing “reasonable” about transforming the vast majority of a university’s property into a “censorship area”: at public institutions of higher education, constitutional protections must be the rule, not the exception. Thus, schools cannot restrict speech to a small portion of campus (such as UNCG has done by limiting free speech to the east lawn area of the Elliott University Center and the east portion of the lawn area in front of the Julius Foust Building) nor to inaccessible or sparsely used/populated areas of the campus only. The speech must be generally accessible to the population at large—and especially to the target audience.
3. Speech may not be unduly restricted by pre-registration regulations, onerous monetary deposit requirements, or expensive insurance requirements. No rule that allows the school substantial discretion to impose conditions on speech for groups or individuals is allowable. Discretionary decisions need to be “content and viewpoint neutral,” meaning they implicate factors like noise or interference with traffic flow, and nothing relating to the substance of the speech.
4. Speech activities should not be unduly restricted by “neatness” and “cleanliness” considerations. A school may require that students clean up after a rally or a leafleting. A school may not stop leafleting because of a general fear that students might not clean up afterwards. Of course, if a particular group has a demonstrated history of not cleaning up after its own mess, then modest restrictions might be in order—such as a monetary bond to cover the cost of a clean-up service. Only in light of past failures should a group be saddled with such pre-conditions.
5. Demonstrative activities should not be restricted in the name of aesthetics. It is reasonable to ask students to restore the campus area to its original condition after a large demonstration or leafleting (beyond normal wear and tear, which is a normal cost of operation for a university), but it is unreasonable to prohibit an expressive activity in advance for fear that it will make a mess or be unaesthetic. (This is related to No. 4, above.)
6. Virtually all universities already have the power, through existing rules, to prevent the type of disruptive conduct they might fear would take place. They can stop demonstrations that substantially impede the function of the university, block traffic flow, or prevent students from sleeping or studying. They can punish students who engage in vandalism or violence. The university also has increased power to regulate the presence of those speakers who have not been invited to campus and who are otherwise unaffiliated with the university. The university should not simply assume before the fact that student or faculty expression will be impermissibly disruptive. Rather, the university should accept its role as the ultimate free speech zone.

When one steps back from the formal analysis, one is left with the uncomfortable feeling that even a “free speech zone” policy that comports in all details with minimum First Amendment requirements is somehow inappropriate for a college campus. After all, the establishment of “free speech zones” connotes that the administration has decided to designate large areas of the campus as “censorship zones.” It is both inappropriate and unnecessary to ban free speech from so many areas of the campus.

UNCG maintains another written policy that impermissibly infringes on students’ right to free speech. UNCG’s Policy on Discriminatory Conduct provides that “UNCG will not tolerate any harassment of, discrimination against, or *disrespect for persons*” (emphasis added). This is unconstitutionally overbroad. The Supreme Court has made clear that the First Amendment protects a tremendous amount of offensive and disrespectful speech. In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), the Court held that “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” In *Texas v. Johnson*, 491 U.S. 397 (1989), the Court stated that “[i]f 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.” Federal courts across the country have relied on these principles to strike down university speech codes much like the one at UNCG. *See Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. Board of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. 1998); *Dambrot v. Central Michigan University*, 839 F. Supp. 477 (E.D. Mich. 1993); *The UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).

The Department of Education has weighed in on these issues as well. In July, 2003, in response to the widespread abuse of harassment policies to punish constitutionally protected speech, the Department of Education’s Office for Civil Rights issued a letter to all of America’s colleges and universities. The letter stated that harassment “must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.”

The precedent clearly establishes that the university cannot prohibit “disrespect”—as members of a free society, students at UNCG are free to express their respect or disrespect for other members of the community provided they do so in a way that does not fall within the very narrow areas of speech not protected by the First Amendment (physical threats, harassment, fighting words). The university can advocate for respect and encourage all members of the community to treat one another with respect. It cannot, however, prohibit constitutionally protected speech in the name of this otherwise worthy goal. This policy would not withstand a constitutional challenge.

We hope that you will revise UNCG’s policies to protect the free speech rights of the UNCG community. We think you will find that any concern you have about having an open campus will be more than offset by the benefits of the dynamic environment that is

created when a university is unafraid to grant its students the freedom they deserve.

Sincerely,



Samantha Harris
Program Officer

cc:

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