

**NORTH DAKOTA STATE BOARD OF HIGHER EDUCATION
POLICY MANUAL**

SUBJECT: STUDENT AFFAIRS

EFFECTIVE: June 26, 2019

Section: 503.1 Student Free Speech and Expression

PROPOSED DRAFT CATEGORY:	Amend
NDUS LIAISON:	Lisa Johnson
PRIMARY COUNCIL:	Student Affairs
SBHE COMMITTEE:	Academic and Student Affairs

1. Definitions for Terms Used in this Section

- a. **Constitutional time, place, and manner restrictions** – Restrictions on free speech which are content-neutral, narrowly tailored to serve a significant interest, and leave open alternative methods of communicating the message in question.
- b. **Faculty** – An individual, regardless of whether the individual is compensated by an institution, and regardless of political affiliation, who is tasked with providing scholarship, academic research, or teaching, including tenured and nontenured professors, adjunct professors, visiting professors, lecturers, graduate student instructors, and those in comparable positions. “Faculty” does not mean an individual whose primary responsibilities are administrative or managerial, unless the individual also teaches at least one credit-hour.
- c. **Free speech or Free Expression** – The rights to speech, expression, and assembly protected by the First Amendment to the United States Constitution or Article I, Section 4 of the Constitution of North Dakota. Such rights include, but are not limited to, all forms of peaceful assembly, protests, demonstrations, rallies, vigils, marches, public speaking, distribution of printed materials, the display of signs or banners, or the circulation of petitions. For the purposes of this policy, “free speech” or “free expression” is not intended to include commercial speech.
 - i. **Commercial Speech** – The promotion, sale, or distribution of a product or service. For the purposes of this section, commercial speech does not include the incidental promotion, sale, or distribution of a product as part of the exercise of non-commercial speech.
- d. **Materially and Substantially Disruptive Conduct** – Conduct by an individual or group which constitutes knowing or intentional affirmative steps to limit the free speech of an individual or a group, prevents the communication of a message, or disrupts a lawful meeting, gathering, or procession through violent or obstructive behavior. Protected conduct does not constitute a material and substantial disruption.
- e. **Protected Conduct** – Free Speech or Free Expression protected by the First

Amendment to the United States Constitution or Article I, Section 4 of the Constitution of North Dakota, subject to reasonable time, place, and manner restrictions, permitting requirements under institutional policies or procedures, and the reasonable safety and security needs of the institution.

- f. **Student** – an individual enrolled in one or more courses at an institution.
- g. **Student-on-Student Harassment** – An institution may only discipline students for student-on-student harassment which meets one or more of the following criteria:
 - i. (1) (4) Unwelcome verbal, written, or physical conduct directed to another student or a specified group of students; (2) directed to an individual which a reasonable person would find offensive or defamatory and which does not constitute protected conduct that is lewd, obscene, defamatory, unlawful, has the purpose of causing distress, or is based on the student's (or students') actual or perceived personal characteristics; and either (3a) objectively and subjectively creates a hostile or disruptive environment or substantially interferes with the student's educational work; or (3b) the conduct is so severe, pervasive, or objectively offensive that it is reasonably likely, based on specific and documented facts, to create a substantial disruption to the educational environment or to effectively deny a student equal access to educational opportunities or benefits provided by the institution;
 - ii. (2) e Conduct which violates North Dakota criminal laws prohibiting harassment, stalking, menacing, criminal coercion, or similar behavior, or
 - iii. (3) e Conduct which would constitute a violation of Title VI or VII of the Civil Rights Act of 1964, as amended or Title IX of the Education Amendments of 1972 (or similar state and federal laws).

- g. Institutions shall ensure that their existing codes of conduct are not enforced beyond this definition and are not used to limit protected conduct.
- h. **Student Organization** – An officially recognized organization, or an organization seeking recognition by an institution, comprised of students, whether or not that organization seeks or receives institutional funds.

2. SBHE Policy on Student Free Speech and Expression

- a. The SBHE recognizes that students have a fundamental right to free speech and expression under the First Amendment to the United States Constitution and Article I, Section 4 of the North Dakota Constitution, and as a result the SBHE and institutions under its control shall ensure that students have the freedom to speak, write, listen, challenge, learn, and discuss any issue, subject to reasonable and constitutionally-recognized limitations.
- b. Institutions under the control of the SBHE shall not engage in viewpoint- or

content-based discrimination or suppression of speech and shall to the greatest extent possible permit and facilitate the open discussion and debate of ideas and issues, regardless of the content of those issues.

- c. As a general rule, institutions under the control of the SBHE shall not use the concepts of civility or mutual respect as a basis to suppress or limit the discussion of ideas, regardless of content, except as reasonably necessary in the educational setting.
- d. Institutions under the control of the SBHE generally shall not seek to shield individuals from the free speech or expression of others.
- e. Institutions under the control of the SBHE shall control the availability of campus spaces for free speech and expressive activity as follows:
 - i. Institutions shall maintain the generally accessible, open, outdoor areas of its campus as traditional public fora for free speech by students, faculty, student organizations, and members of the public, subject to reasonable and constitutional time, place, and manner restrictions. Institutions may require students, faculty, student organizations, and members of the public to obtain a permit to reserve the exclusive use of an outdoor space constituting a traditional public forum. Such permits may not be issued or denied based on the content of the message or viewpoint the permit requestor seeks to convey.
 - ii. Institutions may only designate as restricted or designated forums: (1) those areas inside buildings which have not otherwise been treated as traditional public fora; (2) areas in residential areas of campus during evening and overnight hours; (3) areas immediately surrounding academic buildings during times when classes are held in that building; (4) areas which must be restricted due to reasonable safety and security concerns; (5) areas which must be restricted to enable the flow of pedestrian or vehicle traffic; and (6) areas surrounding building entrances and exits to provide for safe and convenient ingress and egress from those buildings. Institutions may only designate an area of campus as a restricted or designated forum on the grounds of an educational, safety or security, or health-related reason (e.g. ensuring a quiet residential environment for students in residence halls). Institutions may grant permits to students, faculty, student organizations, or others to exercise free speech or expression in such restricted or designated fora based on content-neutral criteria.
 - iii. Institutions may close to free speech or expressive activity those areas which are not designed for the exercise of free speech or expression or which have traditionally not been open to the exercise of free speech or expressive activity.
- f. Institutions may not deny student organizations funding from the student activity fee based on the viewpoints of the student organization; however, institutions may create content-neutral criteria which permit the distribution of limited funds to student organizations. Student activity fee funding may not be reduced based on

outside funding received by a student organization.

g. Institutions may not treat a student organization differently (i.e. more favorably or more negatively) than other student organizations with respect to the provision of any right, benefit, or privilege based on a requirement in the organization's constitution or bylaws that leaders or voting members of the organization shall (1) adhere to the organization's viewpoints or sincerely held beliefs; or (2) be committed to furthering the organization's viewpoint or mission.

f.h. Students, faculty, and student organizations shall be permitted to invite guest speakers or groups to campus, and institutions may not prohibit or disinvite such guest speakers based on the anticipated content or viewpoint of their speech or expression.

g.i. Institutions may not impose security-fees on students, faculty, or student organizations who invite guest speakers or groups to campus based on the anticipated content or viewpoint of the guest speaker or group's speech or expression or the anticipated reaction thereto, and-but institutions are not required to subsidize the free speech and expression of students, faculty, or student organizations. As a result, institutions may, in their discretion, impose security and logistiefacility use fees based on venue, anticipated attendance, anticipated protest activity, and other non-content-based factors. Such fees may not exceed the actual costs incurred by the institution, and the institution must refund any overpayment. Institutions shall set forth empirical and objective criteria for calculating such fees, and such criteria shall be made publicly available. Institutions may not consider the potential reaction to speech when calculating facility use fees.

h.j. Institutions may make their facilities available to guest speakers or groups invited by students, faculty, or student organizations, and may subject such guest speakers or groups to the same terms and conditions governing use of the facilities for other outside groups. If institutions choose to make facilities available to guest speakers or groups invited by students, faculty, or student groups, those facilities must be made equally available to all such speakers or groups.

i.k. Institutions may prohibit materially and substantially disruptive conduct.

j.l. Institutions may impose measures regarding student free speech and expression which comport with the First Amendment of the United States Constitution and Article I, Section 4 of the Constitution of North Dakota, including, but not limited to:

- i. Constitutional time, place, and manner restrictions on the use of traditional public fora;
- ii. Reasonable and viewpoint-neutral restrictions on the use of restricted or designated fora;
- iii. Prioritizing the use of institution resources and property for students, faculty, and student organizations over individuals and groups not affiliated with the

institution;

- iv. Prohibiting or limiting speech, expression, or assemblies not protected by the First Amendment to the United States Constitution and Article I, Section 4 of the Constitution of North Dakota, such as defamatory speech, true threats, and other recognized exceptions; and
- v. Content-based restrictions reasonably related to a legitimate educational or pedagogical purpose, such as rules for behavior in the classroom.

3. Institutional Policies on Student Free Speech and Expression

- a. Institutions shall adopt policies and procedures which shall be no more restrictive of student free expression than this SBHE Policy on Student Free Speech and Expression.

4. Institutional Policies on the Distribution of Publications, Hanging of Banners or Posters, and Chalking.

- a. Institutions shall adopt policies or procedures governing the distribution of information through publications, banners and posters, or chalking. Such policies or procedures must allow students, faculty, or other individuals and groups to access meaningful opportunities to distribute information, while ensuring safety and access to facilities, maintaining clear directional signage, minimizing disruption to the educational mission of the institution, and limiting litter and clutter on institution properties and campuses. The opportunity to distribute information through publications, banners or posters, or chalking may not be limited based on the content of the information to be distributed, but the institution may impose reasonable time, place, and manner restrictions on such distribution, provided that such restrictions ensure the existence of meaningful alternative means of distribution.

5. Reports of Violations of this Policy – Individuals who believe this policy (or an institutional policy covering the same or similar subject matter) has been violated may report any violation through an existing reporting process at an institution. Alternatively, individuals may report violations to the NDUS Office’s Director of Student Affairs (the “Director”). In the event that a report is made to the Director, he or she shall determine the appropriate institution official to address the report in consultation with the Vice Chancellor of Academic and Student Affairs. Pursuant to SBHE Policy 308.2, no NDUS employee, officer or member of the SBHE shall retaliate against an individual for making a report under this paragraph.

6. Institutional Reporting – Institutions shall annually, or at the request of the Vice Chancellor of Academic and Student Affairs, report the total number of reports made under this policy (or an institutional policy covering the same or similar subject matter), the time to resolve such reports, and the number and type of corrective actions taken to the Vice Chancellor of Academic and Student Affairs.

HISTORY: New policy, SBHE minutes, June 27, 2019.