

2019 SENATE EDUCATION

SB 2320

2019 SENATE STANDING COMMITTEE MINUTES

Education Committee
Sheyenne River Room, State Capitol

SB 2320
2/6/2019
32258 (55:25)

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Lynn Wolf

Explanation or reason for introduction of bill/resolution:

A bill relating to free speech at institutions under the control of the state board of higher education; and to provide a penalty.

Minutes:

Att. 1-Holmberg; Att. #2-Coward; Att. #3-Dodson; Att. #4-Johnson; Att. #5-Gerhardt; Att. #6-Lampe
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Chairman Schaible: We'll open the hearing for SB 2320.

Senator Holmberg: **See Att. #1.** Senator Holmberg introduced the and shared an article from the National Review. The bill has to do with free speech and campus speech.

Tyler Coward, Foundation for Individual Rights in Education(FIRE): **See Att. #2.**

(18:30) **Christopher Dodson, ND Catholic Conference:** **See Att. #3.** We obviously support free speech and religious rights expression on campuses and public campuses. One of the issues we face around the country, it may be the constitution, but administrators don't know – they are not expected to be experts. By codifying this, it is a clear policy for the state, you are saying, this is the floor to recognize. While this bill gets very close to what we would like, we think it could be better. We have an amendment to address that. What we are concerned about around the country, is public institutions establishing “all comers” policies, which says, a recognized student organization must accept all members and accept all members as officers for that organization. A Christian organization or Christian members can take over a Moslem student organization and so on. Some years ago, the Christian society in Hastings School of Law – part of the University of California System had an “all comers” policy and the Christian Legal Society required that they adhere to a certain set of biblical beliefs if they were going to be officers of the club and they lost their status as a student organization. It was appealed to the US Supreme Court and Christian Legal Society lost. After that, FIRE started saying we can get some protection for these organizations so they are not taken over by people of different beliefs and still be recognized as a student organization. It is actually an amendment that is modeled on FIRE's own things that I would like to offer. It has one typo – I apologize – but this would make it clear that the state university/higher ed. system could not establish an “all comers” policy which would prevent the organization from having its

officers adhere to certain beliefs or mission. I think it fits within this bill and would definitely improve it.

Chairman Schaible: Okay, we will have a look at it. Any questions. Thank you. Other testimony in favor of the bill. Agency testimony.

(22:37) **Lisa Anderson, Interim Vice Chancellor for academic and Student Affairs, ND University System. See Att. #4.**

(34:53) **Senator Rust:** Currently, if a student feels his or her free speech has been violated by the University, what options do they have? Do the universities have a due process or grievance procedures with regard to someone who feels their free speech rights have been curtailed?

Lisa Anderson: At present each of the campuses have a review process and that process does culminate at the campus level. The University System – and I rarely see any of these – but the students on this any other case, if they feel the campus has mishandled it or not followed their established policies, the University System with our general counsel will look at that to make sure they have followed protocol, but we generally don't override that. The second avenue – as I mentioned in testimony – is a federal lawsuit.

Senator Rust: You say there are currently no lawsuits that are out there with regard to students suing the university. Correct?

Lisa Anderson: I assume you are meaning ND and the University System, I believe there have been cases that have been presented to the campus for review. I am not aware of any substantiated ones where the campus was found in violation. I am not saying that lawsuits weren't filed, but would say they were found to not be in violation of first amendment rights.

Senator Rust: Do you know how many of these have been filed across the University System?

Lisa Anderson: That is a good questions and I would be willing to ask the campuses that. That is not reported directly to me, I am not sure if it has been reported to general counsel – they may be aware of it. We can compile that.

Senator Rust: For that matter, I would like to know a timeline – is it five of them, but four of them have been going on for two years or three years. It would be good to know – according to a timeline.

Lisa Anderson: We can provide that for you.

Chairman Schaible: Other questions.

Senator Davison: Can you tell me why we can't have a consistent policy regarding a framework and expectations when necessary. My question is why can't we have a consistent policy across our 11 campuses?

Lisa Anderson: In preparing for testifying today, I examined the state board of higher ed. policy which is overarching guidance. Somewhat surprised to see it was last modified thirty-five years ago. Some would argue, it has served us well – we haven't had a substantial number of violations, but I think the national dialog around first amendment rights and free speech and campuses on particular, I believe you are correct that it does necessitate a re-examination. As mentioned in my testimony, the University System I think supports your idea of a stronger framework. As I looked at the current board policy, I thought it was more directed towards faculty rights and less so on managing that time, place and manner. The framework that you referenced I think we are in alignment. The University System, by way of board policy – providing overarching guidance – I like the idea of a framework. I think the bill itself starts getting down into the weeds in terms of monetary award, description of student on student harassment – the things I cited as concerning. If you look through the amendments, I actually think that could be the foundation of a board policy that addresses your very concern.

Senator Davison: And then implementing a policy across all 11 campuses – is there a reason it can't be consistent? The framework is one thing – I'll call it administrative rules of implementing something else that other organizations – how do we get that consistency in the policy? Why would be any different than our vacation policy or sick policy. Isn't that the purpose of having a University System?

(40:59) **Lisa Anderson:** I do think there might be some differences on campuses on spaces that they have in terms of closed spaces that students – I feel like there might be some differentiation if there is equipment that that might vary. A cookie cutter policy from campus to campus, but I think that larger framework provided by the board would not be as difficult to implement and we do have internal auditors in compliance that could assess that, but without that policy, they have nothing to hold them to, so that is where I think the policy would be beneficial.

Senator Oban: I would find it a little bit frustrating that if this policy has not been updated since 1984, based on the national conversation – as you said – it probably does mean that there is some reason to review. Why the board would not have taken the fact that the legislature had a bill that would have forced this policy – as we wrote it – on the state board, why they wouldn't have taken that as a sign two years ago, when we had this. Do you feel like they are any further along? Is this a serious effort to review it or is it a pat the legislature on the head and say we are already doing this – forget it. Then, two years down the road, we are in the same place.

Lisa Anderson: Two years ago, we had different people in administrative positions. I know that some of the board members have probably been in a peripheral role on some of this dialog. I don't expect the same outcome this time.

Senator Oban: Sort of everything I have heard so far is seems to be directed at one campus – not all all of them. If you already have a policy on the books and one campus is choosing not to follow it or go rouge, what do you do about that?

Lisa Anderson: The discussion that we are having today, enables me to bring that back to them. This sort of formally documents that there is a concern about a campus in particular.

That gives me the purview to approach them. The University of ND – again, only my recent kind of discovery of FIRE and the services they provide contacted the UND who said their experience was positive in working with FIRE and we would ask NDSU to do the same. In preliminary conversations, I asked if they would be open to that and I talked to them since and asked if they would be receptive to working with FIRE in revising and examining their own policy and they indicated they would be.

Senator Oban: My question is what if they ultimately say no? What recourse does the state board have – the University System office – have if they just refuse?

Lisa Anderson: I guess what I would be willing to do is draft board policy, share that – I think we could have that turned pretty fast for your review to see if looks like it has the teeth that is satisfactory to you that we could hold the campuses to. In looking at the policy that was thirty some years old, it was very broad or as legal counsel described it, it was almost more like a mission statement. It didn't have – the term they used was, it was – unenforceable because of the – maybe the way we wrote policy thirty years ago, it was implied that people would be in compliance with it and they would understand. Today, we live in a world that requires strengthening that a bit more and that is why I think it is appropriate for the board to pick that up. In their defense, I think that why it hadn't changed was – I felt like, as I said – they felt it had served them well to date.

Senator Rust: You say, NDUS is beginning a process of review its free speech policies. Did that begin start with the introduction of this bill?

Lisa Anderson: Yes, that is correct. I have had a crash course in this topic.

Senator Rust: Is FIRE the only organization that would do this kind of a rating? Are there others that might rate these universities differently?

Lisa Anderson: I completely agree. Just because I have been so fixated on this bill and the organization coming in to assist, I like the direction you are going – there might be other organizations and we would welcome conversation. I don't necessarily know that we have to-

Senator Rust: My apology to FIRE because I have got to tell you, they haven't been high on my radar, so I don't know anything about them, so I am not trying to be disparaging toward them, I am just asking. In today's world, it seems like for everyone that has this long list that something is done wrong, there is another organization that has a long list of things that they are doing everything really right. I am kind of wondering are there other organizations out there that would rate the University System in a –

Lisa Anderson: That would be part of our process in moving ahead with external assistance with drafting board policy.

Chairman Schaible: Seeing no other questions, thank you. Any other agency testimony. Testimony in opposition to the bill.

(48:39) **Tom Gerhardt, ND United: See Att. #5.** We recommend a do not pass recommendation on SB 2320 as written.

Senator Rust: If someone feels their free speech has been violated, generally speaking, there is some organization that is willing to take up that cause and take them to task – because it is always that big bad governmental agency that is doing something to somebody else. I am curious if you are aware are there lawsuits out there? Is the problem of such a nature that it needs to be corrected and if so, why hasn't it been challenged by some organization?

Tom Gerhardt: Our concern is yes, I think you are right, there are avenues already for lawsuits to be brought up and for these issues to be dealt with. We believe the language in this bill as written will open up more options and creates more ambiguity with its terminology that could create undo financial stress for the universities and the state and the taxpayers.

Senator Rust: Do you feel it is an invite for other people to get involved because of the dollars that would be involved and the fact that the attorney fees would have to be paid and therefore we can –

Tom Gerhardt: It certainly appears that way as written with compensatory damages up to \$100,000. In our opinion, the vague language who defines caution and careful and words like that? If I believe caution wasn't used as a student, I could bring a complaint or lawsuit forward and that could happen many times.

Senator Rust: Could those attorney fees exceed \$100,000 pretty easily?

Tom Gerhardt: The legal profession is not where I come from, but I would assume those bills could mount rapidly.

Chairman Schaible: Other testimony in opposition to the bill. Seeing none, we'll close the hearing on SB 2320.

Testimony submitted after the hearing: **Brayden Lampe, NDSCS Student Senate President: See Att. #6.**

2019 SENATE STANDING COMMITTEE MINUTES

Education Committee
Sheyenne River Room, State Capitol

SB 2320
2/11/2019
32537 (8:05)

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Lynn Wolf

Explanation or reason for introduction of bill/resolution:

A bill relating to free speech at institutions under the control of the state board of higher education; and to provide a penalty.

Minutes:

Att. 1-Oban; Att. 2-Oban

Chairman Schaible: Did we get a Christmas Tree version of SB 2320?

Senator Oban: I don't have it.

Chairman Schaible: We don't have this one then. Would you like to explain the bill?

Senator Oban: See Att. #1. The amendment that I distributed on 2320. Basically responds to the point I tried to make about how we often discuss these kind of things with K12 education. Rather than dictate the language that must be included in policy to K12 school boards, we usually say if it is that important, here is a framework, you need to adopt a policy – but figure it out within your board and put that in policy. This would provide the basics of what we would feel should be in a free speech policy across all of the university system. I apologize we don't have a Christmas tree version, because it has some substantial changes and I will be talking to the bill's sponsor about it before I would move it forward, but, ultimately, the major points would be at the bottom of page one, moving on to page two. That the policy has to protect student's rights to free speech, assembly, and expression; has to permit institutions to establish and enforce reasonable and constitutional time, place and manner. Those are the three kind of pieces that both the Foundation for Individual Rights in Education (FIRE) and the university system said are important to include. They can include restrictions with regard to time, place and manner on free speech, assembly and expression. It permits students, faculty and student organizations to invite guest speakers or groups to present regardless of the viewpoint or content of the anticipated speech of the guest speaker or group and it protects the academic freedom and speech rights while adhering to guidelines established by the American Association of University Professors. The last one responds to the concerns that ND United brought forward. The third point, I will note, the way the bill is written, it says the University has to pick up the cost of anything that comes with the group that is invited. If you think – there is potentially controversial speakers that a student

organization might invite – what if they wanted to have it in the Fargodome? So now, NDSU has to pay for the rental of the Fargodome? I don't think that is appropriate. But, that would be left up to the State Board of Higher Education to further define those policies. It would create a foundation of the things we believe are necessary in a State Board of Higher Education policy.

Chairman Schaible: You have not talked to the prime sponsor yet?

Senator Oban: This has been shared with him, but, I have not had a chance to speak with him myself.

Chairman Schaible: We will do that. I have requested a Christmas Tree version of the bill. We will get emailed or if I get it emailed, I will have it sent to everybody so we will have time to look at that. We will take that up probably later tomorrow.

Senator Oban: If we can, maybe before that, I would love to hear any feedback on how you feel about this vs. substantive amendments that I know the University System brought forward. I guess, it is whether or not we feel as a committee that we should go into full detail on what they do or we should tell them they must do it and it must include these points.

Senator Rust: In Lisa Johnson's testimony, she said the following, "We have had no speakers shouted down, no visitors assaulted, no disinvited speakers and no student lawsuits. Sometimes, I get a feeling that we are trying to pass a law on something that is already constitutionally protected. I wonder about the validness of doing that. Maybe the idea of informing them that they need to have some kind of policy, so go to it and do it. I guess we have done that with school boards in K12, maybe that is an acceptable way, but I am wondering what kinds of issues are we trying to correct here? If I hear nobody has gone after them to sue them – do we have an issue? Where is the problem? I am trying to think of – seems to me it was at one of the schools in ND or Minnesota that Ben Shaprio was going to come? I am trying to remember what happened in that one. If he was uninvited or if they had him – I don't remember. I am still trying wondering if we are trying to take care of a problem that doesn't really seem to be quite there yet – and maybe it is being proactive. Sometimes when you are proactive there are unintended consequences with the way you write the bill.

Chairman Schaible: We are going to get a Christmas tree version and let's look at it in context and see what it looks like and we can discuss it from there.

Senator Oban: I would also note that Senator Davison asked a that question during the introduction of the bill – how many complaints hve there been. Lisa Johnson went back and reviewed everything and sent follow-up to both Senator Rust and Senator Schaible and I asked that as well. I have had it printed off and will distribute them. **See Att. # 2.**

2019 SENATE STANDING COMMITTEE MINUTES

Education Committee
Sheyenne River Room, State Capitol

SB 2320
2/13/2019
32645

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Lynn Wolf

Explanation or reason for introduction of bill/resolution:

A bill relating to free speech at institutions under the control of the state board of higher education; and to provide a penalty.

Minutes:

Att. #1-Oban(19.0520.02001)

Chairman Schaible: Committee – we will look at SB 2320. Everybody should have the 2320 amendment – the 2001 version.

Senator Oban: See Att. #1 Based on the conversation we had during the introduction of this, what this amendment would do is create sort of a framework to instruct the State Board of Higher Education that they have to adopt a policy that would include – essentially – on the amendment on the bottom of page one, a policy has to include items 1, 2, 3, and 4. It is kind of what we did – if you can remember – and we will review it very shortly – what we instructed K12 school districts to with regard to bullying. We defined a couple of things, we said you have to adopt a policy and that was that. It takes out all of the fine details – it leaves that to the board of higher education to do. These have been reviewed with the prime sponsor. He is more than OK with it. He is happy that something would be moving forward and did not feel strongly that it had to be exactly what was in the original bill. It gives guidelines to the State Board of Higher Education that they have to do this, but the details are left up to them. **I move that amendment 19.0520.02001 be adopted.**

Senator Marcellais: Second.

Roll Call Vote: 7 Yeas; 0 Nays; Absent 0.

Amendment Adopted.

Senator Davison: Motion to Do Pass SB 2320 as Amended.

Senator Oban: Second.

Roll Call Vote: 6 Yeas; 1 Nay; 0 Absent.

Motion Carries. Senator Oban will carry the bill.

SK
102

PROPOSED AMENDMENTS TO SENATE BILL NO. 2320

Page 1, line 2, remove the semicolon

Page 1, line 3, remove "and to provide a penalty"

Page 1, line 13, remove "ample"

Page 1, line 14, remove "to its intended audience"

Page 1, line 15, remove "or "faculty member""

Page 1, line 20, replace "individuals" with "an individual"

Page 1, line 20, after "managerial" insert ", unless the individual also teaches at least one credit-hour"

Page 2, line 2, after "service" insert ", unless the promotion, sale, or distribution of the product or service is incidental to the exercise of free speech"

Page 2, line 5, remove ""Materially and substantially disrupts" means when a person knowingly or intentionally"

Page 2, remove lines 6 through 17

Page 2, line 18, remove "6."

Page 2, line 18, replace "a course of study at the institution" with "at least one course offered by an institution"

Page 2, remove lines 19 through 22

Page 2, line 23, replace "8." with "6."

Page 2, line 27, remove "1."

Page 2, line 27, remove "and enforce a"

Page 2, remove lines 28 and 29

Page 3, remove lines 1 through 31

Page 4, remove lines 1 through 30

Page 5, remove lines 1 through 30

Page 6, replace lines 1 through 11 with "a policy that:

1. Protects students' rights to free speech, assembly, and expression;
2. Permits institutions to establish and enforce reasonable and constitutional time, place, and manner restrictions on free speech, assembly, and expression;

- 252
3. Permits students, faculty, or student organizations to invite guest speakers or groups to present regardless of the viewpoint or content of the anticipated speech of the guest speaker or group; and
 4. Protects the academic freedom and free speech rights of faculty while adhering to guidelines established by the American association of university professors."

Renumber accordingly

Date: 2-13-19
Roll Call Vote #: 1

2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2320

Senate Education Committee

☐ Subcommittee

Amendment LC# or Description: 19.0520.02001

Recommendation: ☒ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Sen Oban Seconded By Sen Marcellais

Senators	Yes	No	Senators	Yes	No
Chairman Schaible:	✓		Senator Marcellais:	✓	
Vice-Chairman Fors:	✓		Senator Oban:	✓	
Senator Davison	✓				
Senator Elkin:	✓				
Senator Rust:					

Total (Yes) 7 No 0

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Motion Carries
Amendment Adopted

Date: 2-13-19
Roll Call Vote #: 2 ✓

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2320**

Senate Education Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☒ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Davison Seconded By Oban

Senators	Yes	No	Senators	Yes	No
Chairman Schaible:	✓		Senator Marcellais:		X
Vice-Chairman Fors:	✓		Senator Oban:	✓	
Senator Davison	✓				
Senator Elkin:	✓				
Senator Rust:	✓				

Total (Yes) 6 No 1

Absent 0

Floor Assignment Chan

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2320: Education Committee (Sen. Schaible, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). SB 2320 was placed on the Sixth order on the calendar.

Page 1, line 2, remove the semicolon

Page 1, line 3, remove "and to provide a penalty"

Page 1, line 13, remove "ample"

Page 1, line 14, remove "to its intended audience"

Page 1, line 15, remove "or "faculty member""

Page 1, line 20, replace "individuals" with "an individual"

Page 1, line 20, after "managerial" insert ", unless the individual also teaches at least one credit-hour"

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Page 5, remove lines 1 through 30

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1. Protects students' rights to free speech, assembly, and expression;
2. Permits institutions to establish and enforce reasonable and constitutional time, place, and manner restrictions on free speech, assembly, and expression;
3. Permits students, faculty, or student organizations to invite guest speakers or groups to present regardless of the viewpoint or content of the anticipated speech of the guest speaker or group; and

4. Protects the academic freedom and free speech rights of faculty while adhering to guidelines established by the American association of university professors."

Renumber accordingly

2019 HOUSE EDUCATION

SB 2320

2019 HOUSE STANDING COMMITTEE MINUTES

Education Committee
Coteau A Room, State Capitol

SB 2320
3/26/2019
34235

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Bev Monroe

Explanation or reason for introduction of bill/resolution:

A bill relating to free speech at institutions under the control of the state board of higher education

Minutes:

Attachment 1, 2, 3, 4, 5, 6, 7

Chairman Owens: Opened the hearing on SB 2320.

Sen Holmberg: (Attachment 1)

Chairman Owens: Any questions?

Rep. Hoverson: Just looking at 'g' regarding the committee, I'm assuming the Senate Education Committee – you aren't on that committee? Whatever happened to college students just going to get educated? I am concerned about 'g' and wondering what the committee said about 'g'. I would be disturbed about letter 'g' because a student cannot disinvite somebody who is offensive, unwise, immoral, indecent, etc. A student can invite whoever they want and say whatever they want to say and the institution is supposed to be banned from doing anything about it? Am I reading too much into that?

Sen. Holmberg: You might be. I was not there, but the answer is society and how that has changed. That is one of the reasons we have these kinds of things.

Chairman Owens: Anyone else in support of SB 2320?

Joe Cohn, Legislative and Policy Director, Foundation for Individuals Rights in Education (FIRE): (Attachment 2) We are a national, non-profit, non-partisan organization that deals exclusively with university student and faculty-free speech and due process rights. We have members of our board and staff at all parts of the political spectrum and all parts of our leadership, all the way down to the bottom. There isn't a place in the country that doesn't have to deal with these very tough issues. We are setting forth the tests that the Supreme Court has set forth to resolve them.

Chairman Owens: Any questions from the committee?

Rep. Mary Johnson: Sen. Holmberg said the need for this bill is because society has changed. That is absolutely true. Referencing Dick Gregory coming to speak to the students at UND and there was no questioning their right to speak at this function. The FBI was following his adventures, but he could still speak. This has done a complete 180.

Joe Cohn: The most important of the things is that we review the policies at most schools in the country every year. We do it under a traffic light system that is in the report I handed out. We judge individual policies because a school can have multiple policies that affect students' free speech rights from how you can use your computers, the distribution of literature policies, your harassment policies, etc. These all affect what words you can say. We rate the policies based on whether or not they conform with what the case law says on those topics.

A red light is given if that individual policy is blatantly unconstitutional. You get a green light if it is completely constitutional and a yellow light gives the campus administrators really broad discretion to either wield appropriately or abuse. It is dependent on the personality of the people that are there. Yellow lights are also very bad. How sensitive individuals are to the first amendment isn't always just dependent on their view on how crucial free speech is, but also about their understanding of the nuance of the case law under the first amendment. UND has a green light from us meaning all their policies are constitutional on free speech. Your other flagship university does not – it has a yellow light. You have a biased reporting system in the state at that institution that encourages the reporting of subjective speech. You have somewhat of a permitting requirement before engaging in protests that require getting permission from the campus police department in advance. That is a problem because it doesn't set forth the criteria of which it is going to be-granted or not granted.

There has never been a golden age of free speech on campuses. While it is somewhat new, the particular ways in which the tensions are unfolding because of the different societal issues that are at the forefront, we are historically been a nation of conflict and that is increasingly true on college campuses.

Rep. Johnston: I think this bill is indicative of the times we live in, but if you could clump all of North Dakota universities together and you would rate them, what would the rating be?

Joe Cohn: You'll get a green light if you are in compliance with the legislation. I don't think the legislation touches one area where they are in a yellow light. That is the bias reporting system. The bill doesn't deal with that particular form. It earns a yellow light because this system can be used to chill speech but they don't necessarily do that. If you ban a reporting system in your bill you could definitely earn a green light. You will get the rating of your worst policy.

Rep. LaurieBeth Hager: In our particular bill it narrowly defines faculty and (inaudible)

Joe Cohn: It also includes the dual academic research, but it excludes those folks who are in the straightforward administrative privet positions where they usually don't reside in the campus bureaucracy but do reside in anything that deals with any interactions with students.

Rep. LaurieBeth Hager: The University of North Dakota had a Peace Center. Would the administrator of the peace center be protected by this if they bring in a multicultural coordinator of an international program? Would they be protected with this strict of a definition?

Joe Cohn: I don't think they are protected under that particular provision. That would fall under the rules of the administration being allowed to decide its own speakers and nonspeakers. The question there is whether or not it is really an independent center or an arm of the university. If it's an independent center it's protected under the other provisions. The campus can't disinvite someone else's speakers. If it's a branch of the institution itself as a student run or independent center, then no, because an institution can decide that they don't want to invite someone themselves.

Chairman Owens: Any further questions?

Rep. Andrew Marschall: The concerns I have when talking about free speech, I don't want to limit anyone's ability to speak, but I question some of the protests going on. Can we put rules and regulations into place where you can't impede people's travels, whether you are in a vehicle, on foot, etc.? If someone is out there speaking, I don't want them to stop me from where I want to go.

Joe Cohn: The bill allows for those kind of rules – that is the section on time, place and manner restrictions having to be content or viewpoint neutral. I've never seen a court say that any jurisdiction can't prevent people from impeding traffic, blocking egresses, entrances, etc. Those across the board satisfy that test that is in the bill.

Chairman Owens: Any further questions from the committee?

Rep. Hoverson: If our founding fathers who wrote the First Amendment – free speech – and if you or us would have given them this list, do you think they would have said that's what we had in mind?

Joe Cohn: Regardless of my feelings on that topic, the Supreme Court has interpreted it over the years to cover all of these concepts. People on both sides of the political spectrum have benefited from it.

Chairman Owens: Any further questions from the committee?

Rep. Mary Johnson: Does this \$25,000 limit a civil action?

Joe Cohn: I think you could adjust that to say 'or any costs that you have lost' if you wanted. It wouldn't necessarily be an unwise change. When we crafted this we were envisioning situations where we were dealing with just the censorship aspect and the statutory claim. If someone would bring both claims – their first amendment claim and the statutory claim - the statutory award that the court could award would be \$25,000. If it gets removed to the federal court and the federal court is ruling under the First Amendment and not ruling under your statute, then it is uncapped.

Rep. Ron Guggisberg: In looking at the bill as the Senate voted it in and passed and it looks as though it asks each institution to adopt a policy and list four things. Would those four things give us a green light in your view.

Joe Cohn: No, it was so void of specifics and it farmed things out to the American Association of University Professors (AAUP). The AAUP came up with what I consider to be the gold standard for academic freedom in the 1940's. A lot of what we try to emulate are the things that are in their standard. The Senate version doesn't fill in the graduation loophole. It doesn't provide a cause of action.

Chairman Owens: Any other questions from the committee? Anyone else in favor of SB 2320?

Lisa Johnson, Interim Vice Chancellor for Academic/Student Affairs, North Dakota University System (NDUS): (Attachment 3) The materials distributed include my testimony to the engrossed version of SB 2320 and the other documents are my comments referring back to the amendments that were presented to you this morning by the bill sponsor.

Chairman Owens: Any questions from the committee?

Rep. Mary Johnson: Are you familiar with the bias reporting at NDSU? That whole process?

Lisa Johnson: I am familiar with some instances. I might not be using the same terminology.

Rep. Mary Johnson: They had a system of biased reporting encouraging students to report biases. Are you familiar with that or with the Valley News Live report on that procedure?

Lisa Johnson: I am not.

Rep. Mary Johnson: There was biased reporting against Christian student groups on campus. You are not familiar with that?

Lisa Johnson: I am not.

Rep. Mary Johnson: This regards not encountered any substantiated cases of restrictions being placed on free speech. Can you explain what substantiated cases means?

Lisa Johnson: Substantiated cases would be those reported to the institution for review. I am not sure the ones you cited were not reported to the institutions, not reviewed by a committee formally.

Rep. Mary Johnson: So a dean of a college or someone below that level was reviewing these cases. For example, someone in anthropology gets a report of a bias and they decide what is free speech according to the NDSU bias report?

Lisa Johnson: Was this the incident where the students were in a public space but they wished to have a display and were asked to move the display?

Rep. Mary Johnson: No, this is an ongoing process at NDSU which has the yellow reporting system. Reported cases don't necessarily address the chilling effect that signs would have on students. You could certainly have a chilling effect on freedom of speech but that is unreported, which is unsubstantiated.

Lisa Johnson: I can speak to the free speech zones that came up in the last legislative session. We have tried to provide clarification on that term. I believe that it is misused. While the institutions describe free speech zones as very limited, the state zones were confusing that with a national organization to train student affairs staff on providing safe zones that permitted students to have dialogue about different topics in their professional capacities. The safe zone they were talking about was a coordinated training course for people who worked in student affairs to help students with issues they were grappling with at home, relationships, etc. and that it was a safe place. It was not meant to restrict first amendment rights or that people around them could not have those discussions. It was meant to encourage students to talk.

Chairman Owens: Any further questions?

Rep. Mary Johnson: With Rep. Becker's free speech bill back in 2015, it died in the Senate because we were told that it is not happening and the only outcome of this is going to be a cost to the taxpayer to defend. Now in 2019, you are making the same argument that it is going to cost a lot and it is not happening.

Lisa Johnson: The university system is actually here in support of the engrossed version. We are not here in opposition. We do feel that we have some obligations to provide safety when speakers come we just don't have the budget to hire additional security. Our concern is the unlimited attorney's fees that are now running nowhere under \$100,000, our institutions don't have the budget for that.

Rep. Daniel Johnston: I worry about the fees you mentioned. Sometimes that concern is expressed when trying to dissuade legislators from voting for a certain bill. Some of our neighbors do the same thing for a fraction of the cost. I worry if we say that you can charge fees, some may use that as a backdoor censorship. Do you have that concern?

Lisa Johnson: That is a concern. You will see in board policy language that campuses publicly disclose what it costs for security. If you are going to organize a march that closes streets and we have to work with local law enforcement to close streets and have security, it should be fair the campuses could recover that and we can be transparent in producing that upfront.

Rep. Daniel Johnston: Do think that the substantial cost that another university (University of Washington) may have accrued due to an individual speaker may have been because they didn't have the sound, free speech policies in place to begin with?

Lisa Johnson: In that instance, I believe it probably had to do with local law enforcement because that is what he invites – disruption to that level – damage to facilities, harm to other people, etc.

Rep. Daniel Johnston: You are saying that that individual invites that kind of rhetoric?

Lisa Johnson: The protestors that show up at his events, he doesn't invite that, the protestors that arrive have tended to demonstrate that behavior. Since then, he has probably been less prominent on the speaking tour, but there was a period of time he was a figure that was attractive to campus organizations.

Rep. Hoverson: That leads to my question of public input as to who actually is hired (the administration that makes these policies). As far as the administration who makes these decisions? Do the people of the community of that college get to weigh in as to whether that person is hired or is it within the system?

Lisa Johnson: To be clear, it was a clear decision that Milo Yiannopoulos and the president of the college republicans made jointly. The administration permitted it; they never tried to suppress that activity. To what point does the public have input on administrators that are hired at colleges and universities? That depends on the level. If it is hiring of faculty, sometimes they may have a presentation that might be available to the public largely. They are presenting largely to students and faculty, peers, etc. The top administrators may have an exchange with the public for them to express any concerns.

Rep. Hoverson: Let's say the community where I am from did not like the censorship approach of the administration. Can the community have him fired or replaced?

Lisa Johnson: I'm not the best person to answer that. As a whole, the administration of the university can factor in public sentiment. I don't believe a person can be terminated for exercising first amendment rights.

Rep. Hoverson: Could the public fire the president?

Lisa Johnson: I don't think I'm the best person to answer that. I don't think that the public hires and fires campus presidents and that would be brought to the boards attention for deliberation.

Vice Chairman Cynthia Schreiber-Beck: When you talked about the draft policy, when might that be instituted or what is the plan for that?

Lisa Johnson: In preparation for testimony to the Senate Education Committee, the University System drafted and had in hand testimony but we did not distribute it because we had not shared it with the board.

Prior to this committee meeting, knowing this was advancing, there were similar concerns, we asked the board if it was permissible to distribute a draft because this has not been vetted. What you are seeing is a draft – a subset of the board approved its distribution today and we are supportive of distributing it. The reason we did not roll it in for full board approval is

because the outcome of this committee's deliberation and floor's deliberation will impact the language therein and possibly any release of new information at the federal level that may be incorporated into the bill.

Rep. Ron Guggisberg: When you were given the amendment by the bill sponsor, did you share with him the concerns you have? Especially how it may jeopardize the federal funding?

Lisa Johnson: I only received electronic copy of the proposed amendments from the bill's sponsor. We did not speak directly.

Rep. Ron Guggisberg: Would the draft version cover the South Dakota incident where they had the "Hawaiian Day"?

Lisa Johnson: I would have to look at the South Dakota material.

Chairman Owens: Any further questions? References of attorney's fees for the court cases were cases that were lost, is that correct?

Lisa Johnson: Those were incurred in defending the institution.

Chairman Owens: You referenced no substantiating reports. These students volunteered that they couldn't speak or couldn't talk about certain things in certain areas of the campus. These were UND students, and they didn't report it. There are situations that occur that are not reported, therefore not substantiated?

Lisa Johnson: We do hear from students who have felt that perhaps their first amendment rights have been violated. In the unsubstantiated ones, if you delve a bit further you find out that they violated elements of time, place and manner.

Chairman Owens: You stated you were interim to this position, but in 2017 we had a free speech bill before this committee and we were told we would work on this right away and devise a policy. That was two years ago and we killed the bill in the House. Now I have a policy that hasn't been through Higher Education that looks like it was assembled in recent months, so I feel like I was misled in 2017. What delayed the development of the policy since the last session we were here versus now?

Lisa Johnson: I don't know what delayed the policy. We have a policy for free speech but it has been a number of years since it has been revised so we deemed it appropriate to incorporate all of the proposed bill's language into a new bill which is more reflective of contemporary society. What you see today is more enforceable in working with the campuses.

Chairman Owens: The engrossed version you are referring to is .03000?

Lisa Johnson: That is correct.

Eric Olson, Outside Council for North Dakota University System, State Board of Higher Education: I wanted to provide clarification as to where those dollar amounts provided by Vice Chancellor Johnson had provided. Those are from media reports based on settlements that have been reached to resolve free speech lawsuits. Some of them were resolved earlier in the process so the dollar amounts were less and others were later in the process and the dollar amounts were much higher.

Chairman Owens: Where the amendment talks about reasonable court costs and attorney fees, is the university liable for all of it on both sides, win, lose or draw or only if they lose?

Eric Olson: The university system or institution would be responsible for paying their own attorney's fees. This is not likely something that the Attorney General's office would represent the campus for, because of the high stakes involved. On your use of 'reasonable', that is typically determined from a 1983 lawsuit, it is based on a rather complicated approach that determines what a reasonable hourly rate for an attorney is to work on a case of this complexity.

Rep. Pat D. Heinert: It does say that the court finds a violation of policy prior to any awards of reimbursement of attorney's fees or other actions taken, correct?

Eric Olson: Yes, that is correct.

Rep. Pat D. Heinert: There are other sections in the civil statute that allow this same action to occur in other types of lawsuits across the board.

Eric Olson: My focus is on higher education. In terms of the finding of a violation, that is correct. What we are concerned with at the university system level is that the university system can do everything right, but if someone on campus were to go rogue, even if that is a violation of policy this bill does not distinguish for acts that were done with administration approval of something of that nature.

Rep. Pat D. Heinert: I don't see the difference in the university system versus other sections of North Dakota agencies that have the same background guidelines that where the administration may set a policy and it not be followed from field perspective and so the administration does have to act and has to stand in defense of that policy or take care of their staff member appropriately.

Eric Olson: I have no reason to believe that this would be different in the large scale. There is a gigantic potential liability out there. We would prefer to not have a set liquidated damage in statute. The problem is not the damages; it is the attorney's fees.

Rep. Pat D. Heinert: It does say that the court sets a reasonable . . . if they find you in violation.

Eric Olson: That is correct.

Rep. Mary Johnson: If Mr. Cohn could come back he has a wide variety of experience with the attorney's fees issues and how the court reviews those attorney's fees. Could he speak

to that? Don't confuse cause of action with evidence, because a frivolous cause of action will come out in the evidence.

Chairman Owens: Any other questions?

Chancellor Mark Hagerott: One of the concerns regarding the liability, I saw the burden placed on law enforcement during the protests and we are trying to find our way on how not to have a college turn into a Woodstock type thing. That is where the concern came from.

Rep. Pat D. Heinert: The colleges should not be held responsible for security at the campuses outside of a typical security that they would require for a regular event. We are talking specifically about somebody violating the code (administrative code or state law) and the college campuses being responsible for reasonable attorney's fees.

Chairman Owens: Any further questions?

Rep. Michelle Strinden: My only questions or comments would be to Mr. Cohn. When he described or offered the gold standard as considered by the Supreme Court. Perhaps you could comment on that.

Chancellor Hagerott: We support this bill and my colleagues tell me they would come and work on a North Dakota campus tomorrow if they could because of how they are being treated on their own campuses. The Gold Standard is not a bad thing to strive for. We are always willing to improve.

Chairman Owens: Any further questions?

Rep. Hoverson: How much can the public weigh in on the hiring and firing of administration?

Chancellor Hagerott: We have very open board meetings. With open meetings, live streaming, etc., this allows for public comment. We are one of the more open boards you will be finding.

Rep. Hoverson: Does one board hire for all the colleges?

Chancellor Hagerott: I don't even hire or fire. The board hires and fires.

Chairman Owens: Any further questions for the chancellor? Any more in favor of SB 2320?

Christopher Dodson: Executive Director, North Dakota Catholic Conference (Attachment 4)

Birgit Pruess, Faculty Member, State Board of Higher Education: (Attachment 5)

Jared Melville, President, North Dakota Student Association: (Attachment 6) end 2:01:40

Chairman Owens: Any questions from the committee?

Rep. Daniel Johnston: There was a \$17,000 cost for a speaker to come to the University of Washington. Do you think besides no student organization being able to afford this type of cost to bring a speaker in that this was a form of censorship?

Jared Melville: Based on the organizations I've been involved with, a cost of this amount could be prohibitive of inviting speakers onto campus. Based on my experiences and understanding of examples is that they are able to provide security for speakers, however, if there is a substantial inflow of different speakers at different events at different times, then the university system becomes stressed which requires the additional costs.

Rep. Daniel Johnston: I was just referring to one speaker at one event. The university had projected; they did not really know.

Jared Melville: In that instance, the organization would probably attempt to obtain outside support in order to address the security costs, but there could be a lot of variables involved.

Chairman Owens: Any further questions? Anyone else in support? Any neutral testimony? Could we please have Mr. Cohn come back up?

Rep. Mary Johnson: The one time I was awarded attorney fees the court went through them with a fine tooth comb. Once they find the rate okay, then they look at the number of hours. Not only did they look at the hours and rate, but they looked at what I did. I had to explain everything I did. Consultation did not pass muster and that was tossed out. Can you speak to attorney's fees awarded to those who defend the 1st amendment?

Joe Cohn: The key thing to remember is aside from settlements is that when a court is issuing the attorney's fees and it has to be done reasonably under the statute, no matter how long and how hard you have to fight you may only get a small limited amount. How many attorneys are going to take those cases? I'm only familiar with those in non-complex litigations, i.e., housing eviction cases where it's a form type of process. I'm unfamiliar with the kinds of caps on reasonable attorney's fees for a complex litigation, especially constitutional rights. There is nothing you can do to prevent them from being sued under the first amendment itself with an even higher value. The only question before you is that do you think that juniors, seniors and graduate students in short programs should also have access to courts? Can it be crafted in a way that it doesn't exacerbate and skyrocket the exposure that they have?

We are dealing with attorney's fees and security fees. In looking at the amendment that Sen. Holmberg brought forward today – Section e – just says that an institution may not charge students or student organizations security fees based on the content of the students or student organizations speech, the content of the speech of guest speakers invited by the students or the anticipated reaction or opposition to the listener's speech. It doesn't prohibit them from giving or charging student organizations security fees based on content and viewpoint neutral criteria. (Cites Forsyth County vs. Nationalist Movement) end 2:12:00

Chairman Owens: That's the point to the question, how do we word it so that doesn't happen?

Rep. Pat D. Heinert: In the Supreme Court ruling where you talk about subsection e of the amendment, does the Supreme Court ruling say that or the anticipated reaction or opposition to a listener's speech? Is that specifically in the Supreme Court ruling?

Joe Cohn: Yes, that's the entire topic of that case.

Rep. Pat D. Heinert: Did the Supreme Court say that you could not look at other campuses or rallies where incidents occurred and base your security needs off what happened in other locations?

Joe Cohn: I don't think you can look to those other things if what you are looking to is cost driven by critics of speech. You can't farm out whether or not someone else can put a heckler's veto over someone else being allowed to do it. That wouldn't be viewed as a content or viewpoint neutral thing.

Rep. Pat D. Heinert: Can a college campus look at a speaker who is coming to their campus with previous history on other campuses to determine what security needs they may require?

Joe Cohn: They can look to the things that the speaker themselves did. If the speaker himself doesn't incite in a previous place or engages in unprotected speech, you can look back at that in terms of evaluating the prior conduct and whether additional security is needed. You couldn't look to the opposition that was protesting the speaker and the history of whether or not it drew opposition.

Chairman Owens: Any further questions?

Rep. Mary Johnson: Of those state colleges that have green lights in your system, have those colleges been subject of lawsuits? Can you give a little history on that?

Joe Cohn: I don't know of any who have lost any first amendment lawsuit over a policy we have given a green light to. Green light policies don't lose lawsuits.

Rep. Pat D. Heinert: With your organization, a state college campus could get a green light with administrative policies versus state law?

Joe Cohn: We aren't giving the rating system based on what the state law says. It's harder to change state law. It provides them a broad latitude to craft their own policies regardless of whether or not you pass a bill. It's a fairly modest bill scaled down from its original content. What you are talking about is the time, place and manner restrictions and how they are handling the concept of outside speakers in a way that is consistent with the case law.

Chairman Owens: Any questions from the committee?

Rep. Hoverson: The part of your booklet regarding obscenity and the case of University of Missouri – the Supreme Court has already ruled that those things are already protected. Would your bill clarify that, strengthen that or make that easier or better?

Joe Cohn: It doesn't touch it at all. It goes nowhere near that aspect of analysis.

Rep. Hoverson: Wouldn't your language clarify that?

Joe Cohn: If your committee has time for amendments you could strike all those adjectives and just say it can't be done on a content or viewpoint basis.

Rep. Hoverson: The Supreme Court has already ruled that an administrator of a college cannot tell someone who printed a newsletter with that wording on it to clean it up.

Joe Cohn: There are a few exceptions to the first amendment - obscenity is one of them. This bill doesn't change any of those tests at all.

Chairman Owens: Any further questions? We will close the hearing on SB 2320.

Debora Dragseth, President, Council of College Faculties (Attachment 7) Testimony handed in.

2019 HOUSE STANDING COMMITTEE MINUTES

Education Committee
Coteau A Room, State Capitol

SB 2320
4/2/2019
34443

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Bev Monroe

Explanation or reason for introduction of bill/resolution:

A bill relating to free speech at institutions under the control of the state board of higher education

Minutes:

Attachment 1, 2

Chairman Owens: Opened the committee meeting on SB 2320.

Rep. Pat D. Heinert: I've passed out the Christmas tree version labeled .0300X, and if I may, either move for adoption or ask for you to allow Ms. Johnson to come up and explain the amendments (**Attachment 1**)

Chairman Owens: You can move for adoption and we can then discuss it if that would be your wish.

Rep. Pat D. Heinert: With that we can have Ms. Johnson come up and explain.

Lisa Johnson (Interim Vice Chancellor, Academic and Student Affairs, North Dakota University System): I will walk you through the amendments. The document before you numbered .0300X, we took the amendments presented by the bill's sponsor last week, so the amendments you see in Christmas tree version are acknowledgement, support for those amendments that were proposed by the bill's sponsor and that which you see in red and green which are our amendments.

Chairman Owens: Please, go ahead.

Lisa Johnson: On page 2, on line 19, 'the following principles of speech' and so an amendment was made to letter a – 'An institution shall maintain the generally accessible open, outdoor areas of its campus as traditional public forums for free speech by students, faculty, and invited guests', - with the addition of 'subject to reasonable time, place, and manner restrictions;'

Letter b – An institution may not – we struck 'restrict students' free speech, but rather replaced it with 'confine the exercise of student free speech to area(s) aside for that purpose unless adequate alternative means of communication are provided.'

What that meant and what we have said repeatedly, students and faculty saying that we do not actually have designated free speech zones, small carved out spaces for which people are limited to their speech. We replaced it with, if it should happen and it would morph in that direction, it would probably look like the confinement of speech to small areas set aside. We just replaced free speech zone with that language. The adequate alternative means of communication that are provided – that was actually original language that FIRE supplied to the Senate Education Committee.

Chairman Owens: Can you explain to me why we keep hearing that there are free speech zones, if you don't have any free speech zones?

Lisa Johnson: As FIRE describes free speech zones, they are very small limited spaces on campus. In the worst case example, they were taped off; some were no bigger than the space of your desks combined.

Chairman Owens: How is this a free speech zone if someone is standing over there saying something loud enough for me to hear something that I don't want to listen to?

Lisa Johnson: Free speech zones are the public ones that are designated. That's why they are not permitted or discouraged; is because they were so limited. Our campuses have fairly broad free speech zones in which the public can organize a protest. Free speech zones are what permit people to use that language, language that FIRE uses, that in that free speech zone you can say things that are offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, wrongheaded. That's permissible in those spaces.

Chairman Owens: Any other questions?

Rep. Mary Johnson: So, the previous language was – 'an institution may not restrict student's free speech to particular areas of campus sometimes known as free speech zones'. So you cannot confine the exercise of student free speech areas to areas set aside unless adequate alternative means of communication are provided?' What is adequate alternative means of communication?

Lisa Johnson: The language that was supplied by the FIRE organization wrote the entire original bill for Senator Holmberg. They gave a definition at the beginning of the bill with definitions that we all work under and this is the definition that they supplied. Constitutional time, place and manner restrictions means restrictions on the time, place and manner of free speech which do not violate the First Amendment to the United States Constitution, are Section 4 of Article 1 of the Constitution of North Dakota and which are reasonable content and viewpoint neutral and narrowly tailored to satisfy significant institutional interests and leave open alternative channels for the communication of information or message.

Rep. Mary Johnson: What are alternative means of communications? That's not a definition in here.

Lisa Johnson: I will have to defer that to our attorneys. That is legal language that was recommended for inclusion, so we put that in. This is a committee meeting; this is your

choice. If you want to strike that altogether and leave it as free speech zones, the university system has no problem with that. It basically means that we cannot restrict you unless there are ample alternatives for the exercise of free speech. If you want the original languages propose by Senator Holmberg, this isn't one that I

Rep. Mary Johnson: If the universities had no problem with the original language, why change it?

Lisa Johnson: None of the campuses have designated free speech zones that are taped off, cordoned off areas for which students are limited in their speech.

Rep. Mary Johnson: Yes, they do. Minot State had it.

Lisa Johnson: The free speech was the safe zone for which the individuals had received special training to work in the area of student affairs and they do say 'safe zones', and they are people who work in student affairs who work with students grappling with personal issues of sexual identity, issues with transition to campus, etc. We are confusing safe zones with free speech zones.

Chairman Owens: Let's move forward.

Lisa Johnson: Letter d – an institution may not establish permitting requirements prohibiting spontaneous outdoor assemblies or outdoor distribution of literature, except that an institution must maintain a policy granting an individual or organization the right to reserve the exclusive use of certain outdoor spaces, and may prohibit spontaneous assemblies or distribution of literature inside reserved outdoor spaces.

For example, at Minot State University, Old Main has a circular driveway and a group can reserve that entire outdoor space for an event that they wish to have and as this is written, it would prevent other groups from coming in and disrupting that reserved space. That falls under time, place and manner.

Letter e – an institution may not charge students or student organizations security fees based on the content of the students or the student organizations speech or the content of the speech that the guest speakers invited by the students. Striking the language 'anticipated reaction or oppositions of listeners to speech'. The reason for that amendment would be that the campuses do feel it's permissible to charge based on anticipated opposition that could cause safety issues, destruction to property and infringement on the free speech rights of other individuals.

Campuses have to estimate and make available what the costs might be and refund any differences for the costs of security and logistics was not what was estimated.

Rep. Mary Johnson: Under this change in e you can charge students or whatever based on the anticipated reaction or opposition of listeners to speech. By striking that language you are allowing it.

Lisa Johnson: That is correct. It would permit the institutions to charge, not on content or viewpoint, but on anticipated crowd size and opposition. Not as a means to just make money or suppress free speech.

Rep. Mary Johnson: You do understand that allowing anticipated reaction just takes away the whole meaning of free speech. Then anyone can say 'we anticipate this reaction'. By taking out anticipated reaction you can anticipate any reaction.

Lisa Johnson: To me the caveat is in the 'in refunding any difference', so if a million dollars in damages was incurred . . .

Rep. Mary Johnson: Is the NDUS attorney here?

Chairman Owens: Let's finish up the amendments and we can go to the two questions you have.

Lisa Johnson: Under g – an institution may not retract, or compel a student, student organization or faculty member to retract, a guest speaker's invitation to speak at the institution based on the guest speaker's viewpoints or the content of the anticipated speech. This goes to your point, Rep. Hoverson, with your concerns about language that was offensive, unwise, immoral, indecent, etc.

The university asks to strike the entire section of 'cause of action'. At this time individuals and organizations still have that right to report cause of action at the federal level and seek and injunction or compensatory damages. This adds another level.

Chairman Owens: Are there any questions?

Rep. LaurieBeth Hager: Could you explain the exclusion of the cause of action section?

Lisa Johnson: At present we have had no cases. We believe that the inclusion of the cause of action section actually invites frivolous cases. At the federal level the individuals have to prove that they were harmed. The way this is written you can just have an allegation that you feel that your rights have been violated. There is no fiscal note on this because we do not know how many lawsuits we will have. Our campuses can't seek insurance for this so it is going to come out of general funds or private funds to pay these costs.

Chairman Owens: Any further questions?

Rep. Mary Johnson: What price do you place on freedom of speech?

Lisa Johnson: I'm probably not the best person to answer that question.

Chairman Owens: Any further questions?

Rep. Daniel Johnston: If you are operating within the confines of the bill within the law, wouldn't that limit the amount of lawsuits that the university would have against it?

Lisa Johnson: Yes, we are currently operating under the confines of the law and intend to in the future. The fact that we have had no substantiated cases shows that we have been complying.

Rep. Daniel Johnston: On page 3, line 5, to me that still borders on backdoor censorship. Could they not count on getting their money back? They wouldn't know if they get it back or not. Wouldn't the effect be that it would be censorship?

Lisa Johnson: I think that would be for your committee to decide. I think the campus has the responsibility to provide a safe environment for protestors regardless of their viewpoint.

Rep. Mary Johnson: Absent the security argument, it's the striking of the language 'anticipated reaction'. We aren't talking about security. We are talking about administration can say that there is a speaker coming, they can anticipate a reaction, whether valid or not, and they can anticipate a reaction. They can inflate the charge that has a chilling effect. The anticipated reaction language means it can be anticipated. Administration can deny any speaker.

Chairman Owens: Any questions?

Rep. Daniel Johnston: In other words, their constitutional rights come with perceived costs? Mr. Cohn mentioned the 1960's where mayors in towns wanted to prevent protestors from coming through because of the costs to provide security for the event. It was ruled that they couldn't do that. The marchers had a level of expectation of protection of their constitutional rights. Wouldn't this fall under the same category?

Lisa Johnson: As described by the FIRE representative, yes.

Rep. Ron Guggisberg: I understand that a free speech area doesn't include private offices. What other offices is it restricting? Is it classrooms, hallways and buildings? I'm not sure what public space is?

Lisa Johnson: Some examples as drafted on board policy that would be restricted areas would be residential areas of campus; areas immediately surrounding academic buildings during times when classes are held in that building; areas that must be restricted due to reasonable safety and security concerns – that might be your boiler rooms, electrical utility rooms, and areas that must be restricted to enable the flow of pedestrian or vehicle traffic. Not in front of doorways, entrances to buildings.

Chairman Owens: Any further questions? Could we have the attorney for NDUS come up please?

Eric Olson, Outside Counsel, North Dakota University System, Department of Higher Education: I'm happy to stand for your questions.

Chairman Owens: One of the things that was asked was what is alternative means of communication?

Eric Olson: That is language that is taken from the case law on the first amendment. If you as a public entity are to restrict freedom of speech in any way you have to ensure that there are adequate alternatives means of communication. You can't tell someone you can't speak. That has been one of the problems of the many of the free speech zones. If an individual is relegated to a small area, it's usually off the beaten path where they can't actually communicate the message. Just by relegating individuals to a designated area, you are not violating their free speech. None of our campuses have free speech zones. The term free speech zone is pretty loaded. It means different things to different people. It is not defined in this bill. If the committee would like different language, our office is open to that.

Chairman Owens: Any questions?

Rep. Mary Johnson: You heard they had no problem with the original language so then why change it. You said nobody has free speech zones or it is a different definition of free speech zones, but it is pretty common.

Eric Olson: It is a common term used but we found that it is a term that many people use without having a consistent definition for it. We figured we would have a clear definition rather than using a term that has been defined variously in case law and in the media and other places.

Rep. Mary Johnson: The difference between the original language and the Christmas tree version is the 'unless'.

Eric Olson: That is a good question and one that has been litigated for many years about what an alternative means of communication actually is.

Rep. Mary Johnson: I asked who gets to decide.

Eric Olson: That would be the individuals creating the campus policy and then if that policy is insufficient, I imagine that Mr. Cohn or one of the groups that bring this up would send a letter letting us know that they don't view that policy as sufficient and we could work with them. We aren't set in stone definitely. This is an ongoing discussion that happens with First Amendment law.

Rep. Pat D. Heinert: The language you're talking about – adequate alternative means – was that taken out of the lawsuits for the First Amendment.

Eric Olson: The language on the first page is actually language that is in there. That is language that is taken from First Amendment Juris Prudence.

Chairman Owens: Any further questions?

Rep. Mary Johnson: Did you understand my point about e?

Eric Olson: I believe I do, but please repeat your question.

Rep. Mary Johnson: By striking 'for the anticipated reaction or oppositions of listeners to speech', you are virtually allowing it. That becomes very subjective to me.

Eric Olson: I understand what you are saying. There is sort of a dual legal and practical concern that is motivating this language. If the committee has better language, we are entirely open to that. The institutions of the university system have limited funds to work with and those funds are generously provided by the taxpayer and received from students and donors, etc. If there was a funding mechanism, we wouldn't have this problem. Because there is none, institutions would have to absorb that cost and come back to ask the legislature for reimbursement during the next session. That is the concern we are trying to balance. At smaller campuses they do not have the budget and the manpower on campus. That is a significant budgetary impact. The key piece is if there was a way for campuses to ensure that they would have a method to pay for that, we have no objection and we could remove that strikethrough.

Chairman Owens: I have a problem with removing the strikethrough. If I am in charge of security and I know the enormity of issues with the speaker, I would be able to use that information to adjust it and set the fees. If you take out the strike, they can't do that. If you leave the strike in your point is valid as well. We need something in between.

Eric Olson: That is what we are asking for. I understand your concerns entirely, Rep. Johnson. This has been a concern but there has been no consensus reached. One thing we did agree upon is that this can be a high burden.

Rep. Mary Johnson: Anyone can sue anyone for anything. The argument that frivolous cases might occur is one that you deal with that as it comes. Cost should never be a concern, truly, when it comes to freedom of speech. We really do a disservice to our students when we limit the marketplace of ideas on campus.

Eric Olson: I agree that it is a concern. In the university system there is really no good way to put a dollar amount on how much free speech is worth. We are faced with the reality that our budgets are much smaller than they used to be. That is the prerogative of this body. The concern – with frivolous lawsuits – that if there is a state statute giving a clear remedy and a clear dollar amount, that has been shown to invite lawsuits.

Rep. Mary Johnson: Why are you so fearful of lawsuits?

Eric Olson: In my role as an attorney I have to look at the worst case scenario. We can have the best free speech policy in the country and we can have great training. All it takes for there to be a valid lawsuit under this section would be for a professor to see someone in the institution become offended by something and then there is a lawsuit. Under this section there may not be actual compensatory damages but the concern is to protect against these lawsuits. The worst case scenario could affect the long term finances and structure of the university system. We support the version that came out of the Senate.

Chairman Owens: Any further questions?

Rep. Daniel Johnston: Can you think of a time when the university system has incurred a significant cost for hosting a particular speaker. If you can't, are you hypothesizing about a future event?

Eric Olson: There was nearly a significant cost a few years ago when a speaker was coming to one of our eastern campuses, but in the end that event didn't take place but the campus was trying to figure out a method for paying for the extra security for that matter. There is not a hypothetical, but is also not something that we have not had to deal with in the past.

Rep. Daniel Johnston: Our universities have been around for a while, so if this hasn't occurred in the past, are we just fearmongering about a potential future event?

Eric Olson: I don't think we are being unreasonable in being concerned about this. It is just a matter of happening all around the country where the costs have been significant and our campuses are concerned about the budgetary impact and the potential of a lawsuit in the event of these going sideways.

Chairman Owens: Any further questions? We have the original bill that passed the Senate. It has the four exceptions that shall adopt a policy that includes these four. You have a draft of the policy they are talking about now that they are reviewing and we have Sen. Holmberg's amendment and we have this amendment that relies on the Holmberg amendment with some changes.

Rep. LaurieBeth Hager: What number are we are talking about?

Rep. Mary Johnson: .03002. Rep. Heinert, who drafted 'x'?

Rep. Pat D. Heinert: It was provided by the university system

Rep. Mary Johnson: I think I have a grasp of the needs for an amendment, Mr. Chair. Are we reconvening this afternoon? I think I could put together a pretty good amendment based on the testimony and the chair's concern on anticipated reaction and come up with some language in conference with Mr. Cohn.

Chairman Owens: Is there any committee member that wants to take action with what you have in front of you?

Rep. Andrew Marschall: What bill version is the one we have in front of us?

Chairman Owens: It is .03000.

Rep. Andrew Marschall: All the things we are talking about now is proposed changes?

Chairman Owens: Correct.

Rep. Ron Guggisberg: I was going to offer an amendment. The problem with this during testimony was that we were told in the interim that there would be policy written. The policy wasn't written because of change in some personnel and my amendment would be to ensure

that they write it as the Senate bill came across and ensure that they complete the policy before the fall semester begins. With the federal rules coming down every time we bring this bill up there are nuances to it and it would be best handled by the administration and not necessarily those of us who meet every two years.

Chairman Owens: I don't disagree with you in the history. Your point to requiring it before the fall would take the amendment to put a deadline on it.

Rep. Pat D. Heinert: In reference to what Rep. Guggisberg talked about, we have to recognize that there is a new person responsible for that section of the office and that person is taking drastic measures to improve what was done in the past. It has already been proven to us in committee by reading from sections that have been written already, not approved by the final board, but already written and proposals ready to go. I don't think it would be necessary if we stayed with the original bill.

Chairman Owens: Do we need to take that big of a bite with all these amendments or do we need to start the process?

Rep. Hoverson: I Move we Do Pass version .0300X as is?

Rep. Pat D. Heinert: Second it.

Chairman Owens: We have a motion for a do pass as is and a second. Is there any discussion?

Representative Denton Zubke: Did you say .03000 as is or .0300X?

Chairman Owens: .0300X as is.

Rep. Pat D. Heinert: If I may ask Rep. M. Johnson in reference to 'e', I'm going to make a couple of thought processes – it says an institution may not charge students or student organizations – if we added the word after organizations 'undo' so it would say 'undo security fees'?

Rep. Mary Johnson: Everything is subjective.

Rep. Pat D. Heinert: I don't know how you can get away from it.

Rep. Pat D. Heinert: After organizations we put in 'undo security fees' and where it is stricken out, we leave in the language that says oppositions of listeners to speech, but strike or the anticipated reaction or. . . '.

Rep. Mary Johnson: So, how does that work? 'Or the content of the speech of guest speakers invited by students, oppositions of listeners to speech'? I think the anticipated needs to be changed to something historical. There has been a history of the need for security, not based on the content of the speaker but on what has historically happened at where the previous speaker has spoken.

Chairman Owens: In order to change the motion it would have to take the first and second to do that. Is that what you want to do? I like what they wrote in their policy. Remove the overstrike 'or the anticipated reaction or opposition of listeners to speech' and the anticipation is based on history and put exactly what they had in their policy. Remove the strike and put that in. It's on page 4.

Rep. Mary Johnson: In this regard, security costs aren't a prepay. That is off the table?

Chairman Owens: It's not off the table. The university would still have to collect the money up front. It's unreasonable for them to say it's owed to them.

Rep. Mary Johnson: It still has the same effect of chilling speech.

Rep. Brandy Pyle: What happens when NDSU hosts ESPN for "Game Day"? Who pays for security when they have the big rallies in downtown Fargo?

Rep. Mary Johnson: ESPN.

Chairman Owens: Remove on page 1 'and to provide penalty'. Come back to page 2 – I like taking out the phrase 'free speech zone'. I would change it to adequate alternative location or means of communication are provided. I am concerned about lawyer's fees as there is no cap on lawyers' fees.

Rep. Mary Johnson: You limit attorney's fees and that is functionally a chilling effect as well. The court is very discerning in reviewing attorney's fees before they award those fees and they do disallow the rate, the hours and they look at what you did in those hours. We should allow the courts to work the way they work now regarding attorney's fees and not limit them.

Chairman Owens: When the taxpayers are paying, I don't think we can leave it wide open.

Rep. Ron Guggisberg: There is a point where it costs too much and somebody has to pay for it.

Chairman Owens: Any further conversation?

Vice Chairman Cynthia Schreiber-Beck: I have a recommendation for everyone to look at the Purdue University policy in the FIRE testimony booklet. That may answer some questions as to what is expected to be in a policy that is considered exceptional. It may shed some light on what we are talking about. **(Attachment 2)**

Vice Chairman Cynthia Schreiber-Beck: Is there any back data as to what kind of attorney fees have been paid? If we had them I would like to see them so we have some point of discussion. Let's look at some history and see what kind of attorney's fees are being paid out.

Chairman Owens: We have a motion in front of us and unless they would like to table that we have to act on that motion.

Rep. Hoverson: I do like some of your amendments and I would be willing to withdraw my motion if the committee would like to have outside discussion.

Chairman Owens: Get your amendments and we will finish this bill today.

Rep. Hoverson: Before I withdraw my motion, I would like to caution the committee that it feels like we are trying to micromanage perceived scenarios that are impossible to do and I would suggest that we will never get away from subjectivity with this issue if we try to write any bill. These terms are not going to offer us that much concreteness.

Chairman Owens: I do not disagree with you on that, Rep. Hoverson.

Rep. Hoverson: I will **withdraw** my motion.

Rep. Ron Guggisberg: Do you need something drafted for that?

Chairman Owens: No, if you just want to type it up and hand it out. We can establish a policy on such and such a day, they already have a policy and we can improve it. I wouldn't object to putting that requirement on there and sending it out as it came from the Senate with that requirement and seeing if we can't get it in conference committee.

With that we are adjourned and we will see you at three.

2019 HOUSE STANDING COMMITTEE MINUTES

Education Committee
Coteau A Room, State Capitol

SB 2320
4/2/2019
34454

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Kathleen Davis for Bev Monroe
--

Explanation or reason for introduction of bill/resolution:

A bill relating to free speech at institutions under the control of the state board of higher education

Committee work - afternoon

Minutes:

Attachment 1 and 2

Chairman Owens: opened the hearing on SB 2320.

Rep. Ron Guggisberg: presented Amendment 19.0520.0300Z (Attachment 1).

Rep. Mary Johnson: presented Amendment 19.0520.0300Y (Attachment 2), explained her changes. Regarding attorney's fees Mr. Chair, you thought the \$25,000 limit should come back.

Chairman Owens: That was just my opinion.

Rep. Mary Johnson: LC implemented what he thought you said.

Chairman Owens: Everything but the exclude reasonable court costs and attorney fees because I don't want to lock the tax payer into that. I suggested it come out, you suggested it needed to stay in there.

Rep. Mary Johnson: So we need to change that part.

Chairman Owens: I'm curious about the anticipate, Sub 3, Lines 4-5.

Rep. Mary Johnson: and the effective date, 2020, gives universities time to develop policies within the guidelines of the statute. And H, was presented by Mr. Dodson in his testimony. Therefore, if I'm college Christians and we don't accept atheists we can't be penalized for not accepting atheists.

Chairman Owens: called the University representative to come forward and answer questions.

Lisa Johnson, Interim Vice Chancellor, NDUS: I have read the amendment.

Chairman Owens: Do you understand each section as amended and do you have any comments?

Lisa Johnson, Interim Vice Chancellor, NDUS: I would reiterate as we advocated or defended in the Senate Education Committee we were very comfortable with what exited their committee. I've very comfortable with the recommendation from Rep. Heinert and Rep. Guggisberg that brought us back to that. I'm respectful of comments by Rep. Johnson and appreciate your willingness to work with our attorney. My preference is for that which was presented by Rep. Heinert and Rep. Guggisberg, is most aligned with what the campuses could reasonably achieve.

Vice Chairman Cynthia Schreiber-Beck: Page 3, H- the institution may not discriminate against a student organization, any issues with that from a campus perspective?

Lisa Johnson: There was some concern. In essence it forces us to micromanage membership of student organizations. It's unclear on who decides or who monitors the leaders. For example who's monitoring that, what are the thresholds for adhering to those viewpoints and when should money be withheld or students removed from that organization? For me personally I don't know what thresholds exist or qualify as a student in compliance with a religious organization; what level is Christian, Christian enough? When students deviate from the tenants of the Catholic faith, when do we withhold money from that organization? That puts campuses in a very uncomfortable position in trying to honor this freedom of expression, freedom of speech.

Rep. Mary Johnson: The only action that requires you is in "h" is not to discriminate. It doesn't require you to monitor any membership. You don't need to micromanage to learn everybody's membership.

Lisa Johnson: I think there might be language elsewhere that has that tied into receipt of student funds.

Rep. Mary Johnson: It doesn't require any action.

Rep. Guggisberg: I would move Amendment 0300Z.

Rep. Heinert: second.

Chairman Owens: we have a motion and a second to adopt Amendment 0300Z. Discussion? This is basically the version that came over from the Senate saying you must do it by a certain date and report to Legislative Management with a copy of the policy or policies.

Rep. Brandy Pyle: I prefer version Z but using version Y as part of the policy that is written up in the higher ed. I think it lays out some great items. I think the policy should really be done in the university system and we just set guidelines and definitions. The campus free speech policy is found on Page 2. So I'm supporting version Z, but I think the way it's written in Y is the way I would like to see the policy written within the university system.

Chairman Owens: the advantage of having the policy written by the board of higher ed is they don't have to wait 2 years for us to change something.

Rep. Mary Johnson: I think in my 3 sessions I've learned lack of specificity produces bad policy. In here Y provides some great specificity and we've been waiting years. We waited several years for due process. Effective date of Y with January 1, 2020 gives them ample opportunity to come up with policy within the guidelines of what should be statute.

Vice Chairman Cynthia Schreiber-Beck: Does anyone have any idea how many states have this in their code or laws?

Rep. Hoverson: I would draw attention to what I like about Z is back page, No. 2 Line 18 which permits students, faculty and student organizations to invite guest speakers or groups to present regardless of the viewpoint or content of the anticipated speech of the guest speaker. Other than financial issues you could write that and I think it would be a good bill.

Chairman Owens: we have a motion and a second to adopt Amendment 0300Z for SB 2320. Roll call vote: 11 yes, 2 no, 1 absent.

Rep. M. Johnson: (didn't turn mic on, inaudible)

Chairman Owens: you can offer your amendment. Just because we amended it once doesn't mean you can't, and that amendment would override this one.

Rep. M. Johnson: (didn't turn mic on, inaudible)

Rep. Zubke: move a Do Pass as Amended on SB 2320.

Rep. D. Johnson: second.

Chairman Owens: We have a motion and a second for a Do Pass as Amended on SB 2320. Discussion? Roll call vote: 11 yes, 2 no, 1 absent. Rep. Guggisberg is carrier.

April 2, 2019

De 4/2/19

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2320

Page 2, line 12, replace "The" with "By August 27, 2019, the"

Page 2, after line 20, insert:

"Upon adoption of the policies under this section, the state board of higher education shall provide a copy of the policies to the legislative management."

Renumber accordingly

**2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2320**

House Education Committee

☐ Subcommittee

Amendment LC# or Description: Referring to free speech zones and safe zones

Recommendation: ☒ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Rep. J. Hoverson Seconded By Rep. Pat Heinert

Representatives	Yes	No	Representatives	Yes	No
Chairman M. Owens			Rep. Guggisberg		
V. Chair. Schreiber-Beck			Rep. Hager		
Rep. Heinert					
Rep. Hoverson					
Rep. D. Johnson					
Rep. M. Johnson					
Rep. Johnston					
Rep. Longmuir					
Rep. Marschall					
Rep. Pyle					
Rep. Strinden					
Rep. Zubke					

Total (Yes) _____ No _____

Absent _____

Floor Assignment Withdrawn

If the vote is on an amendment, briefly indicate intent:

Date: 4-2-19
Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2320

House Education Committee

☐ Subcommittee

Amendment LC# or Description: 19.0520.0300.3

Recommendation: ☒ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Rep. Guggisberg Seconded By Rep. Heinert

Representatives	Yes	No	Representatives	Yes	No
Chairman M. Owens	✓		Rep. Guggisberg	✓	
V. Chair. Schreiber-Beck	✓		Rep. Hager	✓	
Rep. Heinert	✓				
Rep. Hoverson	✓				
Rep. D. Johnson	✓				
Rep. M. Johnson		✓			
Rep. Johnston	A				
Rep. Longmuir	✓				
Rep. Marschall	✓				
Rep. Pyle	✓				
Rep. Strinden		✓			
Rep. Zubke	✓				

Total (Yes) 11 No 2

Absent 1

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 4-2-19
Roll Call Vote #: 2

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2320

House Education Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☒ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Rep. Zubke Seconded By Rep. D. Johnson

Representatives	Yes	No	Representatives	Yes	No
Chairman M. Owens	✓		Rep. Guggisberg	✓	
V. Chair. Schreiber-Beck	✓		Rep. Hager	✓	
Rep. Heinert	✓				
Rep. Hoverson	✓				
Rep. D. Johnson	✓				
Rep. M. Johnson		✓			
Rep. Johnston	A				
Rep. Longmuir	✓				
Rep. Marschall	✓				
Rep. Pyle	✓				
Rep. Strinden		✓			
Rep. Zubke	✓				

Total (Yes) 11 No 2

Absent 1

Floor Assignment Rep. Guggisberg

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2320, as engrossed: Education Committee (Rep. Owens, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2320 was placed on the Sixth order on the calendar.

Page 2, line 12, replace "The" with "By August 27, 2019, the"

Page 2, after line 20, insert:

"Upon adoption of the policies under this section, the state board of higher education shall provide a copy of the policies to the legislative management."

Renumber accordingly

2019 TESTIMONY

SB 2320

SB 2320 SEN. HOLMBERG

NATIONAL REVIEW

EDUCATION

A Curious Time for InsideHigherEd to Lose Interest in Campus Speech

By FREDERICK M. HESS

& CODY CHRISTENSEN

January 31, 2019 3:06 PM

Colleges have a free speech “problem.” From high-profile instances at Missouri, Yale, and Middlebury, to more recent events at UC Berkeley and Sarah Lawrence College, we’ve seen college leaders allow the campus left to harass speakers, silence debate, and drive conservative views and values from the academy.

This state of affairs is one reason why *InsideHigherEd’s* annual survey of college and university chief academic officers has been especially useful. Since 2015, this survey has been the only annual snapshot that captures what senior college administrators think about trigger warnings, free speech, and academic freedom — and thus the only reliable way to gauge changes in their actions or attitudes. In light of the contretemps of the past year, many were eager to see what campus leaders had to say


Unfortunately, in the latest survey, released last week, those questions had been neatly scrubbed from the survey. Yep, one of the nation’s primary news outlets covering higher education decided that now would be a propitious time to *stop* asking about academic freedom and free speech on campus.

What might appear to be simply a curious case of bad timing is emblematic of a larger problem with the higher ed-industrial complex — a tendency to sweep under the rug those developments which raise uncomfortable questions about the orthodoxies and agendas pervading campus culture. This dynamic was on full display last fall in the lawsuit that Students for Fair Admissions has mounted against Harvard's admissions policies, when all the quarreling factions of academe responded by finding a way to link arms in the cause of race-based admissions.

The survey did find time to ask whether conservative and liberal students feel welcome in classrooms on their campus. Four percent of provosts expressed reservations about whether liberal students feel welcome; 12 percent expressed concerns about whether conservative students do. Given that surveys of students have indicated that half of them report having censored themselves in class for fear of what will be said in response, this kind of question provides a useful, sometimes laughable, window into the self-serving bubble that campus mandarins occupy.

In prior years, the survey had asked substantive questions relating to academic freedom, if guest speakers on campus are welcome to offer a range of political viewpoints, and if conservative academics and public figures are treated with respect on campus. It also asked if students and academics respect free speech, if colleges should interfere with the invitations to outside speakers extended by student groups or faculty, and if shouting down speakers poses a threat to academic freedom. The results tended to suggest there are real grounds for concern — over half of provosts, for instance, responded that free speech rights are either “threatened” or “very threatened” on college campuses. Even when questions generate self-serving responses, the results can be unintentionally revealing.

All of this begs the question as to why these questions were excised from this year's survey. Free-speech concerns on campus have certainly not abated, making these queries a useful and timely barometer of what campus leaders are thinking and how they are responding. Regardless of the rationale, the decision suggests an unfortunate casualness about the burning question of what it really means for campuses to welcome and support the free and unfettered exchange of ideas. With more Americans than ever saying that higher education is headed in the wrong direction and polls expressing concerns about the state of free speech on campus, this is the wrong time to opt for the comforts of ignorance.

:
Tyler Coward <tyler@thefire.org>
Wednesday, February 06, 2019 10:14 AM
To: NDLA, S EDU - Wolf, Lynn
Subject: Tyler Coward testimony in support of SB 2320


CAUTION: This email originated from an outside source. Do not click links or open attachments unless you know they are safe.

Thank you for your patience, my testimony is below:

Chairman Schaible, and members of the Education Committee,

My name is Tyler Coward and I am Legislative Counsel at the Foundation for Individual Rights in Education, or FIRE. FIRE is a nonpartisan, nonprofit organization dedicated to protecting the free speech and due process rights of students and faculty at colleges and universities across the country. Thank you for taking the time to hold this important hearing.


FIRE supports SB 2320 to protect student and faculty speech rights at public institutions of higher education in the state. The important protections provided in this bill would ensure that universities can no longer quarantine student expression to tiny, out of the way corners of campus. The bill also helpfully and carefully defines the line between constitutionally protected protests and unprotected "heckler's vetoes."

 would protect students from overbroad harassment codes that restrict constitutionally protected expression by requiring that public institutions of higher education adopt the student-on-student harassment definition issued by the United States Supreme Court in a case called Davis v. Monroe County Board of Education.

The bill would also protect academic freedom by codifying principles of academic freedom supported by the American Association of University Professors dating back to the 1940s.

SB 2320 would also prevent institutions from assigning "security fees" to student organizations based on the content of their speech; a common way that FIRE has seen universities violate student First Amendment rights, particularly over the past few years.

Thank you for your time, and I look forward to taking any questions you have.

—
Tyler Coward
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Help FIRE Defend and Promote Free Speech on Campus with a Tax Deductible Donation Today.

AMENDMENTS TO SENATE BILL NO. 2320

Page 4, after line 28, insert:

- g. An institution may not discriminate against a student organization with respect to a benefit available to any other student organization, based on that organization's requirement that its leaders or voting members adhere to the organization's viewpoints or sincerely held beliefs or be committed to furthering the organization's beliefs or religious missions.

SB2320

Senate Education Committee

February 6, 2019

Lisa A. Johnson, Interim Vice Chancellor for Academic/Student Affairs, NDUS
701.328.4143 | lisa.a.johnson@ndus.edu

Chair Schaible and members of the Senate Education Committee: My name is Lisa Johnson, and I serve as the Interim Vice Chancellor for Academic and Student Affairs of the North Dakota University System. I'm here to provide testimony regarding Senate Bill 2320.

The institutions of the NDUS are, of course, unreservedly supportive of free speech. We understand the intent of this bill. However, as currently written, we are deeply concerned that it would not enhance freedom of speech. In fact, it would create even greater challenges. Broadly speaking, the NDUS feels that SB2320 is duplicative of rights already provided by law and, as written, is so prescriptive that, at times, it creates conflicts with State Board of Higher Education policy and constitutional law.

The highest law of the land, the U.S. Constitution, guarantees freedom of speech. All of us in this room understand the expansiveness and importance of the First Amendment. There is a long history of case law supporting a very broad interpretation of free speech rights. SB2320 attempts to enhance or expand rights already so enshrined. Similarly, SBHE Policy 401.1 (attached) thoroughly defends much of what SB2320 attempts accomplish. A few excerpts are as follows:

- The academic community must be hospitable . . . and it must welcome the conflict of ideas likely to ensue. Institutions have an academic responsibility to provide opportunity for expression of diverse points of view generate academic freedom.
- [Students] have a right to intellectual disagreement with their instructors and associates, and to question them, without fear of recrimination or punishment.
- It is not necessary that [a speaker's] point of view presented be congenial to the campus, members of the staff or student body individually, or to individual members of the wider community. The speaker must be accorded the courtesy of any uninterrupted presentation.

Both the Constitution as well as Board policy already protect freedom of speech. Free speech zones are defined as small areas that the campus sets aside as the sole places where individuals or groups are permitted to engage in First Amendment activity. There are none on NDUS campuses. This problem does not exist.



To the knowledge of the System Office, our campuses have not encountered any substantiated cases of restrictions being placed on free speech that point to the need for a law to replace what has proven highly effective. We have had no speakers shouted down, no visitors assaulted, no “disinvited” speakers, and no student lawsuits. Certainly, there have been and continues to be media attention on free speech. Like the bill’s sponsors, we are greatly concerned by anything that limits the free exchange of ideas. However, I would urge the legislature to not generalize from nationally publicized cases as to what is happening at public colleges and universities in North Dakota. No one can ignore that free speech has become a problem at some institutions in the U.S., but it does not follow that our institutions will follow that same path.

It is clear that the bill’s sponsors and others have a desire to see greater protections of free speech at the institutions under the control of the SBHE. The NDUS is beginning a process of reviewing its free speech policies and would welcome the input of all interested parties—students, student organizations, faculty, and any outside organizations. We expect the result of this process to be a strong policy that provides a greater level of specific protection for free speech, including as regards student-on-student harassment, open versus non-public spaces, academic freedom, and content-neutral, viewpoint-neutral criteria for determining responsibility for the costs of hosting events and invited guests.

Free speech law is an ever-changing and deepening area of law. Every year the parameters of the First Amendment are further defined by court decisions across the country. We are concerned that by moving the specific definitions included in the bill into Century Code, the SBHE and its institutions would be unable to respond as rapidly to the everchanging environment of campus free speech. By moving much of the bill’s provisions into policy, the University System can more quickly respond to changing case law and issues that arise in the educational environment. The alternative is spending as much as 18-20 months in violation of the First Amendment waiting for the next legislative session to revise the requirements of North Dakota Century Code.

That said, if the Committee prefers to proceed with this bill as written there are four key areas for which the NDUS seeks specific amendments.

Student-on-Student Harassment

The first is regarding the definition of “student-on-student harassment” which is defined in SB2320 as “unwelcome conduct directed toward an individual which is discriminatory on a basis prohibited by federal, state, or local law, and is so severe, pervasive, and objectively offensive it effectively bars the victim’s access to an education opportunity or benefit.” As written, the bill would force institutions to adopt a policy that is in violation of Title IX along with potentially

Title VI and Title VII of the Civil Rights Act. The current guidance from the Department of Education instructing campuses in how to respond to Title IX complaints would fall outside the actions permitted by this bill. Additionally, as written, the institutions which comprise the University System would be barred from taking action to stop criminal harassment or stalking based on the definitions set forth in Century Code. This limitation arises from the bill's requirement that the actions in question must be discriminatory before the institution can take action. By limiting the institution's ability to intervene in conduct that rises to the level of being "severe, pervasive, and objectively offensive," the bill prohibits campuses from taking action during a period of escalation and early intervention.

Academic Freedom – Faculty

Long standing guidance from the American Association of University Professors (AAUP) and other professional organizations have served to protect faculty academic freedom and free speech. The bill seeks to limit the topics on which faculty would be entitled to discuss in class which would require the institutions to police and censor faculty lessons plans to ensure that faculty closely abide by the express subject matter of each class. There is a concern that these limitations would violate faculty free speech rights because faculty are afforded broader leeway under First Amendment law than other employees.

The bill would also place institutions in an impossible position because it would grant students the ability to sue the institution for even momentary expressions of political or other opinion by faculty unrelated to their subject area; however, institutions are barred from taking any action against faculty who veer into subjects outside areas of their competence unless that digression "comprises a substantial portion of classroom instruction."

Fees

As written, the bill prohibits the institution from charging the student organization security fees based on the content of the speech of the guest speakers or the anticipated reaction or opposition of the listeners, and we support restrictions on such content-based actions. However, the system's firm belief in this principle does not mean that institutions would not incur significant unbudgeted costs as a result of student groups inviting guest speakers to campus, and the bill would not require the institution to subsidize those speakers. To clarify this concern, the NDUS instead seeks to clarify that institutions may use non-content-based factors to assess anticipated security costs. The NDUS proposes language in the accompanying amendments that stipulate that "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....that institutions may, in their discretion, impose



security and logistic fees based on venue, anticipated attendance, anticipated protest activity, and other non-content-based factors...and that objective criteria for calculating such fees shall be made publicly available in advance of their use.” Lastly, the NDUS suggests additional language indicating that institutions may make their facilities available to guest speakers or groups invited by students, faculty, or student organizations using the same terms and conditions governing use of the facilities for other outside groups and should be made equally available to all speakers or groups.

Cause of Action

The bill, as written, grants every student the right to file a lawsuit against an institution if that institution violates any of the numerous and detailed provisions set forth in the bill. If that student prevails in their lawsuit, this bill requires the institution to pay between \$1,000 - \$100,000 to the student. The campus would then also have to pay the student’s attorney fees. This would be a gift to trial lawyers who would have no incentive to limit their fees because they know that the taxpayers will be paying in the end. This potentially subjects institutions and North Dakota taxpayers to functionally unlimited liability and even if an institution follows the law perfectly, it would be forced to defend against meritless lawsuits. This part of the bill is particularly concerning where students already have two avenues to pursue if they contend that their First Amendment rights have been violated. First, they can file a complaint with their campus and seek policy changes to ensure that the alleged violation does not reoccur. Second, they can file a federal lawsuit under federal civil rights laws which also grant the ability to seek damages. The bill’s creation of a new, expensive means for students to seek compensation from their institutions is redundant and unnecessary.

As currently written, I respectfully recommend a “do not pass” on SB2320 and wish to convey the willingness of our office to work with this Committee and others to provide additional guidance to the campuses of the University System. I stand for questions from the Committee.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2320

Page 1, Line 13, remove “ample”

Page 1, Line 14, remove “to its intended audience”

Page 1, Line 20, after “managerial” insert “unless such an individual also teaches one or more credit hour”

Page 2, Line 2, after “product or service” insert “except as incidental to the exercise of free speech”

Page 2, Line 5, after “means when” replace “a person knowingly or intentionally hinders significantly expressive activity of an individual or a group, prevents the communication of a message, or prevents the transaction of the business of a lawful meeting, gathering, or procession by engaging in fighting or violent or seriously disruptive behavior, or physically blocking or significantly hindering an individual from attending, listening to, viewing, or otherwise participating in an expressive activity. Conduct that “materially and substantially disrupts” does not include conduct protected under the First Amendment to the United States Constitution or section 4 of article I of the Constitution of North Dakota. Protected conduct includes lawful protests and counterprotests in the outdoor areas of campus generally accessible to the members of the public, except during times when the areas have been reserved in advance for other events, and minor, brief, or fleeting nonviolent disruptions of events which are isolated and short in duration” with “an individual or group takes knowing or intentional affirmative steps to limit the free speech of another individual or group, prevents the communication of a message, or disrupts a lawful meeting, gathering, or procession through violent or obstructive behavior. Protected conduct does not materially and substantially disrupt the free speech of another within the meaning of this chapter”

Page 2, Line 18, after “6.” Insert:

““Protected conduct” means free speech or free expression protected under the First Amendment to the United States Constitution or section 4 of article 1 of the Constitution of North Dakota, subject to constitutional time, place, and manner restrictions, permitting requirements under institutional policies or procedures, and the reasonable safety and security needs of the institution.

7.”

Page 2, Line 18, after “individual” replace “enrolled in a course of study at an institution” with “taking one or more courses offered by an institution”

Page 2, Line 20, after “which” replace “is discriminatory on a basis prohibited by federal, state, or local law, and is so severe, pervasive, and objectively offensive it effectively bars the victim’s access to an educational opportunity or benefit” with “(1) a reasonable person would find offensive or defamatory and which does not constitute protected conduct, (2) constitutes conduct which violates North Dakota criminal laws prohibiting harassment, stalking, or similar behavior, or (3) 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 covering institutions)”

Page 2, Line 24, after “recognition” insert “by an institution”

Page 2, Line 24, after “comprised of” replace “admitted students receiving or seeking to receive benefits through the institution” with “students, whether or not that organization seeks or receives institutional funds”

Page 2, Line 27, remove “and enforce”

Page 3, Line 3, before the semicolon insert “and reasonable and constitutionally-recognized limitations”

Page 3, Line 13, after “free speech,” replace “including ideas the institution the institution finds offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrongheaded” with “unless a legitimate pedagogical reason exists to do so within the classroom or other educational setting, or if an accommodation is requested in light of a mental health or other medical concern (including, but not limited to, post-traumatic stress disorder)”

Page 3, Line 17, after the comma replace “however offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrongheaded those ideas may be to some students or faculty” with “regardless of content, except where there exists a legitimate pedagogical reason to do so within the classroom or other educational setting”

Page 3, remove lines 24 through 31 and replace with:

h. Faculty shall generally adhere to the 1940 Statement of Principles on Academic Freedom and Tenure adopted by the American Association of University Professors, which provides that “Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.” Notwithstanding, faculty shall not face discipline or other adverse employment action based on speech in the classroom unless such speech violates other institutional policy or procedure;

i. Institutions shall control the availability of campus spaces for free speech as follows:

- i. An institution shall maintain the generally accessible, open outdoor areas of campus as traditional public forums for free speech by students, faculty, student organizations, and members of the public, subject to 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 is anticipated to convey;
- ii. An institution may designate as restricted forums: (1) those areas inside buildings which have not otherwise been treated as traditional public forums; (2) residential areas of campus during early morning, evening, and overnight hours; (3) the area immediately surrounding an academic building during times when classes are held in that building; (4) areas which must be restricted due to safety or security concerns; (5) areas needed to ensure the unrestricted flow of pedestrian or vehicle traffic; and (6) areas surrounding building entrances and exits to provide for safe and convenient ingress and egress. Institutions may not designate an area of campus as a restricted forum in the absence of an educational, safety or security, or health-related reason, including 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 in such restricted forums based on content and viewpoint neutral criteria.
- iii. Institutions may close to free speech those areas of campus which are not designed or had been traditionally used as a traditional public forum.
- j. Students, faculty, and student organizations shall be permitted to invite guest speakers or groups to campus, and institutions may not bar such guest speakers based on the anticipated content or viewpoint of their speech or expression.
- k. 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. However, institutions are not required to subsidize the free speech and expression of students, faculty, student organizations, or their guests. As a result, institutions may, in their discretion, impose security and logistic 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 in advance of their use.

1. 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. “

Page 4, remove lines 1 through 28

Page 4, Line 30, remove “annually”

Page 5, Line 5, after “c.” insert “Annually”

Page 5, Line 9, after “does not” replace “enable an individual to engage in conduct that intentionally, materially, and substantially disrupts the expressive activity of another individual if the activity occurs in a campus space reserved for that activity under the exclusive use or control of a particular group” with “bar an institution from prohibiting materially and substantially disruptive conduct in closed forums, restricted forums, and traditional public forums if the traditional public forum had been reserved for the exclusive use of another student, faculty, or student organization”

Page 5, Line 15, replace “and no more expansively than” with “or substantially similar to”

Page 5, Line 19, after the period insert “Nothing in this chapter shall bar an institution from assessing security or logistics fees on students, faculty, or student organizations for their exercise of free speech or that of their guests based on content and viewpoint neutral criteria.”

Page 5, Line 24, before the semicolon insert “on the use of traditional public forums”

Page 5, Line 25, replace “nonpublic” with “restricted or closed forums”

Page 6, Line 2, after “faculty” insert “or the institution”

Page 6, remove lines 3-11

Renumber accordingly

SB 2320
2-6-19
AA #4
p.9 of 10

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

SUBJECT: ACADEMIC AFFAIRS

EFFECTIVE: May 11, 1984

Section: 401.1 Academic Freedom

1. The primary responsibility of the academic community is to provide for the enrichment of intellectual experience. Essential to the realization of this ideal is a free and open academic community which takes no ideological or policy position itself. The responsible academic community welcomes those who do take an ideological or policy position and jealously guards their right to do so. Conflict of ideas cannot occur unless there is opportunity for a variety of viewpoints to be expressed. Toleration of what may be error is an inescapable condition of the meaningful pursuit of truth. The academic community must be hospitable even to closed minds and it must welcome the conflict of ideas likely to ensue. Academic responsibility to provide opportunity for expression of diverse points of view generates academic freedom.
2. Faculty members are entitled to full freedom in research and in the publication of results, subject to the adequate performance of their other academic duties. They are also entitled to freedom in lecturing or conducting demonstrations in their subject or field of competence. They are entitled as any other member of the community in which they live to establish membership in voluntary groups, seek or hold public office, express their opinions as individuals on public questions and act in accordance with their views. Cognizant of their responsibilities to their profession and to their institution, faculty accept certain obligations; they should attempt to be accurate, to exercise sound judgment and respect the rights of others to express opinions. They shall communicate that their actions, their statements and their memberships do not necessarily represent views of the academic community. If there are controls to be exercised over faculty members, they are the controls of personal integrity and the judgment of their colleagues.
3. Students are entitled to be taught by unfettered faculty members and to have access to all information pertinent to their subjects of study. They are entitled to as complete freedom as possible in the selection of their curriculum, teachers, and associates. Moreover, they have a right to intellectual disagreement with their instructors and associates and to question them without fear of recrimination or punishment. They also are entitled to seek the publication of their views, to seek membership in voluntary groups, to seek or hold public office, and to take lawful action in accordance with their views. Students also shall make clear that their actions, memberships, and statements do not represent the views of the academic community.
4. An institution by its very nature cannot pay lip service to the concept of freedom of expression and then deny persons with whom it is in disagreement the opportunity of giving expression to their views. Furthermore, a policy that extends the right of freedom of expression to some persons and denies that right to others, places the institution in the position of endorsing the past records and views of those who are given permission to speak. Therefore, a speaker, performer, or program may be presented under the sponsorship of any duly recognized student, faculty, or administrative organization or any individual officer of instruction. It is not

necessary that the point of view presented be congenial to the campus, members of the staff or student body individually, or to individual members of the wider community. The speaker must be accorded the courtesy of any uninterrupted presentation. Except for ceremonial occasions, speakers shall accept as a condition of their appearance the right of their audience to question or challenge statements made in their address. Questions must be permitted from the floor unless prevented by physical limitations, or the size of the audience. The invitation or scheduling of such a program must represent the desire of the institutional sponsor and not the will of external individuals or organizations. The sponsor must establish full responsibility for the program and should help to establish the concept that the point of view expressed in an address or performance does not necessarily represent the position of the academic community. Such presentations shall comply with all applicable federal, state, and local laws and regulations.

HISTORY: New policy, SBHE minutes, May 10-11, 1984 (replaces Article II, Section 4-A, pages II-15, 16); Revised by legal counsel, June 21, 2018.



Great Public Schools

Great Public Service

Testimony Before the Senate Education Committee

SB 2217

Wednesday, February 6, 2019

Good morning Chairman Schaible and members of the Senate Education Committee. For the record, my name is Tom Gerhardt and I'm here on behalf of the members of North Dakota United to recommend a DO NOT PASS recommendation on SB 2320 as written.

We find two areas of the bill particularly troublesome to our members. Section "i" and the final paragraph on page 6 of the bill—the Cause of Action. Let's start with section "i."

The language in "i" potentially stifles faculty members and is unclear. Where is the line drawn on "caution" when expressing personal views? What defines "careful" when a faculty member considers introducing a subject matter in class? The same question could be asked of the words "competence" and "authority" later in the sentence. We believe a classroom should be an open marketplace of ideas and not an environment where statements or questions need to meet a checklist of broad terms before they can be spoken. The bill does not directly address views shared through paths other than "discussion."

Section "i" is especially troubling when combined with the Cause of Action paragraph which opens the possibility of legal action, attorney fees and compensatory damages. Among many questions, where would the money come from and what kind of financial liability could this be to the state? What kind of message does this send to current and potential faculty in terms of recruitment and retention?

Though perhaps unintended, this bill creates an atmosphere that could muffle a learning environment instead of allowing it to flourish through ardent questioning and thought from a variety of perspectives.

We have heard from concerned members who believe to their core in the principles of free and informed conversations in classrooms. They conclude this bill will have a chilling effect on academic thought as well as produce incentives for bad actors to seek costly legal remedies to silence opinions and individuals they disagree with.

You may ask where is the proper arena to take up potential problems or issues asked in this bill? My answer would be to start with the local institutions and the State Board of Higher Education. Protocols and procedures are already in place and if potential changes need to be considered I believe you will find the institutions and the board open to conversations. We don't need this in state statute.

For these reasons I ask this Committee to forward a DO NOT PASS recommendation for SB 2320.

Chairman Schaible and members of the Committee, I'm grateful for your time and would stand for any questions.

SB 2320
2-6-19
Att. #6
p1 of 1



SR 02-1819

A resolution concerning the opposition of proposed North Dakota Legislation Senate Bill 2320.

WHEREAS, the North Dakota State College of Science (NDSCS) Student Senate is the voice of the over 2,900 students enrolled at NDSCS, and

WHEREAS, the NDSCS Student Senate supports creating and maintaining a positive college experience for all students,

WHEREAS, the NDSCS Student Senate supports the first amendment right of all students and employees,

WHEREAS, the NDSCS Student Senate is in favor of the college providing a safe learning environment, by the continued implementation of free speech restrictions,

THEREFORE, keeping our environment free from disruptive displays that may interrupt student learning or college business,

BE IT RESOLVED, That the NDSCS Student Senate recommends the North Dakota 66th Legislative Assembly places a do not pass recommendation on Senate Bill 2320,

Respectfully Submitted on Behalf of the NDSCS Student Senate,

Brayden Lampe

President, NDSCS Student Senate

February 11, 2019

SB 2320
2-11-19
AH #1
p1 of 2

PROPOSED AMENDMENTS TO SENATE BILL NO. 2320

Page 1, line 2, remove the semicolon

Page 1, line 3, remove "and to provide a penalty"

Page 1, line 13, remove "ample"

Page 1, line 14, remove "to its intended audience"

Page 1, line 15, remove "or "faculty member""

Page 1, line 20, replace "individuals" with "an individual"

Page 1, line 20, after "managerial" insert ", unless the individual also teaches at least one credit-hour"

Page 2, line 2, after "service" insert ", unless the promotion, sale, or distribution of the product or service is incidental to the exercise of free speech"

Page 2, line 5, remove ""Materially and substantially disrupts" means when a person knowingly or intentionally"

Page 2, remove lines 6 through 17

Page 2, line 18, remove "6."

Page 2, line 18, replace "a course of study at the institution" with "at least one course offered by an institution"

Page 2, remove lines 19 through 22

Page 2, line 23, replace "8." with "6."

Page 2, line 27, remove "1."

Page 2, line 27, remove "and enforce a"

Page 2, remove lines 28 and 29

Page 3, remove lines 1 through 31

Page 4, remove lines 1 through 30

Page 5, remove lines 1 through 30

Page 6, replace lines 1 through 11 with "a policy that:

1. Protects students' rights to free speech, assembly, and expression;
2. Permits institutions to establish and enforce reasonable and constitutional time, place, and manner restrictions on free speech, assembly, and expression;

3. Permits students, faculty, or student organizations to invite guest speakers or groups to present regardless of the viewpoint or content of the anticipated speech of the guest speaker or group; and
4. Protects the academic freedom and free speech rights of faculty while adhering to guidelines established by the American association of university professors."

Renumber accordingly

To: Chair Schaible and Members of the Senate Education Committee
From: Lisa A. Johnson, North Dakota University System
Date: February 8, 2019
Re: Committee Request for Five Years of Data – Free Speech Complaints

The following is the number of complaints, the number of substantiated complaints, and the number of days to respond or resolve each complaint for the for the period of 2014-2018. There are no pending complaints as of this date.

Institution Name	Number of Complaints Received Related to an Alleged Violation of Free Speech/First Amendment Rights.	Number of Substantiated Complaints Related a Violation of Free Speech/First Amendment Rights.	Number of days or months to resolve each complaint.	Comments
Bismarck State College	0	0	NA	NA
Dakota College at Bottineau	0	0	NA	NA
Dickinson State University	0	0	NA	NA
Lake Region State College	0	0	NA	NA
Mayville State University	0	0	NA	NA
Minot State University	0	0	NA	NA
North Dakota State College of Science	0	0	NA	NA
North Dakota State University	0	0	Informal concerns are generally addressed within 1 day, but at most a few days.	NDSU has received no formal complaints related to its policies for free speech/first amendment rights. NDSU receives approximately 1 informal complaint/concern per year regarding these policies. NDSU works with the student or student organization to resolve their concerns. No student or student organization has been denied the opportunity for their expressive activity that we can recall.
University of North Dakota	0	0	NA	NA
Valley City State University	0	0	NA	NA
Williston State College	0	0	NA	NA

Introduced by

Senators Holmberg, Davison

Representatives Becker, K. Koppelman, Mock, Schreiber-Beck

- 1 A BILL for an Act to create and enact chapter 15-10.4 of the North Dakota Century Code,
2 relating to free speech at institutions under the control of the state board of higher education;
3 ~~and to provide a penalty.~~

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1.** Chapter 15-10.4 of the North Dakota Century Code is created and enacted as
6 follows:

7 **15-10.4-01. Definitions.**

8 As used in this chapter:

- 9 1. "Constitutional time, place, and manner restrictions" means restrictions on the time,
10 place, and manner of free speech which do not violate the First Amendment to the
11 United States Constitution or section 4 of article I of the Constitution of North Dakota
12 and which are reasonable, content- and viewpoint-neutral, and narrowly tailored to
13 satisfy a significant institutional interest, and leave open ample alternative channels for
14 the communication of the information or message to its intended audience.
- 15 2. "Faculty" or "faculty member" means an individual, regardless of whether the
16 individual is compensated by an institution, and regardless of political affiliation, who is
17 tasked with providing scholarship, academic research, or teaching, including tenured
18 and nontenured professors, adjunct professors, visiting professors, lecturers, graduate
19 student instructors, and those in comparable positions. "Faculty" does not mean
20 individuals an individual whose primary responsibilities are administrative or
21 managerial unless the individual also teaches at least one credit-hour.
- 22 3. "Free speech" means speech, expression, and assemblies protected by the First
23 Amendment to the United States Constitution or section 4 of article I of the
24 Constitution of North Dakota, including all forms of peaceful assembly, protests,

- 1 demonstrations, rallies, vigils, marches, public speaking, distribution of printed
2 materials, carrying signs, displays, or circulating petitions. "Free speech" does not
3 include the promotion, sale, or distribution of a product or service, unless the
4 promotion, sale, or distribution of the product or service is incidental to the exercise of
5 free speech.
- 6 4. "Institution" means an institution under the control of the state board of higher
7 education.
- 8 5. "Materially and substantially disrupts" means when a person knowingly or intentionally
9 hinders significantly expressive activity of an individual or a group, prevents the
10 communication of a message, or prevents the transaction of the business of a lawful
11 meeting, gathering, or procession by engaging in fighting or violent or seriously
12 disruptive behavior, or physically blocking or significantly hindering an individual from
13 attending, listening to, viewing, or otherwise participating in an expressive activity.
14 Conduct that "materially and substantially disrupts" does not include conduct protected
15 under the First Amendment to the United States Constitution or section 4 of article I of
16 the Constitution of North Dakota. Protected conduct includes lawful protests and
17 counterprotests in the outdoor areas of campus generally accessible to the members
18 of the public, except during times when the areas have been reserved in advance for
19 other events, and minor, brief, or fleeting nonviolent disruptions of events which are
20 isolated and short in duration.
- 21 ~~6.~~ "Student" means an individual enrolled in a course of study at the institution at least
22 one course offered by an institution.
- 23 ~~7.~~ "Student on student harassment" means unwelcome conduct directed toward an
24 individual which is discriminatory on a basis prohibited by federal, state, or local law,
25 and is so severe, pervasive, and objectively offensive it effectively bars the victim's
26 access to an educational opportunity or benefit.
- 27 ~~8.6.~~ "Student organization" means an officially recognized organization at an institution, or
28 an organization seeking official recognition, comprised of admitted students receiving
29 or are seeking to receive benefits through the institution.

1 **15-10.4-02. Adoption of campus free speech policy.**

2 ~~1. The state board of higher education and each institution shall adopt and enforce a policy~~
3 ~~affirming the following principles of free speech:~~

4 ~~a. Students have a fundamental, constitutional right to free speech;~~

5 ~~b. An institution shall be committed to giving students the broadest possible latitude to~~
6 ~~speak, write, listen, challenge, learn, and discuss any issue, subject to the exceptions~~
7 ~~in sections 15-10.4-03 and 15-10.4-05;~~

8 ~~c. An institution shall be committed to maintaining a campus as a marketplace of ideas~~
9 ~~for all students and faculty in which the free exchange of ideas is not to be suppressed~~
10 ~~because the ideas put forth are thought by some or even most members of the~~
11 ~~institution's community to be offensive, unwise, immoral, indecent, disagreeable,~~
12 ~~conservative, liberal, traditional, radical, or wrongheaded;~~

13 ~~d. An institution's individual students and faculty may make judgments about ideas for~~
14 ~~themselves and act on those judgments not by seeking to suppress free speech, but~~
15 ~~by openly and vigorously contesting ideas the students and faculty oppose;~~

16 ~~e. An institution may not attempt to shield individuals from free speech, including~~
17 ~~ideas the institution finds offensive, unwise, immoral, indecent, disagreeable,~~
18 ~~conservative, liberal, traditional, radical, or wrongheaded;~~

19 ~~f. An institution's concerns about civility and mutual respect may not be used by an~~
20 ~~institution as a justification for limiting or restricting the discussion of ideas,~~
21 ~~however offensive, unwise, immoral, indecent, disagreeable, conservative,~~
22 ~~liberal, traditional, radical, or wrongheaded those ideas may be to some students~~
23 ~~or faculty;~~

24 ~~g. An institution shall be committed to providing an atmosphere most conducive to~~
25 ~~speculation, experimentation, and creation by all students and faculty so students~~
26 ~~and faculty are free to inquire, study, evaluate, and gain new understanding;~~

27 ~~h. The primary responsibility of faculty is to engage in honest, courageous, and~~
28 ~~persistent efforts to seek and communicate truth in the areas of the faculty's~~
29 ~~competence;~~

30 ~~i. Although faculty members are free in the classroom to discuss subjects within~~
31 ~~their areas of competence, faculty members should be cautious in expressing~~

1 ~~personal views in the classroom and careful not to introduce matters that have no~~
2 ~~relationship to the subject taught, especially matters in which the faculty~~
3 ~~members have no special competence or training and for which the views of the~~
4 ~~faculty members lack the authority accorded to statements about subjects within~~
5 ~~areas of their competence. However, a faculty member may not face adverse~~
6 ~~employment action for classroom speech unless the speech is not reasonably~~
7 ~~germane to the subject matter of the class as broadly construed and comprises a~~
8 ~~substantial portion of classroom instruction;~~

9 ~~j. An institution shall maintain the generally accessible, open, outdoor areas of its~~
10 ~~campus as traditional public forums for free speech by students, faculty, and~~
11 ~~invited guests;~~

12 ~~k. An institution may not restrict students free speech to particular areas of campus,~~
13 ~~sometimes known as "free speech zones";~~

14 ~~l. An institution may not deny student activity fee funding to a student organization~~
15 ~~based on the viewpoints the student organization advocates;~~

16 ~~m. An institution may not establish permitting requirements prohibiting spontaneous~~
17 ~~outdoor assemblies or outdoor distribution of literature. An institution may~~
18 ~~maintain a policy granting members of the college or university community the~~
19 ~~right to reserve certain outdoor spaces in advance;~~

20 ~~n. An institution may not charge students or student organizations security fees~~
21 ~~based on the content of the student's or student organization's speech, the~~
22 ~~content of the speech of guest speakers invited by students, or the anticipated~~
23 ~~reaction or oppositions of listeners to speech;~~

24 ~~o. An institution shall allow all students, student organizations, and faculty to invite~~
25 ~~guest speakers to campus to engage in free speech regardless of the views of~~
26 ~~the guest speakers; and~~

27 ~~p. An institution may not disinvite a speaker invited by a student, student~~
28 ~~organization, or faculty member because the speaker's anticipated speech may~~
29 ~~be considered offensive, unwise, immoral, indecent, disagreeable, conservative,~~
30 ~~liberal, traditional, radical, or wrongheaded by students, faculty, administrators,~~
31 ~~government officials, or members of the public.~~

- 1 ~~2. Each institution shall make the policy the institution adopted pursuant to subsection 1~~
- 2 ~~available to students and faculty by annually:~~
- 3 ~~a. Publishing the policy in the institution's handbook and faculty handbook, whether~~
- 4 ~~paper or electronic;~~
- 5 ~~b. Posting a prominent notice on the institution's internet site other than through the~~
- 6 ~~electronic publication of the policy in the student handbook and faculty handbook;~~
- 7 ~~c. Sending the policy to the institutionally provided electronic mail addresses of~~
- 8 ~~students and faculty; or~~
- 9 ~~d. Addressing the policy in the institution's orientation programs for new students~~
- 10 ~~and new faculty.~~
- 11 ~~3. This chapter does not enable an individual to engage in conduct that intentionally,~~
- 12 ~~materially, and substantially disrupts the expressive activity of another individual if the~~
- 13 ~~activity occurs in a campus space reserved for that activity under the exclusive use or~~
- 14 ~~control of a particular group.~~
- 15 ~~15-10.4-03. Student on student harassment.~~
- 16 ~~Each institution shall adopt a policy on "student on student harassment" defining the term~~
- 17 ~~consistent with and no more expansively than the definition in section 15-10.4-01.~~
- 18 ~~15-10.4-04. Costs associated with speech.~~
- 19 ~~This chapter does not require an institution to fund costs associated with student speech or~~
- 20 ~~expression. An institution may not impose costs on students or student organizations on the~~
- 21 ~~basis of the anticipated reaction or opposition to a person's speech by listeners.~~
- 22 ~~15-10.4-05. Permissible restrictions on campus speech.~~
- 23 ~~This chapter does not prohibit an institution from imposing measures that do not violate the~~
- 24 ~~First Amendment to the United States Constitution or section 4 of article I of the Constitution of~~
- 25 ~~North Dakota including:~~
- 26 ~~1. Constitutional time, place, and manner restrictions;~~
- 27 ~~2. Reasonable and viewpoint neutral restrictions in nonpublic forums;~~
- 28 ~~3. Prioritizing the use of the institution's resources and property for students and faculty~~
- 29 ~~above requests from groups or individuals not affiliated with the institution;~~

- 1 ~~4. Prohibiting or limiting speech, expression, or assemblies not protected by the First~~
- 2 ~~Amendment to the United States Constitution or section 4 of article I of the~~
- 3 ~~Constitution of North Dakota; or~~
- 4 ~~5. Content restrictions on speech reasonably related to a legitimate pedagogical~~
- 5 ~~purpose, including classroom rules enacted by faculty.~~
- 6 ~~15.10.4-06. Cause of action.~~
- 7 ~~The attorney general or a person whose expressive rights are violated by an action~~
- 8 ~~prohibited under this chapter may bring an action in a court of competent jurisdiction to recover~~
- 9 ~~compensatory damages, reasonable court costs, and attorney fees. If the court finds a violation~~
- 10 ~~of this chapter occurred, the court shall award the aggrieved party a minimum of one thousand~~
- 11 ~~dollars. Excluding reasonable court costs and attorney fees, the total compensatory damages~~
- 12 ~~available to a plaintiff in a case arising from a single violation of this section may not exceed one~~
- 13 ~~hundred thousand dollars. If there are multiple plaintiffs, the court shall divide the damages~~
- 14 ~~equally among the plaintiffs until the maximum award is exhausted.~~~~a policy that:~~
- 15 ~~1. Protects students' rights to free speech, assembly, and expression;~~
- 16 ~~2. Permits institutions to establish and enforce reasonable and constitutional time, place,~~
- 17 ~~and manner restrictions on free speech, assembly, and expression;~~
- 18 ~~3. Permits students, faculty, or student organizations to invite guest speakers or groups~~
- 19 ~~to present regardless of the viewpoint or content of the anticipated speech of the guest~~
- 20 ~~speaker or group; and~~
- 21 ~~4. Protects the academic freedom and free speech rights of faculty while adhering to~~
- 22 ~~guidelines established by the American association of university professors.~~

SB 2320
3-26-19
#1

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FIRST ENGROSSMENT

Sixty-sixth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2320

Introduced by

Senators Holmberg, Davison

Representatives Becker, K. Koppelman, Mock, Schreiber-Beck

- 1 A BILL for an Act to create and enact chapter 15-10.4 of the North Dakota Century Code,
2 relating to free speech at institutions under the control of the state board of higher education;
3 and to provide a penalty.

4 BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

- 5 SECTION 1. Chapter 15-10.4 of the North Dakota Century Code is created and enacted as
6 follows:

7 15-10.4-01. Definitions.

8 As used in this chapter:

- 9 1. "Constitutional time, place, and manner restrictions" means restrictions on the time,
10 place, and manner of free speech which do not violate the First Amendment to the
11 United States Constitution or section 4 of article I of the Constitution of North Dakota
12 and which are reasonable, content- and viewpoint-neutral, and narrowly tailored to
13 satisfy a significant institutional interest, and leave open alternative channels for the
14 communication of the information or message.
- 15 2. "Faculty" means an individual, regardless of whether the individual is compensated by
16 an institution, and regardless of political affiliation, who is tasked with providing
17 scholarship, academic research, or teaching, including tenured and nontenured
18 professors, adjunct professors, visiting professors, lecturers, graduate student
19 instructors, and those in comparable positions. "Faculty" does not mean an individual
20 whose primary responsibilities are administrative or managerial, unless the individual
21 also teaches at least one credit-hour.
- 22 3. "Free speech" means speech, expression, and assemblies protected by the First
23 Amendment to the United States Constitution or section 4 of article I of the
24 Constitution of North Dakota, including all forms of peaceful assembly, protests,

1 demonstrations, rallies, vigils, marches, public speaking, distribution of printed
2 materials, carrying signs, displays, or circulating petitions. "Free speech" does not
3 include the promotion, sale, or distribution of a product or service, unless the
4 promotion, sale, or distribution of the product or service is incidental to the exercise of
5 free speech.

6 4. "Institution" means an institution under the control of the state board of higher
7 education.

8 5. "Student" means an individual enrolled in at least one course offered by an institution.

9 6. "Student organization" means an officially recognized organization at an institution, or
10 an organization seeking official recognition, comprised of admitted students receiving
11 or are seeking to receive benefits through the institution.

12 **15-10.4-02. Adoption of campus free speech policy.**

13 The state board of higher education and each institution shall adopt a policy that:

14 1. Protects students' rights to free speech, assembly, and expression;

15 2. Permits institutions to establish and enforce reasonable and constitutional time, place,
16 and manner restrictions on free speech, assembly, and expression;

17 3. Permits students, faculty, or student organizations to invite guest speakers or groups
18 to present regardless of the viewpoint or content of the anticipated speech of the guest
19 speaker or group; and

20 ~~4. Protects the academic freedom and free speech rights of faculty while adhering to~~
21 ~~guidelines established by the American association of university professors; and~~

22 4. Complies with the following principles of free speech:

23 a. An institution shall maintain the generally accessible, open, outdoor areas of its
24 campus as traditional public forums for free speech by students, faculty, and
25 invited guests;

26 b. An institution may not restrict students' free speech to particular areas of campus,
27 sometimes known as "free speech zones";

28 c. An institution may not deny student activity fee funding to a student organization
29 based on the viewpoints the student organization advocates;

30 d. An institution may not establish permitting requirements prohibiting spontaneous
31 outdoor assemblies or outdoor distribution of literature. An institution may

Sixty-sixth
Legislative Assembly

1 maintain a policy granting members of the college or university community the
2 right to reserve certain outdoor spaces in advance;

3 e. An institution may not charge students or student organizations security fees
4 based on the content of the student's or student organization's speech, the
5 content of the speech of guest speakers invited by students, or the anticipated
6 reaction or oppositions of listeners to speech;

7 f. An institution shall allow all students, student organizations, and faculty to invite
8 guest speakers to campus to engage in free speech regardless of the views of
9 the guest speakers or the viewpoint or content of the anticipated speech; and

10 g. An institution may not disinvite a speaker invited by a student, student
11 organization, or faculty member because the speaker's anticipated speech may
12 be considered offensive, unwise, immoral, indecent, disagreeable, conservative,
13 liberal, traditional, radical, or wrongheaded by students, faculty, administrators,
14 government officials, or members of the public.

15 **15-10.4-03. Cause of action.**

16 The attorney general or a person whose expressive rights are violated by an action that is
17 not compliant with the policy provisions required under subsection 4 of section 15-10.4-02, may
18 bring an action in a court of competent jurisdiction to recover compensatory damages and
19 reasonable court costs and attorney's fees. If the court finds a violation of the policy provisions
20 required under subsection 4 of section 15-10.4-02 occurred, the court shall award the aggrieved
21 party a minimum of one thousand dollars. Excluding reasonable court costs and attorney's fees,
22 the total compensatory damages in a case arising under this section from a single violation may
23 not exceed one hundred thousand dollars, regardless of the number of plaintiffs awarded
24 damages. If there are multiple plaintiffs in an action under this section, the court shall divide any
25 compensatory damages equally among the plaintiffs.

Sixty-sixth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2320

Introduced by

Senators Holmberg, Davison

Representatives Becker, K. Koppelman, Mock, Schreiber-Beck

1 A BILL for an Act to create and enact chapter 15-10.4 of the North Dakota Century Code,
2 relating to free speech at institutions under the control of the state board of higher education;
3 and to provide a penalty.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1.** Chapter 15-10.4 of the North Dakota Century Code is created and enacted as
6 follows:

7 **15-10.4-01. Definitions.**

8 As used in this chapter:

- 9 1. "Constitutional time, place, and manner restrictions" means restrictions on the time,
10 place, and manner of free speech which do not violate the First Amendment to the
11 United States Constitution or section 4 of article I of the Constitution of North Dakota
12 and which are reasonable, content- and viewpoint-neutral, and narrowly tailored to
13 satisfy a significant institutional interest, and leave open alternative channels for the
14 communication of the information or message.
- 15 2. "Faculty" means an individual, regardless of whether the individual is compensated by
16 an institution, and regardless of political affiliation, who is tasked with providing
17 scholarship, academic research, or teaching, including tenured and nontenured
18 professors, adjunct professors, visiting professors, lecturers, graduate student
19 instructors, and those in comparable positions. "Faculty" does not mean an individual
20 whose primary responsibilities are administrative or managerial, unless the individual
21 also teaches at least one credit-hour.
- 22 3. "Free speech" means speech, expression, and assemblies protected by the First
23 Amendment to the United States Constitution or section 4 of article I of the
24 Constitution of North Dakota, including all forms of peaceful assembly, protests,

demonstrations, rallies, vigils, marches, public speaking, distribution of printed materials, carrying signs, displays, or circulating petitions. "Free speech" does not include the promotion, sale, or distribution of a product or service, unless the promotion, sale, or distribution of the product or service is incidental to the exercise of free speech.

4. "Institution" means an institution under the control of the state board of higher education.

5. "Student" means an individual enrolled in at least one course offered by an institution.

6. "Student organization" means an officially recognized organization at an institution, or an organization seeking official recognition, comprised of admitted students receiving or are seeking to receive benefits through the institution.

15-10.4-02. Adoption of campus free speech policy.

The state board of higher education and each institution shall adopt a policy that:

1. Protects students' rights to free speech, assembly, and expression;

2. Permits institutions to establish and enforce reasonable and constitutional time, place, and manner restrictions on free speech, assembly, and expression;

~~3. Permits students, faculty, or student organizations to invite guest speakers or groups to present regardless of the viewpoint or content of the anticipated speech of the guest speaker or group; and~~

~~4. Protects the academic freedom and free speech rights of faculty while adhering to guidelines established by the American association of university professors; and~~

4. Complies with the following principles of free speech:

a. An institution shall maintain the generally accessible, open, outdoor areas of its campus as traditional public forums for free speech by students, faculty, and invited guests;

b. An institution may not restrict students' free speech to particular areas of campus, sometimes known as "free speech zones";

c. An institution may not deny student activity fee funding to a student organization based on the viewpoints the student organization advocates;

d. An institution may not establish permitting requirements prohibiting spontaneous outdoor assemblies or outdoor distribution of literature. An institution may

1 maintain a policy granting members of the college or university community the
2 right to reserve certain outdoor spaces in advance;

3 e. An institution may not charge students or student organizations security fees
4 based on the content of the student's or student organization's speech, the
5 content of the speech of guest speakers invited by students, or the anticipated
6 reaction or oppositions of listeners to speech;

7 f. An institution shall allow all students, student organizations, and faculty to invite
8 guest speakers to campus to engage in free speech regardless of the views of
9 the guest speakers or the viewpoint or content of the anticipated speech; and

10 g. An institution may not disinvite a speaker invited by a student, student
11 organization, or faculty member because the speaker's anticipated speech may
12 be considered offensive, unwise, immoral, indecent, disagreeable, conservative,
13 liberal, traditional, radical, or wrongheaded by students, faculty, administrators,
14 government officials, or members of the public.

15 **15-10.4-03. Cause of action.**

16 The attorney general or a person whose expressive rights are violated by an action that is
17 not compliant with the policy provisions required under subsection 4 of section 15-10.4-02, may
18 bring an action in a court of competent jurisdiction to recover compensatory damages and
19 reasonable court costs and attorney's fees. If the court finds a violation of the policy provisions
20 required under subsection 4 of section 15-10.4-02 occurred, the court shall award the aggrieved
21 party a minimum of one thousand dollars. Excluding reasonable court costs and attorney's fees,
22 the total compensatory damages in a case arising under this section from a single violation may
23 not exceed twenty-five thousand dollars, regardless of the number of plaintiffs awarded
24 damages. If there are multiple plaintiffs in an action under this section, the court shall divide any
25 compensatory damages equally among the plaintiffs.

March 25, 2019

9B3320
3-26-19
#1

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2320

Page 1, line 2, after "education" insert "; and to provide a penalty"

Page 2, line 16, remove "Permits students, faculty, or student organizations to invite guest speakers or groups"

Page 2, remove lines 17 and 18

Page 2, line 19, remove "4."

Page 2, line 20, replace the underscored period with "," and

4. Complies with the following principles of free speech:

- a. An institution shall maintain the generally accessible, open, outdoor areas of its campus as traditional public forums for free speech by students, faculty, and invited guests;
- b. An institution may not restrict students' free speech to particular areas of campus, sometimes known as "free speech zones";
- c. An institution may not deny student activity fee funding to a student organization based on the viewpoints the student organization advocates;
- d. An institution may not establish permitting requirements prohibiting spontaneous outdoor assemblies or outdoor distribution of literature. An institution may maintain a policy granting members of the college or university community the right to reserve certain outdoor spaces in advance;
- e. An institution may not charge students or student organizations security fees based on the content of the student's or student organization's speech, the content of the speech of guest speakers invited by students, or the anticipated reaction or oppositions of listeners to speech;
- f. An institution shall allow all students, student organizations, and faculty to invite guest speakers to campus to engage in free speech regardless of the views of the guest speakers or the viewpoint or content of the anticipated speech; and
- g. An institution may not disinvite a speaker invited by a student, student organization, or faculty member because the speaker's anticipated speech may be considered offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrongheaded by students, faculty, administrators, government officials, or members of the public.

SB 2320
3-26-19
#1

15-10.4-03. Cause of action.

The attorney general or a person whose expressive rights are violated by an action that is not compliant with the policy provisions required under subsection 4 of section 15-10.4-02, may bring an action in a court of competent jurisdiction to recover compensatory damages and reasonable court costs and attorney's fees. If the court finds a violation of the policy provisions required under subsection 4 of section 15-10.4-02 occurred, the court shall award the aggrieved party a minimum of one thousand dollars. Excluding reasonable court costs and attorney's fees, the total compensatory damages in a case arising under this section from a single violation may not exceed twenty-five thousand dollars, regardless of the number of plaintiffs awarded damages. If there are multiple plaintiffs in an action under this section, the court shall divide any compensatory damages equally among the plaintiffs."

Renumber accordingly

SB 2320

3-26-19

#1

Noem, GOP target university 'political correctness' with first-of-its-kind diversity, speech law

Jonathan Ellis, Sioux Falls Argus Leader Published 7:57 p.m. CT March 20, 2019

South Dakota became the first state in the country to pass a law requiring its university system to promote intellectual diversity after Gov. Kristi Noem signed a bill into law Wednesday.

The measure also bars the South Dakota Board of Regents and the state's six public universities from interfering with constitutionally protected speech, including speech that some might find "offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical or wrong-headed."

"Our university campuses should be places where students leave their comfort zones and learn about competing ideas and perspectives," Noem said in a release. "I hope this bill lets the nation know that in South Dakota, we are teaching our next generation to debate important issues, work together to solve problems, and think independently."

The bill had the support of two national groups, the American Council of Trustees and Alumni, which promotes intellectual diversity, and the Foundation for Individual Rights in Education, a group that promotes free speech, association and religious liberty on college campuses.

"An act of this scale concerning academic freedom and intellectual diversity is unprecedented, and sets a strong example for leadership in other states," said Michael Poliakoff, president of ACTA.

The bill was introduced after Republican lawmakers probed the Board of Regents for more than a year about incidents related to whether students' free speech rights were being squelched by political correctness. Conservative groups have criticized colleges across the country following incidents in which conservative speakers were denied opportunities to speak, either by college administrators or angry protesters.

More: Revived after Hawaii Day controversy, free speech bill advances

In response to lawmaker questions about free speech and so-called "free speech zones," which limited where students had free speech rights, the board last fall passed new policies that guaranteed free speech on campuses.

But some lawmakers wanted those free speech rights, as well as the promotion of intellectual diversity, added to state law.

The bill passed the House but died in a Senate committee. However, lawmakers revived it after students at the University of South Dakota School of Law were asked to change the theme of a winter social from "Hawaiian Day" to "Beach Day" amid concerns that calling it Hawaiian was culturally insensitive. The students were also told by the administration not to hand out lei, traditional Hawaiian flower garlands, at the party.

"Free speech zones send the false and illiberal message that a student's First Amendment rights are dangerous, and should be constrained within tiny, pre-approved areas of

(9)

campus,” said FIRE Executive Director Robert Shibley. “We commend legislators in South Dakota for recognizing the critical importance of free speech to higher education, and encourage other states to follow their lead.”

SB2320
3-26-19
#1

More: USD president launches investigation into law school's 'Hawaiian Day' decision

The Board of Regents, which had opposed the bill, agreed to a compromise version signed by Noem.

More: USD regents back investigation into 'Hawaiian Day,' possible free speech policy violation

Besides promoting free speech, it requires each university to report each year what they did to promote intellectual diversity and the free exchange of ideas, and to describe instances in which intellectual diversity or the free exchange of ideas were impeded.

The intellectual diversity provision also had the backing of conservatives, who point to surveys showing that Democrats far outnumber Republicans among college faculty and administrators.

Read or Share this story: <https://www.argusleader.com/story/news/2019/03/20/gov-kristi-noem-gop-target-university-political-correctness-south-dakota-legislature-free-speech/3226155002/>



ACTA
AMERICAN COUNCIL OF
TRUSTEES AND ALUMNI

SB 2320
3-26-19
#1

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March 14, 2019

The Honorable Ray Holmberg
Senator
North Dakota Senate
621 High Plains Court
Grand Forks, ND 58201-7717

Dear Senator Holmberg:

I wanted to reach out to you in light of your recent work on SB2320. As a nonprofit organization committed to the preservation of academic freedom, excellence, and accountability, the American Council of Trustees and Alumni (ACTA) appreciates your efforts to safeguard free speech on campus. We share your sentiment that free speech, assembly, and expression are the lifeblood of both higher education, and our democracy.

In this spirit I'd like to offer our aid if there is any way we can be of assistance. For over 20 years, ACTA has worked with trustees and public officials across the country to ensure that all Americans can receive a high-quality education at an affordable price. We have testified before various state legislatures and commissions in states including Florida, New Jersey, Alaska, Georgia, Montana, Texas, and Pennsylvania, on matters such as curricular quality, academic assessment, and institutional accountability.

If there is anything we can do to help your efforts to support SB2320, or in any matter in the future, please do not hesitate to reach out to me directly at (202)-467-6787, or via email at AAlacbay@GoACTA.org.

We are immensely grateful for your commitment to American higher education, and I look forward to hearing from you in the future.

Sincerely,

Armand B. Alacbay
Vice President of Trustee & Government Affairs

PROMOTING ACADEMIC FREEDOM AND EXCELLENCE

1730 M Street NW, Suite 600 Washington, DC 20036

T (202) 467-6787; (888) ALUMNI-8 F (202) 467-6784 info@GoACTA.org www.GoACTA.org



SPOTLIGHT ON SPEECH CODES 2018

THE STATE OF FREE SPEECH
ON OUR NATION'S CAMPUSES



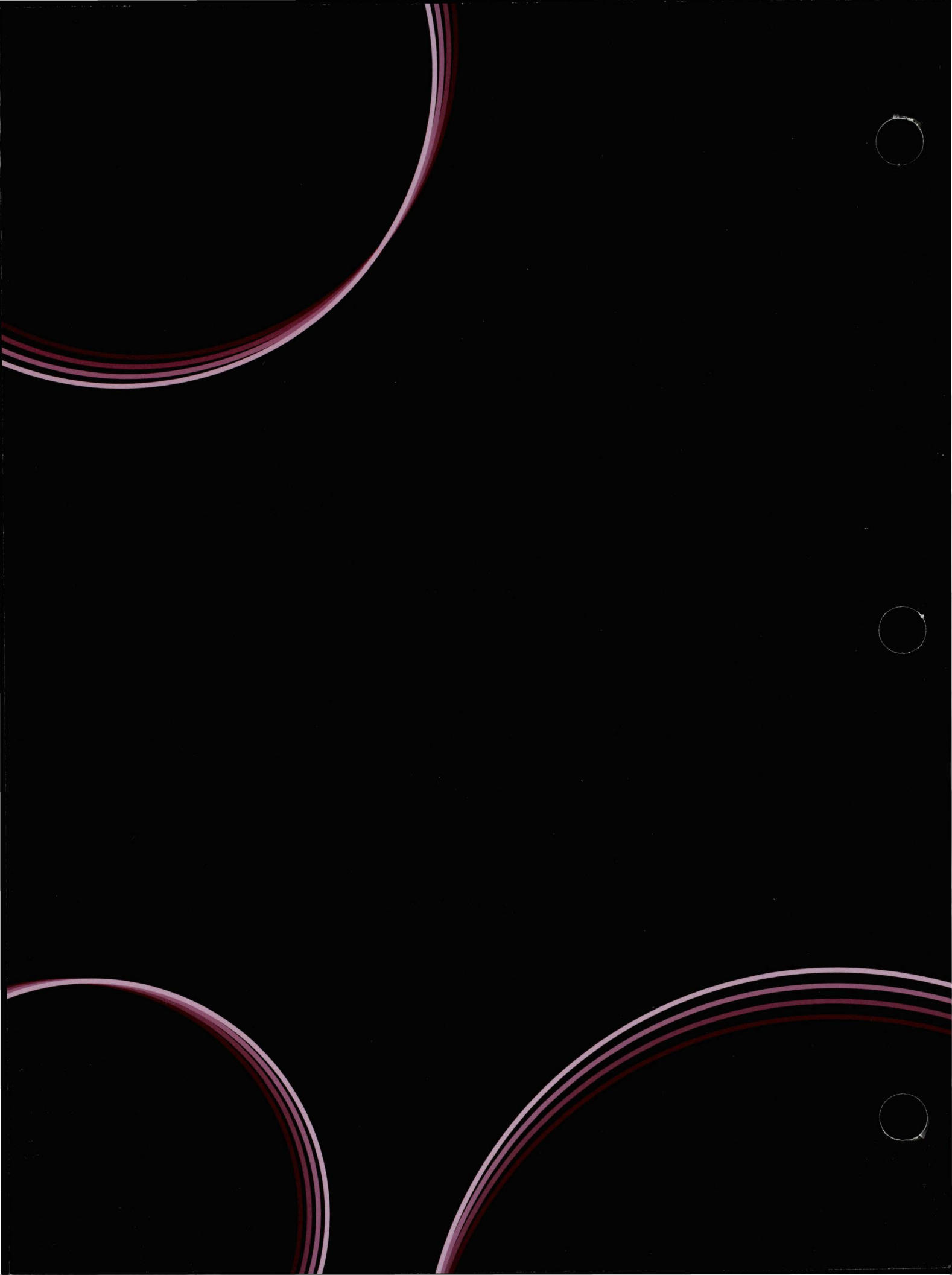


TABLE OF CONTENTS

SB 2320
3-26-19
2

4	EXECUTIVE SUMMARY
5	METHODOLOGY
6	FINDINGS
8	DISCUSSION
18	SPOTLIGHT ON: FIRST AMENDMENT LITIGATION
24	WHAT CAN BE DONE?
25	APPENDICES

EXECUTIVE SUMMARY

SB2320
3-26-19
#2

Despite the critical importance of free speech on campus, too many universities — in policy and in practice — chill, censor, and punish students’ and faculty members’ expressive activity. One way that universities do this is through the use of speech codes: policies prohibiting speech that, outside the bounds of campus, would be protected by the First Amendment.

Despite the continued decline in speech codes, however, free speech on campus remains under serious threat.

FIRE surveyed 461 colleges and universities for this report and found that just under one-third (32.3 percent) of those schools maintain severely restrictive, “red light” speech codes that clearly and substantially prohibit constitutionally protected speech. While even one speech code is too many, this is the tenth year in a row that the percentage

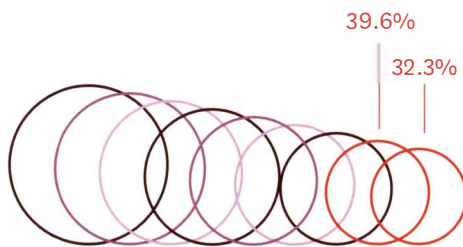
of red light schools has declined, and this year’s drop was more than seven percentage points. (Last year, 39.6 percent of schools earned a red light rating.)

serious threat. Student, faculty, and administrative demands for censorship of controversial or offensive speech are common, and an unacceptable number of universities continue to punish students and faculty for constitutionally protected speech and expression.

It is imperative, therefore, that those who care about free speech on campus continue to stay vigilant. The decrease in speech codes and the proliferation of free speech policy statements are the result of the relentless work of free speech advocates. We must keep up that work to avoid losing ground amid the current of hostility towards free speech that is very much alive on campus and elsewhere.

FIRE surveyed 461 schools and found that 32.3% maintain red light policies.

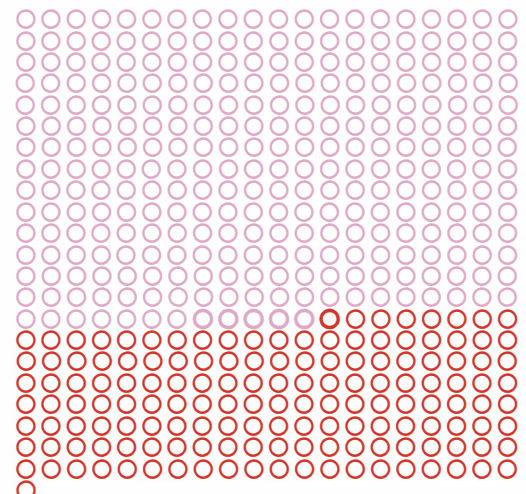
For the tenth year in a row, the percentage of red light schools has declined.



The majority of institutions surveyed (58.6 percent) earned a “yellow light” rating, which means their policies still chill or outright prohibit protected speech, albeit to a lesser degree than at a red light

institution. While the continued decline in red light institutions is cause for optimism, we will work in the coming years to make the number of yellow light institutions decline dramatically as well.

In the best news of all, an unprecedented number of schools have eliminated all of their speech codes to earn FIRE’s highest, “green light” rating: **As of September 2017, thirty-five schools received a green light rating from FIRE.** This number is up from twenty-seven schools as of last year’s



SB 2320
3-26-19
#2

FIRE surveyed publicly available policies at 357 four-year public institutions and at 104 of the nation's largest and/or most prestigious private institutions. Our research focuses in particular on public universities because, as explained in detail below, public universities are legally bound to protect students' right to free speech and can be successfully sued in court when they do not.

FIRE rates colleges and universities as "red light," "yellow light," or "green light" based on how much, if any, protected speech their written policies restrict. FIRE defines these terms as follows:



RED LIGHT: A red light institution is one that has at least one policy both clearly and substantially restricting freedom of speech, or that bars public access to its speech-related policies

by requiring a university login and password for access. A "clear" restriction is one that unambiguously infringes on protected expression. In other words, the threat to free speech at a red light institution is obvious on the face of the policy and does not depend on how the policy is applied. A "substantial" restriction on free speech is one that is broadly applicable to campus expression. For example, a ban on "offensive speech" would be a clear violation (in that it is unambiguous) as well as a substantial violation (in that it covers a great deal of what would be protected expression in the larger society). Such a policy would earn a university a red light.

When a university restricts access to its speech-related policies by requiring a login and password, it denies prospective students and their parents the ability to weigh this crucial information prior to matriculation. At FIRE, we consider this denial to be so deceptive and serious that it alone warrants a red light rating.



YELLOW LIGHT: A yellow light institution maintains policies that could be interpreted to suppress protected speech or policies that,

while clearly restricting freedom of speech, restrict relatively narrow categories of speech. For example, a policy banning "verbal abuse" has broad applicability and poses a substantial threat to free speech, but it is not a clear violation because "abuse" might refer to unprotected speech, such as threats of violence or unlawful harassment. Similarly, while a policy banning "posters promoting alcohol consumption" clearly restricts speech, it is relatively limited in scope. Yellow light policies are typically unconstitutional,¹ and a rating of yellow light rather than red light in no way means that FIRE condones a university's restrictions on speech. Rather, it means that in FIRE's judgment, those restrictions do not clearly and substantially restrict speech in the manner necessary to warrant a red light rating.



GREEN LIGHT: If FIRE finds that a university's policies do not seriously threaten campus expression, that college or university receives a green light

rating. A green light rating does not necessarily indicate that a school actively supports free expression in practice; it simply means that the school's *written* policies do not pose a serious threat to free speech.



WARNING: DOES NOT PROMISE FREE SPEECH: FIRE believes that free speech is not only a moral imperative, but also an essential element of a college education.

However, private universities are just that — private associations — and as such, they possess their own right to free association, which allows them to prioritize other values above the right to free speech if they wish to do so. Therefore, when a private university *clearly and consistently* states that it holds a certain set of values above a commitment to freedom of speech, FIRE warns prospective students and faculty members of this fact.² Seven surveyed schools meet these criteria.³

¹See, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972) (holding that a Georgia statute prohibiting "opprobrious words or abusive language" was unconstitutional because those terms, as commonly understood, encompassed speech protected by the First Amendment).

²For example, Pepperdine University's Student Handbook provides that "[i]n keeping with Pepperdine University's Christian mission and its heritage in Churches of Christ, all members of the University community are encouraged to respect the teachings of Jesus and historic, biblical Christianity. It is expected that all students will adhere to biblical teaching regarding moral and ethical practices. Engaging in or promoting conduct or lifestyles inconsistent with biblical teaching is not permitted." *Code of Conduct*, PEPPERDINE UNIV. SEAVER COLL. OF LETTERS, ARTS, AND SCI. 2017-2018 STUDENT HANDBOOK, at 5, available at <https://www.pepperdine.edu/admission/student-life/policies/content/seaver-handbook.pdf>. It would be clear to any reasonable person reading this policy that students are not entitled to unfettered free speech at Pepperdine.

³FIRE has designated the following schools as "Warning" schools: Baylor University, Brigham Young University, Pepperdine University, Saint Louis University, Vassar College, Worcester Polytechnic Institute, and Yeshiva University.

FINDINGS

SB2320
3-26-19
#2

Of the 461 schools reviewed by FIRE, 149 — or 32.3 percent — received a red light rating. 270 schools received a yellow light rating (58.6 percent), and thirty-five received a green light rating (7.6 percent). Seven schools (1.5 percent) received a warning rating.⁴

This is the tenth year in a row that the percentage of schools maintaining red light speech codes has fallen, and the findings represent a drop of more than seven percentage points from last year, when 39.6 percent of schools received a red light rating. Additionally, the number of green light institutions has more than quadrupled, from eight institutions ten years ago to thirty-five this year.⁵

This is the tenth year in a row that the percentage of schools maintaining red light speech codes has fallen.

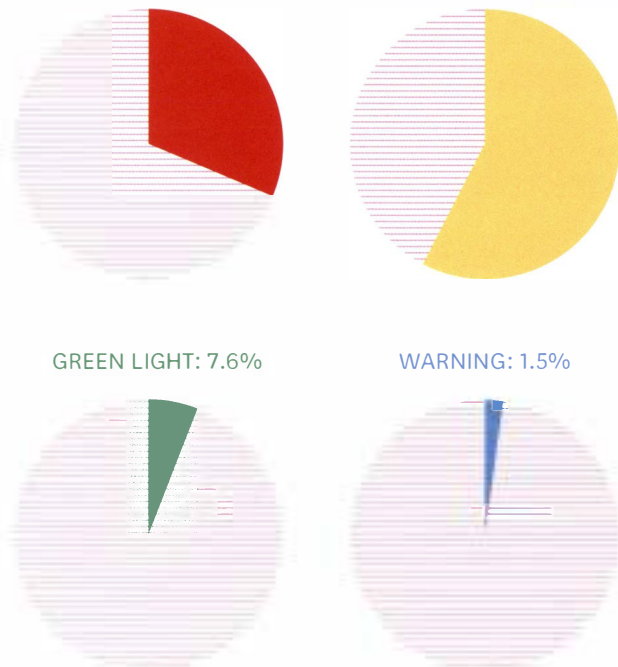
FIRE reviewed policies at 461 colleges and universities.

RED LIGHT: 32.3%

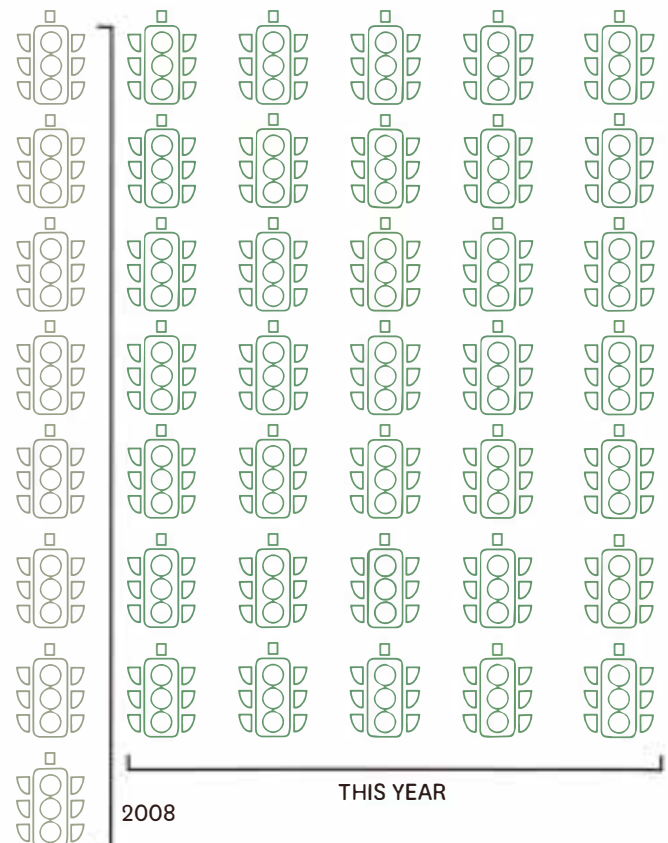
YELLOW LIGHT: 58.6%

GREEN LIGHT: 7.6%

WARNING: 1.5%



The number of green light institutions has more than quadrupled, from 8 institutions in 2008 to 35 this year.



SB 2320
3-26-19
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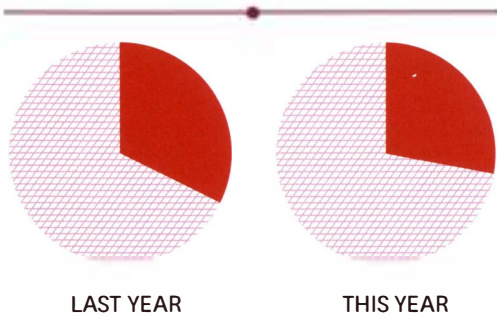
Public Colleges and Universities

The percentage of *public* institutions with a red light rating dropped again this year, from 33.9 percent last year to **26 percent this year**. Overall, of the 357 public universities reviewed for this report, ninety-three received a red light rating (26 percent), 233 received a yellow light rating (65.3 percent), and thirty-one received a green light rating (8.7 percent).

Since public colleges and universities are legally bound to protect their students' First Amendment rights, any speech codes — red or yellow light — are unacceptable.

In November 2016, FIRE sent a certified mailing regarding First Amendment compliance to every public university receiving a red light rating.⁶ FIRE's letter reminded recipient institutions of U.S. House Judiciary Committee Chairman Representative Bob Goodlatte's August 2015 letter urging administrators at red light schools to revise policies that violate the First Amendment. Further, the mailing warned that university administrators who continue to violate clearly established law with respect to expressive rights risk losing their "qualified immunity" — meaning they could be held personally liable for monetary damages in a student or faculty member's lawsuit.

Red light ratings of public schools dropped from 33.9% to 26% this year.



Since public colleges and universities are legally bound to protect their students' First Amendment rights, any speech codes — red or yellow light — are unacceptable. Much work remains to be done. This ongoing positive trend, however, is encouraging. With continued efforts by free speech advocates on and off campus, we expect this percentage will continue to drop.

Private Colleges and Universities

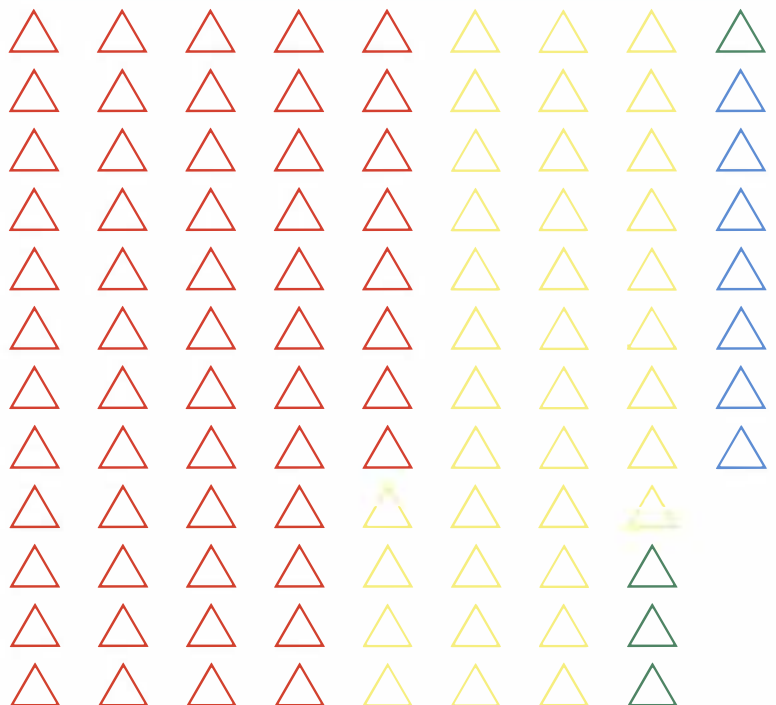
The percentage of private universities earning a red light rating, which stood at 58.7 percent last year, fell nearly five percentage points to 53.9 percent.

While private universities are not legally bound by the First Amendment — which regulates government actors — most make extensive promises of free speech to their students and faculty. When private institutions

make such promises, speech codes impermissibly violate them.

Of the 104 private colleges and universities reviewed, fifty-six (53.9 percent) received a red light rating, thirty-seven (35.6 percent) received a yellow light rating, four (3.8 percent) received a green light rating, and seven (6.7 percent) received a warning rating.

Of the 104 private schools reviewed by FIRE, 56 received a red light rating, 37 received a yellow light rating, 4 received a green light rating, and 7 received a warning rating.



⁶Press Release, Found. for Individual Rights in Educ., FIRE to 'Red Light' Public Universities: Revise Your Unconstitutional Speech Codes (Nov. 2, 2016), <https://www.thefire.org/fire-to-red-light-public-universities-revise-your-unconstitutional-speech-codes>.

Speech Codes on Campus: Background and Legal Challenges

Speech codes — *university regulations prohibiting expression that would be constitutionally protected in society at large* — gained popularity with college administrators in the 1980s and 1990s. As discriminatory barriers to education declined, female and minority enrollment increased. Concerned that these changes would cause tension and that students who finally had full educational access would arrive at institutions only to be offended by other students hostile to their presence, college administrators enacted speech codes.

In the mid-1990s, the phenomenon of campus speech codes converged with the expansion of Title IX, the federal law prohibiting sex discrimination in educational institutions receiving federal funds.⁷ In 1994, the Department of Education's Office for Civil Rights (OCR) — the federal agency that oversees the implementation and enforcement of Title IX — investigated Santa Rosa Junior College after two women complained about comments made about them on an online college bulletin board that included “anatomically explicit and sexually derogatory terms.”⁸

In a letter to the college, OCR concluded that the offensive speech had created a “hostile educational environment” for the complainants and directed the college to adopt a policy banning, among other things, online speech that “has the purpose or effect of creating a hostile, intimidating or offensive educational environment.”⁹ Soon thereafter, when the University of Massachusetts faced criticism over a broad new proposed harassment policy in 1995, then-chancellor David K. Scott “responded to criticism by suggesting that a code was required by Federal Department of Education regulations.”¹⁰

In enacting speech codes, administrators ignored or did not fully consider the philosophical, social, and legal ramifications of placing restrictions on speech, particularly at public universities. As a result, federal courts have overturned speech codes at numerous colleges and universities over the past two decades.¹¹

Despite the overwhelming weight of legal authority against speech codes, a large number of institutions — including some of those that have been successfully sued on First Amendment grounds — still maintain unconstitutional speech codes. It is with this unfortunate fact in mind that we turn to a more detailed discussion of the ways in which campus speech codes violate individual rights and what can be done to challenge them.



Federal courts have overturned speech codes at numerous colleges and universities over the past two decades.

⁷Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, provides that: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

⁸Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROB. 299 (2000).

⁹*Id.* at 315.

¹⁰Anthony Lewis, *Abroad at Home; Living in a Cocoon*, N.Y. TIMES, Nov. 27, 1995, <http://www.nytimes.com/1995/11/27/opinion/abroad-at-home-living-in-a-cocoon.html>.

¹¹McCauley v. Univ. of the V.I., 618 F.3d 232 (3d Cir. 2010); DeJohn v. Temple Univ., 537 F.3d 301 (3d Cir. 2008); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995); Univ. of Cincinnati Chapter of Young Am. for Liberty v. Williams, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio Jun. 12, 2012); Smith v. Tarrant Cty. Coll. Dist., 694 F.Supp. 2d 610 (N.D. Tex. 2010); Coll. Republicans at S.F. St. Univ. v. Reed, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); Roberts v. Haragan, 346 F. Supp. 2d 853 (N.D. Tex. 2004); Bair v. Shippensburg Univ., 280 F. Supp. 2d 357 (M.D. Pa. 2003); Booher v. N. Ky. Univ. Bd. of Regents, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); Corry v. Leland Stanford Junior Univ., No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.); UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis., 774 F. Supp. 1163 (E.D. Wisc. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). In addition, numerous institutions have voluntarily modified their speech codes as part of settlement agreements. See, e.g., Press Release, Found. for Individual Rights in Educ., Victory: Texas College Settles Free Speech Lawsuit After Telling Student that Gun Rights Sign Needs ‘Special Permission’ (May 4, 2016), <https://www.thefire.org/victory-texas-college-settles-free-speech-lawsuit-after-telling-student-that-gun-rights-sign-needs-special-permission>; Press Release, Found. for Individual Rights in Educ., Victory: Lawsuit Settlement Restores Free Speech Rights at Dixie State U. After Censorship of Bush, Obama, Che Flyers (Sept. 17, 2015), available at <https://www.thefire.org/victory-lawsuit-settlement-restores-free-speech-rights-at-dixie-state-u-after-censorship-of-bush-obama-che-flyers>.

SB 2320
3-26-19
#2

Public Universities vs. Private Universities

With limited, narrowly defined exceptions, the First Amendment prohibits the government — including governmental entities such as state universities — from restricting the freedom of speech. A good rule of thumb is that if a state law would be declared unconstitutional for violating the First Amendment, a similar regulation at a state college or university is likewise unconstitutional.

The guarantees of the First Amendment generally do not apply to students at private colleges because the First Amendment regulates only government — not private — conduct.¹² Moreover, although acceptance of federal funding does confer some obligations upon private colleges (such as compliance with federal anti-discrimination laws), compliance with the First Amendment is not one of them.

This does not mean, however, that students and faculty at private schools are not entitled to free expression. In fact, most private universities explicitly promise freedom of speech and academic freedom. Whitman College, for example, promises students the “freedom of speech, expression, and association.”¹³ Similarly, according to Union College’s student handbook, “free inquiry and free expression are indispensable to the objectives of a higher educational institution.”¹⁴ Yet both of these institutions, along with most other private colleges and universities, maintain policies that prohibit the very speech they promise to protect.

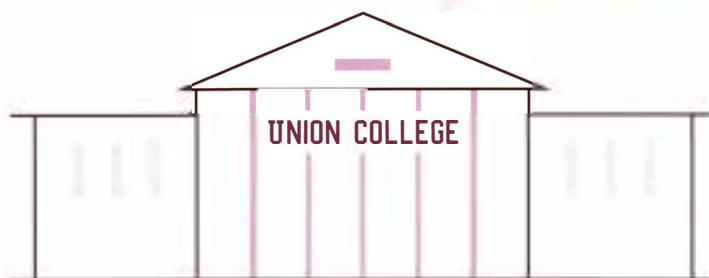
Continuing a trend that began last year, more private schools continue to adopt statements in support of free speech modeled after the one produced in January 2015 by the Committee on Freedom of Expression at the University of

Chicago.¹⁵ In February 2017, for example, Franklin & Marshall College adopted a Chicago-style Statement on Freedom of Expression into the college’s Faculty Handbook to reflect the fact that “Franklin & Marshall College is committed to the ideal of free and open inquiry in all matters.”¹⁶ Georgetown University adopted a similar statement in June 2017, stating:

As an institution of higher education, one specifically committed to the Catholic and Jesuit tradition, Georgetown University is committed to free and open inquiry, deliberation and debate in all matters, and the untrammelled verbal and nonverbal expression of ideas. It is Georgetown University’s policy to provide all members of the University community, including faculty, students, and staff, the broadest possible latitude to speak, write, listen, challenge, and learn.¹⁷

Given that these and other institutions are choosing to strengthen their commitments to free speech at a time when student calls for censorship seem louder than ever, we hope this trend signals a growing understanding, among private school administrators, of the need to protect free speech in higher education quite apart from constitutional questions.

“[F]ree inquiry and free expression are indispensable to the objectives of a higher educational institution.”



¹²California maintains a law that applies the protections of the First Amendment to private, nonsectarian institutions of higher education. Section 94367 of the California Education Code — the so-called “Leonard Law” — provides that “[n]o private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.” The code further provides that “[t]his section does not apply to a private postsecondary educational institution that is controlled by a religious organization, to the extent that the application of this section would not be consistent with the religious tenets of the organization.”

¹³Student Rights and Responsibilities. WHITMAN COLL. STUDENTS HANDBOOK, available at <https://www.whitman.edu/academics/academic-resource-center/student-handbook/student-rights-and-responsibilities>.

¹⁴Rules of Public Order, UNION COLL. STUDENT HANDBOOK, available at <https://www.union.edu/offices/dean/forms/handbook2017-2018.pdf>.

¹⁵Committee on Freedom of Expression at the University of Chicago, *Report on the Committee of Freedom of Expression*, available at <http://provost.uchicago.edu/FOECommitteeReport.pdf>. For a complete list of institutions that have adopted versions of the Chicago Statement, see <https://www.thefire.org/chicago-statement-university-and-faculty-body-support>.

¹⁶F&M Statement on Freedom of Expression, available at <https://www.fandm.edu/president/f-m-statement-on-freedom-of-expression>.

¹⁷Speech and Expression Policy, available at <https://studentaffairs.georgetown.edu/policies/speech-expression#GeneralPolicy>.

What Exactly is "Free Speech," and How do Universities Curtail it?

What does FIRE mean when we say that a university restricts "free speech"? Do people have the right to say absolutely anything, or are certain types of expression unprotected?

Simply put, the overwhelming majority of speech is protected by the First Amendment. Over the years, the Supreme Court has carved out a limited number of narrow exceptions to the First Amendment: speech that incites reasonable people to immediate violence; so-called "fighting words" (face-to-face confrontations that lead to physical altercations); harassment; true threats and intimidation; obscenity; and defamation. If the speech in question does not fall within one of these exceptions, it most likely is protected speech.

The exceptions are often misapplied and abused by universities to punish constitutionally protected speech. There are instances where the written policy at issue may be constitutional—for example, a prohibition on "incitement"—but its application may not be. In other instances, a written policy will purport to be a legitimate ban on a category of unprotected speech like harassment or true threats, but (either deliberately or through poor drafting) will encompass protected speech as well. Therefore, it is important to understand what these narrow exceptions to free speech actually mean in order to recognize when they are being misapplied.

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SB 2320
3-26-19
#2

Threats and Intimidation

The Supreme Court has defined “true threats” as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). The Court also has defined “intimidation,” of the type not protected by the First Amendment, as a “type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* at 360. Neither term would encompass, for example, a vaguely worded statement that is not directed at anyone in particular.

Universities frequently misapply policies prohibiting threats and intimidation so as to infringe on protected speech.

Nevertheless, universities frequently misapply policies prohibiting threats and intimidation so as to infringe on protected speech, citing generalized concerns about safety without regard to the actual boundaries of unprotected speech.

In February 2017, for example, a Linfield College student group invited Jordan Peterson — a psychology professor at the University of Toronto and an outspoken critic of what he perceives as political indoctrination at universities — to speak on campus. A few days in advance of his planned speech, Peterson tweeted, “I’m violating some more safe spaces soon: Linfield College, April 24.”¹⁸ The next day, Vice President for Academic Affairs and Dean of Faculty Susan Agre-Kippenhan informed the campus community that Peterson would no longer be allowed to speak at Linfield, claiming his tweet constituted “the use or threat of force” and “intimidation.”¹⁹

In a letter to Linfield, FIRE reminded the college of the legal definition of a threat, and wrote that

Peterson’s tweet falls far short of this threshold. By any reasonable reading, his statement about “violat[ing]” a “safe space” reveals an intent to introduce potentially controversial ideas to a community he believes to be unwilling

to encounter them, not intent to physically harm that community. Peterson is in no way implying that he intends to use “force” against any member of the Linfield community. To pretend otherwise is disappointingly disingenuous and flatly ignores the obvious hyperbole in his tweet. If Peterson had tweeted that he planned to “blow some minds at Linfield,” would administrators have called in a bomb squad? It would seem unlikely. Specialized legal knowledge is unnecessary to conclude that Peterson’s tweet is not a “threat.”

FIRE does not discount Linfield’s duties to maintain a safe environment for its students and respond quickly and responsibly to genuine threats. But as an institution that has committed itself to “the principles underlying constitutionally protected free expression,” Linfield has a fundamental responsibility to protect the free speech rights of its students. It cannot abandon those duties simply because a student group invited a speaker who used hyperbolic language on an online platform that awards greater attention to those who use hyperbolic language.²⁰



Jordan B Peterson

@jordanbpeterson

I’m violating some more safe spaces soon:
Linfield College, April 24

42 86 450

¹⁸Jordan B Peterson (@jordanbpeterson), TWITTER (Apr. 18, 2017, 3:02 PM), <https://twitter.com/jordanbpeterson/status/854409795335598080?lang=en>.

¹⁹Letter from Ari Cohn, Senior Program Officer, Found. for Individual Rights in Educ. to Michael Schill, President, Univ. of Or. (Nov. 18, 2015), available at <https://www.thefire.org/fire-letter-to-university-of-oregon-president>.

²⁰See Letter from Sarah McLaughlin, Senior Program Officer, Found. for Individual Rights in Educ., to Thomas L. Hellie, President, Linfield College (June 9, 2017), available at <https://www.thefire.org/fire-letter-to-linfield-college-june-2017>.

²⁰ *Id.*

Incitement

There is also a propensity among universities to restrict speech that offends other students on the basis that it constitutes “incitement.” The basic concept, as administrators too often see it, is that offensive or provocative speech will anger those who disagree with it, perhaps so much so that it moves them to violence. While preventing violence is an admirable goal, this is an impermissible misapplication of the incitement doctrine.

Incitement, in the legal sense, does not refer to speech that may lead to violence on the part of those opposed to or angered by it, but rather to speech that will lead those who *agree with it* to commit immediate violence. In other words, the danger is that certain speech will convince sympathetic, willing listeners to take immediate unlawful action. The paradigmatic example of incitement is a person standing on the steps of a courthouse in front of a torch-wielding mob and urging that mob to burn

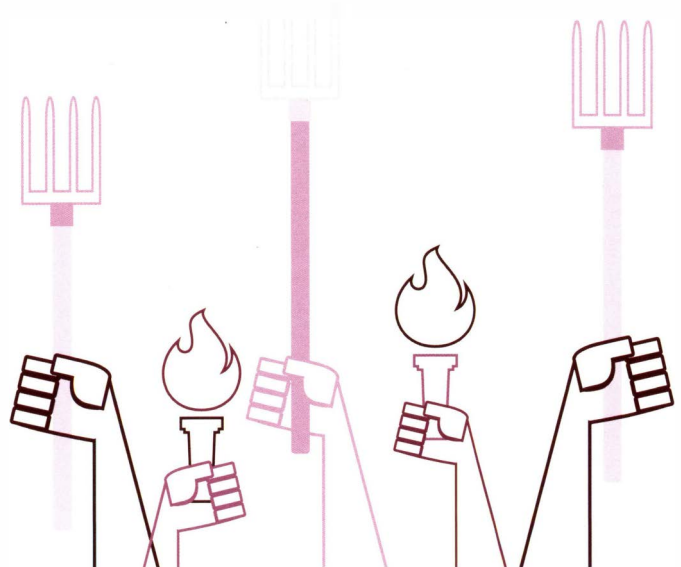
The danger is that certain speech will convince sympathetic, willing listeners to take immediate unlawful action.

down the courthouse immediately. To misapply the doctrine to encompass an opposing party’s reaction to speech they dislike is to convert the doctrine into an impermissible “heckler’s veto,” where violence threatened by those angry about particular speech is used as a reason to censor that speech. As the Supreme Court has made clear, speech cannot be prohibited because it “might offend a hostile mob” or because it may prove “unpopular with bottle throwers.”²¹

The legal standard for incitement was announced in the Supreme Court’s decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). There, the Court held that the state may not “forbid or proscribe advocacy of the use of force or of law violation

except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action.” *Id.* at 447 (emphasis in original). This is an exacting standard, as evidenced by its application in subsequent cases.

For instance, in *Hess v. Indiana*, 414 U.S. 105 (1973), the Supreme Court held that a man who had loudly stated, “We’ll take the fucking street later” during an anti-war demonstration did not intend to incite or produce immediate lawless action. The Court found that “at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time,” and that the man was therefore not guilty under a state disorderly conduct statute. *Id.* at 108–09. The fact that the Court ruled in favor of the speaker despite the use of such strong and unequivocal language underscores the narrow construction that has traditionally been given to the incitement doctrine and its requirements of likelihood and immediacy. Nonetheless, college administrations have been all too willing to abuse or ignore this jurisprudence.



²¹Forsyth Cty. v. Nat'list Movement, 505 U.S. 123, 134–35 (1992).

SB 2320
3-26-19
#2

Obscenity

The Supreme Court has held that obscene expression, to fall outside of the protection of the First Amendment, must “depict or describe sexual conduct” and must be “limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973).

This is a narrow definition applicable only to some highly graphic sexual material. It does not encompass profanity, even though profane words are often colloquially referred to as “obscurities.” In fact, the Supreme Court has explicitly held that profanity is constitutionally protected. In *Cohen v. California*, 403 U.S. 15 (1971), the defendant, Paul Robert Cohen, was convicted in California for wearing a jacket bearing the words “Fuck the Draft” in a courthouse. The Supreme Court overturned Cohen’s conviction, holding that the message on his jacket, however vulgar, was protected speech.

Similarly, in *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), the Court determined that a student newspaper article entitled “Motherfucker Acquitted” was constitutionally protected speech. The Court wrote 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.’” *Id.* at 670. Nonetheless, many colleges erroneously believe that they may legitimately prohibit profanity and vulgar expression.

The University of New Hampshire, for example, recently removed a female student’s display

seeking to raise awareness of “street harassment” during Sexual Assault Awareness Month because the display, which listed actual examples of harassment experienced by UNH students, contained “profane” and “vulgar” language in violation of university policy.²²

UNH is far from the only institution to prohibit profane or vulgar expression, particularly in posted materials. For example:

- According to Virginia State University’s *Community Living Guide*, “[p]rofanity is prohibited at Virginia State University.”²³
- At Cal Poly Pomona, housing officials may remove posted materials from sight if they contain “obscurities.”²⁴



²²Letter from Adam B. Steinbaugh, Senior Program Officer, Found. for Individual Rights in Educ., to Mark W. Huddleston, President, University of New Hampshire (Apr. 6, 2017), available at <https://www.thefire.org/fire-letter-to-the-university-of-new-hampshire-april-6-2017>.

²³General Governing Policies, DEP’T OF RESIDENCE LIFE AND HOUSING CMTY. LIVING GUIDE, available at <http://www.vsu.edu/files/docs/residential-living/living-guide.pdf>.

²⁴UHS 2017–18 Student Housing License Agreement, available at <https://www.cpp.edu/-housing/forms-policies/hla-policies-and-regulations.shtml>.

Harassment

Harassment, properly defined, is not protected by the First Amendment. In the educational context, the Supreme Court has defined student-on-student harassment as discriminatory, unwelcome conduct “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999). This is not simply expression; it is *conduct* far beyond the protected expressive activities that are too often deemed “harassment” on today’s college campus. Harassment is extreme and usually repetitive behavior — behavior so serious that it would interfere with a reasonable person’s ability to receive his or her education. For example, in *Davis*, the conduct found by the Court to be harassment was a months-long pattern of conduct including repeated attempts to touch the victim’s breasts and genitals together with repeated sexually explicit comments directed at and about the victim.

Here are just two examples of overly broad sexual harassment policies based on OCR’s definition:

- At Georgia Southern University, “Sexual harassment is defined as unwelcome conduct of a sexual nature.”²⁷
- At SUNY New Paltz, “Sexual Harassment in the Educational Setting is defined as: Unwelcome conduct of a sexual nature.”²⁸

These examples, along with many others, demonstrate that colleges and universities often fail to limit themselves to the narrow definition of harassment that is outside the realm of constitutional protection. Instead, they expand the term to prohibit broad categories of speech that do not even *approach* actual harassment, despite similar policies having been struck down by federal courts years earlier.²⁹



For decades now, however, many colleges and universities have maintained policies defining harassment too broadly and prohibiting constitutionally protected speech. And years of overly aggressive Title IX enforcement by the Department of Education’s Office for Civil Rights (OCR), including an unconstitutionally broad definition of sexual harassment promulgated by OCR,²⁵ has led numerous colleges and universities to enact more restrictive policies in an effort to avoid an OCR investigation. Although OCR has recently signaled a return to a more speech-protective approach to Title IX enforcement,²⁶ it will likely take years (if not decades) of work by free speech advocates to undo the damage caused by OCR over the past eight years.

These vague and overly broad harassment policies deprive students and faculty of their free speech and academic freedom rights. In May 2017, for example, Howard University law professor Reginald Robinson was found guilty of sexual harassment after two students complained about a test question involving a salon client who believed she might have been touched inappropriately after falling asleep during a Brazilian wax. After a 504-day investigation, administrators determined that Robinson would be required to undergo mandatory

These vague and overly broad harassment policies deprive students and faculty of their free speech and academic freedom rights.

²⁵See Letter from Shaheena Simons and Damon Martinez, U.S. Dep’t of Justice, to Robert G. Frank, President, Univ. of N.M. (Apr. 22, 2016), available at <https://www.justice.gov/opa/file/843901/download>; Letter from Anurima Bhargava, Chief, Civil Rights Div., U.S. Dep’t of Justice, and Gary Jackson, Reg’l Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Royce Engstrom, President, Univ. of Mont. and Lucy France, Univ. Counsel, Univ. of Mont. (May 9, 2013), available at <http://www.justice.gov/opa/documents/um-ltr-findings.pdf>.

²⁶Press Release, Found. for Individual Rights in Educ., Dear Colleague: It’s Over! Education Department Rescinds Controversial Letter (Sept. 22, 2017), available at <https://www.thefire.org/dear-colleague-its-over-education-department-rescinds-controversial-2011-letter>.

²⁷Georgia Southern University Policy Prohibiting Sexual Harassment, available at <http://president.georgiasouthern.edu/diversity/policy-and-procedures/sexual-harassment>.

²⁸State University of New York New Paltz Non Discrimination/Non Harassment Policy Statement and Procedures for Reporting Incidents of Harassment, Discrimination and Sexual Violence, available at https://www.newpaltz.edu/media/academic-affairs/Non-Discrimination_Non-Harassment%20Policy%202002-14.pdf.

²⁹See, e.g., *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (holding that Temple University’s sexual harassment policy was unconstitutionally broad); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (holding that University of Michigan’s discriminatory harassment policy was unconstitutionally broad); *Booher v. N. Ky. Univ. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (holding that Northern Kentucky University’s sexual harassment policy was unconstitutionally broad).

DISCUSSION

SB2320
3-26-19
#2

sensitivity training and submit to classroom observation and prior administrative review of future test questions. The university also warned Robinson that any further “violations” of the university’s Title IX policies could result in his termination.

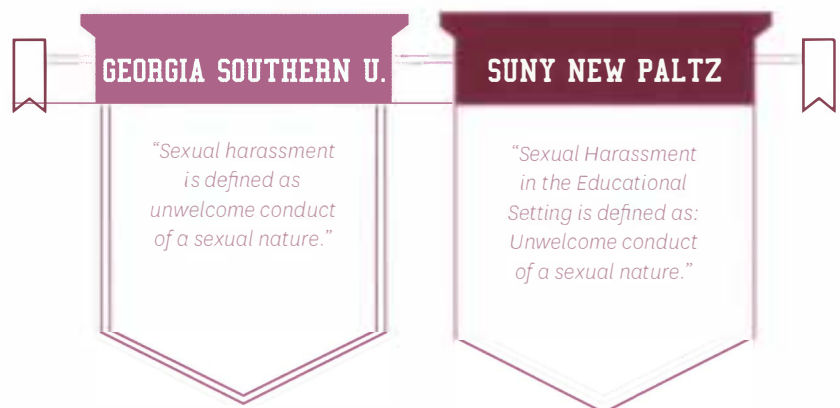
Robinson’s case has particularly distressing implications for professors’ academic freedom if you consider the nature of law school exam hypotheticals, which purposefully require law students to apply the legal principles they are learning to unusual or difficult cases. As FIRE wrote in a letter to Howard University,

All law students in the United States can expect to encounter descriptions of scenarios that involve sexual touching, even if they learn only the subjects tested on bar examinations in all jurisdictions, which include rape and other criminal infractions. The simple fact that a test question involves touching of a hypothetical individual’s genitals and the word “genitals” would not, therefore, unreasonably interfere with any law student’s education.

Any student with even the most basic understanding of the first-year topics taught almost uniformly nationwide would expect such hypothetical questions, and any law student who graduates without having encountered such a question is likely a step behind in learning the knowledge necessary to become a licensed attorney.³⁰

Having discussed the most common ways in which universities misuse the narrow exceptions to free speech to prohibit protected expression, we now turn to university regulations that restrict free speech and expression on their face. Such restrictions are generally found in several distinct types of policies.

³⁰Letter from Susan Kruth, Senior Program Officer, Found. for Individual Rights in Educ., to Wayne A.I. Frederick, President, Howard University (June 16, 2017), available at <https://www.thefire.org/fire-letter-to-howard-university-june-16-2017>.



Anti-Bullying Policies

In recent years, “bullying” has garnered a great deal of media attention, bringing pressure on legislators and school administrators at both the K–12 and college levels to crack down on speech that causes emotional harm to other students. On October 26, 2010, OCR issued a letter on the topic of bullying, reminding educational institutions that they must address actionable harassment, but also acknowledging that “[s]ome conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression.”³¹ For such situations, OCR’s letter refers readers back to the 2003 “Dear Colleague” letter stating that harassment is conduct that goes far beyond merely offensive speech and expression. However, because it is primarily focused on bullying in the K–12 setting, the letter also urges an *in loco parentis*³² approach that is inappropriate in the college setting, where students are overwhelmingly adults.

Court decisions and other guidance regarding K–12 speech has a way of “trickling up” to the collegiate setting, and indeed, FIRE has seen a dramatic increase in the number of university policies prohibiting bullying. Unfortunately, many of these policies infringe on or outright prohibit protected speech.

At Gettysburg College, for example, bullying is defined as “unwelcome or unreasonable behavior that demeans, offends, or humiliates people either as individuals or as a group.”³³ And at Idaho State

University, “[b]ullying includes harsh practical jokes, spreading rumors and gossip, teasing, taunting and using social media to humiliate and ridicule others; using aggressive communication such as insults, offensive remarks, shouting, yelling, angry outbursts, and invading others personal space; and taking intentional actions to exclude or ostracize others from a group.”³⁴

But as courts have held in rulings spanning decades, speech cannot be prohibited simply because someone else finds it offensive, even deeply so.³⁵ Offensive speech, if it does not rise to the level of harassment or one of the other narrow categories of unprotected speech, is entitled to constitutional protection (and, accordingly, to protection at private institutions that claim to uphold the right to free speech).

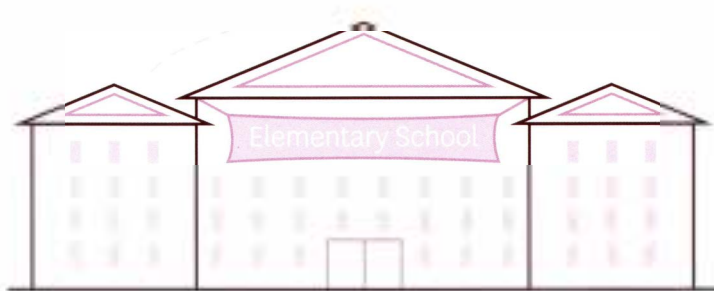
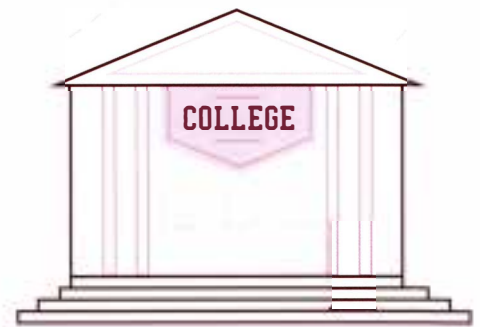
³¹ “Dear Colleague” Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

³² “In the place of parents.”

³³ *Harassment Policy*, GETTYSBURG COLL. HANDBOOK OF STUDENT RIGHTS AND RESPONSIBILITIES, available at http://www.gettysburg.edu/about/offices/college_life/srr/student_handbook/policy-details.dot?id=eb0db757-e02d-4bb9-838c-b0449d38e2f2.

³⁴ *Student Conduct Code*, available at <https://www.isu.edu/media/libraries/student-affairs/5000-Student-Conduct-System.pdf>.

³⁵ See *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.”) See also *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (holding that there is “no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive...”); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (“[R]egulations that prohibit speech on the basis of listener reaction alone are unconstitutional both in the public high school and university settings.”); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (“Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people.”)



SB 2320
326-19
#2

Policies on Tolerance, Respect, and Civility

Many schools invoke laudable goals like respect and civility to justify policies that violate students' and faculty members' free speech rights. While a university has every right to promote a tolerant and respectful atmosphere on campus, a university that claims to respect free speech must not limit speech to only the inoffensive and respectful. And although pleas for civility and respect are often initially framed as requests, many schools have speech codes that effectively turn those requests into requirements.

For example:

- At Utah State University, “[a]ll interactions with faculty members, staff members, and other students shall be conducted with courtesy, civility, decency, and a concern for personal dignity.”³⁶
- Lafayette College’s *Code of Conduct* provides that “[i]n addition to exhibiting maturity and self-control, students and student organizations are expected to so conduct themselves that they cause no physical, emotional, or mental harm to others.”³⁷

While respect and civility may seem uncontroversial, most uncivil or disrespectful speech is protected by the First Amendment,³⁸ and is indeed sometimes of great political and social significance. Some of the expression employed in the civil rights movement of the 1950s and 60s, for example, would violate campus civility codes today. Colleges and universities may *encourage* civility, but public universities — and those private universities that purport to respect students’ fundamental free speech rights — may not require it or threaten mere incivility with disciplinary action.

A university that claims to respect free speech must not limit speech to only the inoffensive and respectful.

³⁶“Responsibilities of Students,” *Utah State University Student Code*, available at <https://studentconduct.usu.edu/studentcode/article1>.

³⁷“Introductory Statement,” *Code of Conduct*, LAFAYETTE COLL. STUDENT HANDBOOK, available at <https://conduct.lafayette.edu/wp-content/uploads/sites/93/2017/08/StudentHandbook-2017-18.pdf>.

³⁸*See, e.g.*, Coll. Republicans at S.F. St. Univ. v. Reed, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy because “there is a substantial risk that the civility requirement will inhibit or deter use of the forms and means of communication that, to many speakers in circumstances of the greatest First Amendment sensitivity, will be the most valued and the most effective.”)

**WE SHALL
OVERCOME**



SPOTLIGHT ON:

FIRST AMENDMENT LITIGATION

¹Gerlich v. Leath, No. 16-1518 (8th Cir. June 13, 2017).

²*Id.*

FIRE always aims to work amicably with college administrations to resolve concerns about students' and faculty members' free speech rights. Sometimes, however, it becomes necessary to resort to the courts to protect those rights.

In July 2014, FIRE launched our Stand Up For Speech Litigation Project, a national effort to eliminate unconstitutional speech codes through targeted First Amendment lawsuits. In June 2017, Stand Up For Speech scored its biggest victory to date when the U.S. Court of Appeals for the Eighth Circuit upheld an Iowa district court's decision to permanently bar Iowa State University from using its trademark policy to prevent an ISU student group from printing t-shirts advocating marijuana legalization.¹ The decision was the tenth

"The defendants' rejection of NORML ISU's designs discriminated against that group on the basis of the group's viewpoint."

student chapter of the National Organization for the Reform of Marijuana Laws (NORML ISU). In October 2012, NORML ISU received university approval for a group t-shirt that featured ISU mascot Cy the Cardinal's head in place of the "O" in NORML. Later that fall, however, following criticism from members of the public and state officials, the university rescinded approval for the t-shirt, and several months after that adopted

new guidelines prohibiting the use of the university's trademark on designs that "suggest the promotion of" drugs or alcohol.

In upholding the district court's ruling that ISU's application of its trademark policy to NORML ISU's expression violated the First Amendment, the Eighth Circuit held that ISU had engaged in impermissible viewpoint-based discrimination. The court ruled that "[t]he defendants' rejection of NORML ISU's designs discriminated against that group on the basis of the group's viewpoint," and that the university's actions were taken "to contain the political controversy" that arose when state lawmakers criticized the t-shirts.¹

The Eighth Circuit also upheld the district court's denial of qualified immunity to the defendant ISU administrators, leaving them personally liable for monetary damages. The court held that NORML ISU's right to be free from viewpoint discrimination under the university's trademark licensing regime was clearly established at the time such that reasonable administrators should have understood the implications of their actions. According to the court, the law is clear that when a public college opens government property or offers a government benefit to all student groups, it may not discriminate in granting access based on a group's chosen message.

Meanwhile, the Stand Up For Speech Litigation

consecutive victory for the Stand Up For Speech Litigation Project and the first from a federal court of appeals.

Paul Gerlich and Erin Furleigh, the plaintiffs in the lawsuit, were members of the university's



Project continues to challenge speech codes at campuses around the country, most recently with a suit against Los Angeles Pierce College.

In November 2016, Pierce student Kevin Shaw was approached by administrators while attempting to distribute Spanish-language copies of the U.S. Constitution and recruit new members for his student group, Young Americans for Liberty, along the main public walkway on campus. He was told that he could not distribute literature outside of the free speech zone — an area roughly the size of three parking spaces on Pierce’s 426-acre campus — and that he would need to apply for a permit to use the zone.

In March 2017, Shaw filed a federal lawsuit challenging Pierce’s free speech zone and the requirement that students get permission before speaking or distributing literature on campus, as well as a system-level policy requiring Pierce and every other college in the Los Angeles Community College District to have free speech zones.² The suit is ongoing; in October 2017, the U.S. Department of Justice filed a Statement of Interest in support of Shaw, arguing that, based on the facts alleged in Shaw’s complaint, Pierce and the District’s policies and practices violate student First Amendment rights and denied Shaw “his right to engage in expressive activity in a public forum.”³ Shaw’s lawsuit is the first of FIRE’s new Million Voices Campaign, which aims to free the voices of one million students by striking down unconstitutional speech codes across the country in partnership with attorneys from FIRE’s Legal Network. By building these partnerships to protect student and faculty speech rights, we hope to expand our reach to force even more universities to defend their policies in court.

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²Press Release, Found. for Individual Rights in Educ., Department of Justice Files Statement of Interest in FIRE Lawsuit (Oct. 25, 2017), <https://www.thefire.org/department-of-justice-files-statement-of-interest-in-fire-lawsuit>.



Internet Usage Policies

A great deal of expression now takes place online, whether over email or on sites like Facebook and Twitter. Therefore, university policies regulating online expression, while perhaps appearing to be narrow, can actually have a significant impact on students' and faculty members' free speech rights.

Examples of impermissibly restrictive internet usage policies from the 2016–2017 academic year include the following:

- At Black Hills State University in South Dakota, the university's "email system shall not to be used for the creation or distribution of any disruptive or offensive messages, including offensive comments about race, gender, hair color, disabilities, age, sexual orientation, pornography, religious beliefs and practice, political beliefs, or national origin. Employees or students who receive any emails with this content from any Black Hills State University employee or student should report the matter to the appropriate authorities immediately."³⁹
- Dartmouth College prohibits use of the college's information technology resources to "post or transmit" content that is "offensive" or "hateful." Neither term is further defined.⁴⁰

³⁹Email/User Account Policy, Black Hills State Univ., available at <http://bhsu.edu/iits/AboutUs/Policies/EmailUserAccountPolicy/tabid/9703/Default.aspx>.

⁴⁰Acceptable Use Policy, Dartmouth Coll., available at <http://tech.dartmouth.edu/its/services-support/help-yourself/knowledge-base/acceptable-use-policy>.

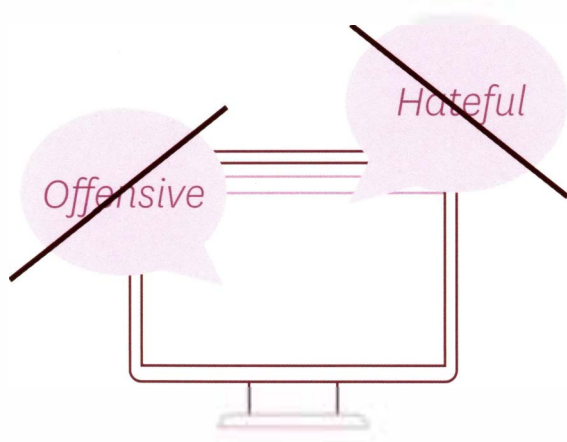
Policies on Bias and Hate Speech

In recent years, colleges and universities around the country have instituted policies and procedures specifically aimed at eliminating "bias" and "hate speech" on campus. These sets of policies and procedures, frequently termed "Bias Reporting Protocols" or "Bias Incident Protocols," often include speech codes prohibiting extensive amounts of protected expression. While speech or expression that is based on a speaker's prejudice may be offensive, it is entirely protected unless it rises to the level of unprotected speech (harassment, threats, and so forth). The speaker's motive has no bearing on whether or not the speech is protected.

These protocols often also infringe on students' right to due process, allowing for anonymous reporting that denies students the right to confront their accusers. Moreover, universities are often heavily invested in these bias incident policies, having set up entire regulatory frameworks and response protocols devoted solely to addressing them.

While many bias incident protocols do not include a separate enforcement mechanism, the reality is that the mere threat of a bias investigation will likely be sufficient to chill protected speech on controversial issues. And when the only conduct at issue is constitutionally protected speech, even investigation alone is inappropriate.

Of the 461 colleges and universities FIRE surveyed for this report, 140 of them — 30 percent — have some form of bias response team. Bias response teams appear to be particularly popular with private universities: of the 104 private institutions surveyed, fifty-three of them — 51 percent — have a bias response team.



Policies Governing Speakers, Demonstrations, and Rallies

Universities have a right to enact reasonable, narrowly tailored “time, place, and manner” restrictions that prevent demonstrations and other expressive activities from unduly interfering with the educational process. They may not, however, regulate speakers and demonstrations on the basis of content or viewpoint, nor may they maintain regulations that burden substantially more speech than is necessary to maintain an environment conducive to education. Policies governing speakers, demonstrations, and rallies fall into several general categories.

Security Fee Policies

In recent years, FIRE has seen a number of colleges and universities hamper — whether intentionally or just through a misunderstanding of the law — the invitation of controversial speakers by levying additional security costs on the sponsoring student organizations.

The Supreme Court addressed exactly this issue in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), where it struck down an ordinance in Georgia that permitted the local government to set varying fees for events based upon how much police protection the event would need. Invalidating the ordinance, the Court wrote that “[t]he fee assessed will depend on the administrator’s measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.” *Id.* at 134. Deciding that such a determination required county administrators to “examine the content of the message that is conveyed,” the Court wrote that “[l]isteners’ reaction to speech is not a content-neutral basis for regulation. ... **Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.**” *Id.* at 134–35 (emphasis added).

Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.

Despite the clarity of the law on this issue, the impermissible use of security fees to burden controversial speech is all too common on university campuses.

In May 2017, for example, a student group at New Mexico State University (NMSU) hosted an event featuring a keynote address by conservative writer and speaker David Horowitz. Just days before the event, NMSU informed the student group that it would be required to pay over \$300 to cover the cost of security that the NMSU Police Department deemed necessary in part due to “planned counter-protests.”

As FIRE explained in a July 2017 letter to NMSU, the university’s actions “unacceptably affixed a price tag to the group’s expressive activities,” noting that

By conditioning the financial burden imposed on a student group on the anticipated reaction to the viewpoints expressed at an event, NMSU impermissibly allows for the exercise of a “heckler’s veto” by anyone wishing to impede or silence a student group engaging in controversial or unpopular expression.⁴¹

In response, NMSU’s chancellor agreed that the university would cover the student group’s security cost for the Horowitz event and would review its regulations to ensure they complied with the university’s First Amendment obligations.⁴²

SB 2320
3-26-19
#2

⁴¹Letter from Ari Z. Cohn, Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ., to Garrey Carruthers, Chancellor, N.M. State Univ. (July 26, 2017), available at <https://www.thefire.org/letter-from-fire-to-new-mexico-state-university-president-garrey-carruthers>.

⁴²Letter from Garrey Carruthers, Chancellor, N.M. State Univ., to Ari Z. Cohn, Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ. (Aug. 3, 2017), available at <https://www.thefire.org/letter-from-new-mexico-state-university-president-garrey-carruthers-to-fire>.

Prior Restraints

The Supreme Court has held that “[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.” *Watchtower Bible and Tract Society of NY, Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002). Yet many colleges and universities do just that, requiring students and student organizations to register their expressive activities well in advance and, often, to obtain administrative approval for those activities.

Last year, for example, Fairmont State University administrators told a student who was gathering signatures in support of a national campus libertarian group that he could not do so without first obtaining a permit. When the student sought clarification from an administrator, he was told that Fairmont State’s decision to require a permit would rest on “a judgment call based on campus security and what they feel is soliciting.”⁴³

For example:

- At Athens State University, “[a]ll materials to be posted or distributed must be reviewed for University Policy compliance by the Office of Student Activities.”⁴⁵
- Bridgewater State University requires that students and student groups obtain “the approval of the chief of police or designee at least 24 hours in advance” in order to distribute “non-commercial pamphlets, handbills, circulars, newspapers, magazines, and other written materials” on campus.⁴⁶

⁴³Press Release, Found. for Individual Rights in Educ., VICTORY: Fairmont State University Revises Unconstitutional Solicitation Policy (Apr. 21, 2017), available at <https://www.thefire.org/victory-fairmont-state-university-revises-unconstitutional-solicitation-policy>.

⁴⁴*Id.*

⁴⁵*Regulations for Posting and Distributing Organization Materials*, ATHENS STATE UNIV. STUDENT CLUBS & ORGS. HANDBOOK, available at <http://www.athens.edu/pdfs/policies/Operating/Student-Affairs/Student-Clubs-Orgs-Handbook.pdf?x75869>.

⁴⁶*Bridgewater State University Free Speech and Demonstration Policy*, available at http://handbook.bridgew.edu/docs/BSU_Free_Speech_and_Demonstration_Policy_Revised_2017.pdf.



FIRE wrote to Fairmont State asking the university to revise the unconstitutional solicitation policy, which not only required students to get permission from administrators to engage in basic expressive activity, but also required them to provide copies of any literature they

intended to hand out for advance approval. The university ultimately revised the policy, but many similarly unconstitutional policies remain on the books at other institutions.⁴⁴

“It 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.”

SB 2320
3.26.19
#2

Free Speech Zone Policies

Of the 461 schools surveyed for this report, fifty-two of them (11 percent) have “free speech zone” policies — policies limiting student demonstrations and other expressive activities to small and/or out-of-the-way areas on campus.⁴⁷ Despite being inconsistent with the First Amendment, free speech zones are more common at public universities than at private universities: 13.7 percent of public universities surveyed maintain free speech zones, while just 4 percent of private universities do.

Free speech zones have repeatedly been struck down by courts or voluntarily revised as part of lawsuit settlements. FIRE’s Stand Up For Speech Litigation Project has included successful challenges to free speech zone policies at six colleges and universities and includes an ongoing challenge to a free speech zone policy at Los Angeles Pierce College.⁴⁸

Several state legislatures also took action this year to prohibit public colleges and universities from maintaining free speech zones. In February 2017, Utah adopted the Campus Free Expression Act, which provides that public universities in the state may not prohibit:

- (a) a member of the institution’s community or the public from spontaneously and contemporaneously assembling in an outdoor area of the institution’s campus; or
- (b) a person from freely engaging in noncommercial expressive activity in an outdoor area of the institution’s campus if the person’s conduct is lawful.⁴⁹

In April 2017, Colorado Governor John Hickenlooper signed a free speech bill providing that Colorado’s public colleges and universities may not “designate an area on campus as a free speech zone or otherwise create policies implying that its students’ expressive activities are restricted to particular areas of campus.”⁵⁰

And in May 2017, Tennessee Governor Bill Haslam signed into law Senate Bill 723, the Campus

Free Speech Protection Act, a comprehensive law providing some of the country’s strongest protections for student and faculty speech on public college campuses. Among other things, the law prohibits Tennessee’s public institutions from establishing free speech zones.⁵¹

Despite the unpopularity of free speech zones with judges and lawmakers, too many universities still maintain them. The University of South Dakota, for example, has just three “free speech areas” on campus, and “[a]nyone wishing to protest or demonstrate must complete a Non-Commercial Free Speech Request Form ... and make reservations at least five (5) days prior to the event.”⁵²

⁴⁷See Appendix D for a full list of schools with free speech zone policies.

⁴⁸For more detailed information on this and other First Amendment lawsuits, see “Spotlight On: First Amendment Litigation,” pp. 18-19.

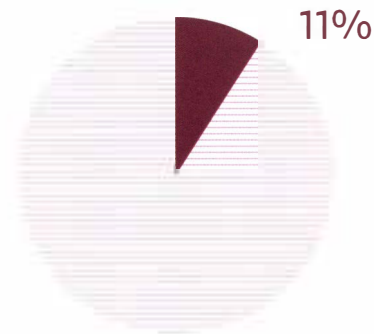
⁴⁹UTAH CODE ANN. §§ 53B-27-101–53B-27-105 (2017), available at <https://le.utah.gov/-/2017/bills/static/HB0054.html>.

⁵⁰COLO. REV. STAT. § 23-5-144 (2017), available at https://leg.colorado.gov/sites/default/files/documents/2017A/bills/2017a_062_signed.pdf.

⁵¹Tennessee Senate Bill 723, Campus Free Speech Protection Act, available at <http://www.capitol.tn.gov/Bills/110/Amend/SA0333.pdf>.

⁵²The University of South Dakota Non-Commercial Free Speech Policy and Reservation Form, available at <http://www.usd.edu/-/media/files/student-life/muc/freespeechregistrationpolicy.ashx?la=en>.

Of the 461 schools surveyed for this report, 11% have “free speech zone” policies.



WHAT CAN BE DONE?

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3-26-19
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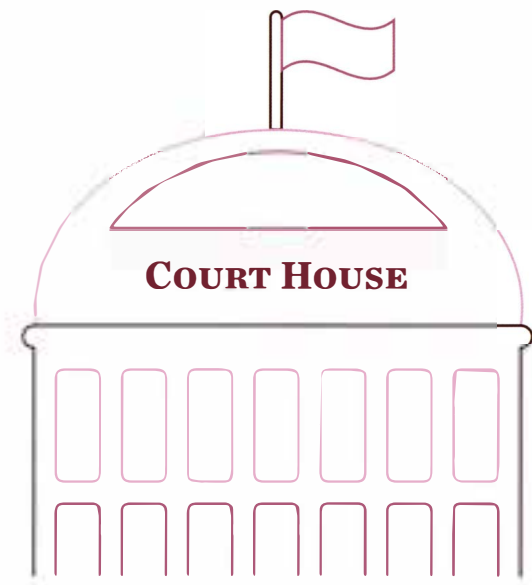
The good news is that the types of restrictions discussed in this report can be defeated. A student can be a tremendously effective advocate for change when he or she is aware of First Amendment rights and is willing to engage administrators in defense of them. Public exposure is also critical to defeating speech codes, since universities are often unwilling to defend their speech codes in the face of public criticism.

⁵³ Azhar Majeed, *Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators for Violating Students' Speech Rights*, 8 CARDOZO PUB. L., POL'Y & ETHICS J. 3, 515 (2010).

Unconstitutional policies also can be defeated in court, especially at public universities, where speech codes have been struck down in federal courts across the country, and yet more speech codes have been revised in favor of free speech as the result of legal settlements.

Any speech code in force at a public university is vulnerable to a constitutional challenge. Moreover, as speech codes are consistently defeated in court, administrators are losing virtually any chance of credibly arguing that they are unaware of the law, which means that they may be held personally liable when they are responsible for their schools' violations of constitutional rights.⁵³

The suppression of free speech at American universities is a matter of great national concern. But supporters of liberty should take heart: While many colleges and universities might seem at times to believe that they exist in a vacuum, the truth is that neither our nation's courts nor its citizens look favorably upon speech codes or other restrictions on basic freedoms.



APPENDIX A:

SCHOOLS BY RATING

SB 2300
3-26-19
#2



RED LIGHT

American University
Adams State University
Alabama A&M University
Barnard College
Bates College
Black Hills State University
Boise State University
Boston College
Boston University
Bryn Mawr College
California State University, Channel Islands
California State University, Dominguez Hills
California State University, Fresno
California State University, Long Beach
California State University, Monterey Bay
Carleton College
Case Western Reserve University
Cheyney University of Pennsylvania
Chicago State University
Clark University
Clemson University
Coastal Carolina University
Colby College
Colgate University
College of Charleston
College of the Holy Cross
Colorado College
Connecticut College
Davidson College
Delaware State University
Delta State University
DePauw University
Dickinson College
Drexel University
Eastern Illinois University
Eastern Michigan University
Eastern Washington University
Evergreen State College
Florida State University
Fordham University
Framingham State University
Franklin & Marshall College
Furman University
George Washington University
Georgetown University



RED LIGHT

Georgia Southern University
Governors State University
Grambling State University
Grinnell College
Harvard University
Howard University
Idaho State University
Jackson State University
Johns Hopkins University
Kean University
Keene State College
Kenyon College
Lafayette College
Lake Superior State University
Lehigh University
Lewis-Clark State College
Lincoln University
Louisiana State University - Baton Rouge
Lyndon State College
Macalester College
Mansfield University of Pennsylvania
Marquette University
McNeese State University
Middle Georgia State University
Middle Tennessee State University
Middlebury College
Missouri State University
Morehead State University
Mount Holyoke College
Murray State University
New Jersey Institute of Technology
New York University
Northeastern Illinois University
Northeastern University
Northern Illinois University
Northern Kentucky University
Oklahoma State University - Stillwater
Pennsylvania State University - University Park
Princeton University
Reed College
Rensselaer Polytechnic Institute
Rice University
Sam Houston State University
Shawnee State University

SB2320
3-26-19
#2



RED LIGHT

Southeastern Louisiana University
Southern Illinois University at Carbondale
Southern Illinois University at Edwardsville
St. Olaf College
State University of New York - Albany
State University of New York - Fredonia
State University of New York - New Paltz
Stevens Institute of Technology
Swarthmore College
Syracuse University
Tennessee State University
The College of New Jersey
Troy University
Tufts University
Tulane University
Union College
University of Alabama at Birmingham
University of Alaska Anchorage
University of Alaska Fairbanks
University of California - Riverside
University of Hawaii at Manoa
University of Houston
University of Illinois at Chicago
University of Kansas
University of Louisiana at Lafayette
University of Maine at Presque Isle
University of Massachusetts at Dartmouth
University of Massachusetts at Lowell
University of Miami
University of Michigan - Ann Arbor
University of Michigan - Dearborn
University of Michigan - Flint
University of Minnesota - Morris
University of Montana
University of New Mexico
University of New Orleans
University of North Georgia
University of North Texas
University of Notre Dame
University of Rhode Island
University of Richmond
University of South Carolina Columbia
University of South Dakota
University of Texas at Austin
University of Texas at Dallas
University of Tulsa
University of West Alabama
University of Wisconsin - Oshkosh



RED LIGHT

University of Wyoming
Utah State University
Utah Valley University
Virginia State University
Wake Forest University
Wellesley College
Wesleyan University
West Chester University of Pennsylvania
Western Illinois University
Whitman College
William Paterson University
Williams College



YELLOW
LIGHT

Amherst College
Alabama State University
Alcorn State University
Angelo State University
Arkansas State University
Armstrong State University
Athens State University
Auburn University
Auburn University Montgomery
Ball State University
Bard College
Bemidji State University
Binghamton University, State University of New York
Bloomsburg University of Pennsylvania
Bowdoin College
Bowling Green State University
Brandeis University
Bridgewater State University
Brooklyn College, City University of New York
Brown University
Bucknell University
California Institute of Technology
California Maritime Academy
California Polytechnic State University
California State Polytechnic University, Pomona
California State University, Bakersfield
California State University, Chico
California State University, East Bay
California State University, Fullerton
California State University, Los Angeles
California State University, Northridge
California State University, Sacramento
California State University, San Bernardino
California State University, San Marcos
California State University, Stanislaus
California University of Pennsylvania
Cameron University
Central Connecticut State University
Central Michigan University
Central Washington University
Centre College
Christopher Newport University
Claremont McKenna College
Clarion University of Pennsylvania
Colorado Mesa University
Colorado School of Mines
Colorado State University



YELLOW
LIGHT

Colorado State University - Pueblo
Columbia University
Cornell University
Dakota State University
Dartmouth College
East Stroudsburg University of Pennsylvania
East Tennessee State University
Eastern New Mexico University
Elizabeth City State University
Emory University
Fayetteville State University
Ferris State University
Fitchburg State University
Florida A&M University
Florida Atlantic University
Florida Gulf Coast University
Florida International University
Fort Hays State University
Fort Lewis College
Frostburg State University
Georgia Institute of Technology
Georgia State University
Gettysburg College
Grand Valley State University
Hamilton College
Harvey Mudd College
Haverford College
Henderson State University
Humboldt State University
Illinois State University
Indiana State University
Indiana University - Bloomington
Indiana University - Kokomo
Indiana University - Purdue University Columbus
Indiana University - Purdue University Indianapolis
Indiana University of Pennsylvania
Indiana University South Bend
Indiana University, East
Indiana University, Northwest
Indiana University, Southeast
Iowa State University
Jacksonville State University
James Madison University
Kennesaw State University
Kent State University
Kentucky State University
Kutztown University of Pennsylvania
Lock Haven University of Pennsylvania

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YELLOW
LIGHT

Longwood University
Louisiana Tech University
Marshall University
Massachusetts College of Liberal Arts
Massachusetts Institute of Technology
Metropolitan State University
Metropolitan State University of Denver
Miami University of Ohio
Michigan State University
Millersville University of Pennsylvania
Missouri University of Science and Technology
Montana State University
Montana Tech of the University of Montana
Montclair State University
New College of Florida
New Mexico State University
Nicholls State University
Norfolk State University
North Carolina A&T State University
North Carolina State University
North Dakota State University
Northern Arizona University
Northern Michigan University
Northwestern Oklahoma State University
Northwestern State University
Northwestern University
Oakland University
Oberlin College
Occidental College
Ohio University
Old Dominion University
Pittsburg State University
Pitzer College
Pomona College
Radford University
Rhode Island College
Richard Stockton College of New Jersey
Rogers State University
Rowan University
Rutgers University - New Brunswick
Saginaw Valley State University
Saint Cloud State University
Salem State University
San Diego State University
San Francisco State University
San Jose State University
Scripps College
Sewanee, The University of the South



YELLOW
LIGHT

Skidmore College
Slippery Rock University of Pennsylvania
Smith College
Sonoma State University
South Dakota State University
Southeast Missouri State University
Southern Connecticut State University
Southern Methodist University
Southwest Minnesota State University
Stanford University
State University of New York - Oswego
State University Of New York - University at Buffalo
State University of New York College of
Environmental Science and Forestry
Stony Brook University
Tarleton State University
Temple University
Texas A&M University - College Station
Texas Southern University
Texas State University - San Marcos
Texas Tech University
Texas Woman's University
The City College of New York
The Ohio State University
The University of Virginia's College at Wise
Towson University
Trinity College
University of Akron
University of Alabama
University of Alabama in Huntsville
University of Alaska Southeast
University of Arizona
University of Arkansas
University of California, Merced
University of California, Berkeley
University of California, Davis
University of California, Irvine
University of California, Los Angeles
University of California, San Diego
University of California, Santa Barbara
University of California, Santa Cruz
University of Central Arkansas
University of Central Florida
University of Central Missouri
University of Cincinnati
University of Colorado at Boulder
University of Connecticut
University of Delaware



YELLOW
LIGHT

University of Denver
University of Georgia
University of Hawaii at Hilo
University of Idaho
University of Illinois at Springfield
University of Illinois at Urbana-Champaign
University of Iowa
University of Kentucky
University of Louisville
University of Maine
University of Maine at Fort Kent
University of Mary Washington
University of Massachusetts Amherst
University of Massachusetts Boston
University of Memphis
University of Minnesota - Twin Cities
University of Missouri - Columbia
University of Missouri at Kansas City
University of Missouri at St. Louis
University of Montana Western
University of Montevallo
University of Nebraska - Lincoln
University of Nevada, Las Vegas
University of Nevada, Reno
University of New Hampshire
University of North Alabama
University of North Carolina at Asheville
University of North Carolina at Pembroke
University of North Carolina School of the Arts
University of North Dakota
University of Northern Colorado
University of Northern Iowa
University of Oklahoma
University of Oregon
University of Pittsburgh
University of Rochester
University of South Alabama
University of South Florida
University of South Florida at Saint Petersburg
University of Southern California
University of Southern Indiana
University of Southern Maine
University of Southern Mississippi
University of Texas at Arlington
University of Texas at El Paso
University of Texas at San Antonio
University of Texas at Tyler
University of Toledo



YELLOW
LIGHT

University of Utah
University of Vermont
University of Washington
University of West Florida
University of West Georgia
University of Wisconsin - Eau Claire
University of Wisconsin - Green Bay
University of Wisconsin - La Crosse
University of Wisconsin - Madison
University of Wisconsin - Stout
Valdosta State University
Vanderbilt University
Virginia Commonwealth University
Virginia Polytechnic Institute and State University
Washington & Lee University
Washington State University
Washington University in St. Louis
Wayne State University
Weber State University
West Virginia University
Western Carolina University
Western Kentucky University
Western Michigan University
Western Oregon University
Westfield State University
Wichita State University
Winona State University
Winston Salem State University
Worcester State University
Wright State University
Yale University
Youngstown State University

SB 2320
3-26-19
#2



**GREEN
LIGHT**

Appalachian State University
Arizona State University
Carnegie Mellon University
Cleveland State University
Duke University
East Carolina University
Eastern Kentucky University
Edinboro University of Pennsylvania
George Mason University
Indiana University - Purdue University Fort Wayne
Kansas State University
Michigan Technological University
Mississippi State University
North Carolina Central University
Oregon State University
Plymouth State University
Purdue University
Purdue University Northwest
Shippensburg University of Pennsylvania
State University of New York - Brockport
State University of New York - Plattsburgh
The College of William and Mary
University of Chicago
University of Florida
University of Maryland - College Park
University of Mississippi
University of North Carolina at Chapel Hill
University of North Carolina at Charlotte
University of North Carolina at Greensboro
University of North Carolina at Wilmington
University of North Florida
University of Pennsylvania
University of Tennessee
University of Virginia
Western State Colorado University





















































**WARNING
SCHOOLS**

Baylor University
Brigham Young University
Pepperdine University
Saint Louis University
Vassar College
Worcester Polytechnic Institute
Yeshiva University

APPENDIX B:

RATING CHANGES, 2016–2017 ACADEMIC YEAR

SB 2320
3.26.19
#2

SCHOOL NAME	2015–2016 RATING		2016–2017 RATING	
Appalachian State University		Yellow		Green
Armstrong State University		Red		Yellow
Athens State University		Red		Yellow
Black Hills State University		Green		Red
California State Polytechnic University, Pomona		Red		Yellow
California State University, Sacramento		Red		Yellow
California University of Pennsylvania		Red		Yellow
Central Michigan University		Red		Yellow
Columbia University		Red		Yellow
Edinboro University of Pennsylvania		Yellow		Green
East Carolina University		Yellow		Green
Emory University		Red		Yellow
Gettysburg College		Red		Yellow
Iowa State University		Red		Yellow
Jacksonville State University		Red		Yellow
Kansas State University		Yellow		Green
Lewis-Clark State College		Yellow		Red
Michigan Technological University		Yellow		Green
North Carolina Central University		Yellow		Green
Northeastern Illinois University		Yellow		Red
Northern Arizona University		Red		Yellow
Northwestern Oklahoma State University		Red		Yellow
Salem State University		Red		Yellow
Smith College		Red		Yellow
SUNY Buffalo		Red		Yellow

SB 2320
3.26.19
#2

SCHOOL NAME	2015-2016 RATING		2016-2017 RATING	
SUNY Plattsburgh	●	Red	●	Green
Texas Woman's University	●	Red	●	Yellow
University of Alaska Fairbanks	●	Yellow	●	Red
University of California, Merced	●	Red	●	Yellow
University of Central Florida	●	Red	●	Yellow
University of Georgia	●	Red	●	Yellow
University of Idaho	●	Red	●	Yellow
University of Missouri St. Louis	●	Red	●	Yellow
University of North Carolina at Charlotte	●	Yellow	●	Green
University of North Carolina at Greensboro	●	Red	●	Green
University of North Carolina at Wilmington	●	Yellow	●	Green
University of North Carolina School of the Arts	●	Red	●	Yellow
University of Oregon	●	Red	●	Yellow
University of Southern Indiana	●	Red	●	Yellow
University of Utah	●	Green	●	Yellow
University of West Florida	●	Red	●	Yellow
Valdosta State University	●	Red	●	Yellow
Virginia State University	●	Yellow	●	Red
Wayne State University	●	Red	●	Yellow
Western Michigan University	●	Red	●	Yellow
Winston Salem State University	●	Red	●	Yellow

APPENDIX C:

SCHOOLS AT WHICH A FACULTY OR ADMINISTRATIVE BODY HAS ADOPTED A VERSION OF THE 'CHICAGO PRINCIPLES'

SB2320
3-26-19
#2

American University
Amherst College
Appalachian State University
City University of New York
Claremont McKenna College
Columbia University
Franklin & Marshall College
Georgetown University
Johns Hopkins University
Kansas State University
Kenyon College
Louisiana State University
Michigan State University
Northern Illinois University
Princeton University
Purdue University
SUNY Buffalo
University of Denver
University of Montana
University of Minnesota
University of Missouri System
University of Southern Indiana
University of Virginia College at Wise
University of Wisconsin System
Vanderbilt University
Washington University in St. Louis
Winston-Salem State University

APPENDIX D:

SCHOOLS WITH 'FREE SPEECH ZONES'

SB 2320
3.26.19
#2

American University
Amherst College
Appalachian State University
City University of New York
Claremont McKenna College
Columbia University
Franklin & Marshall College
Georgetown University
Johns Hopkins University
Kansas State University
Kenyon College
Louisiana State University
Michigan State University
Northern Illinois University
Princeton University
Purdue University
SUNY Buffalo
University of Denver
University of Montana
University of Minnesota
University of Missouri System
University of Southern Indiana
University of Virginia College at Wise
University of Wisconsin System
Vanderbilt University
Washington University in St. Louis
Winston-Salem State University



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Foundation for Individual
Rights in Education

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SB2320

House Education Committee

March 26, 2019

Lisa A. Johnson, Interim Vice Chancellor for Academic/Student Affairs, NDUS

701.328.4143 | lisa.a.johnson@ndus.edu

Chair Owens and members of the House Education Committee: My name is Lisa Johnson, and I serve as the Interim Vice Chancellor for Academic and Student Affairs of the North Dakota University System. I am here to provide supportive testimony regarding Senate Bill 2320.

Freedom of thought and expression is essential to every institution within the North Dakota University System. Our colleges and universities exist not only to impart knowledge. Equally, they have a responsibility to provide an environment to interpret, explore, and expand that knowledge by testing the old and proposing new knowledge. This educational philosophy guides learning outside the classroom just as much as in class, and often inspires vigorous debate on those social, economic, and political issues that arouse the strongest passions. In the process, views will be expressed that may seem to many wrong, distasteful, or offensive. Such is the nature of freedom to sift and winnow ideas.

The highest law of the land, the U.S. Constitution, guarantees freedom of speech. All of us in this room understand the expansiveness and importance of the rights afforded to each of us in the First Amendment. There is a long history of case law supporting a very broad interpretation of free speech rights. SB2320 attempts to enhance or expand rights already so enshrined.

The North Dakota University System is supportive of the amendments recommended by the Senate Education Committee. The amendments, represented in the Engrossed version before you today, addressed several of the NDUS' primary concerns around the definition of student-on-student harassment, faculty rights, transparency in costs associated with logistical expectations for public events, and addresses language permitting cause of action that previously encouraged litigation through the award of damages ranging from \$1,000 to \$100,000 and reimbursement of all attorney's fees. I want this Committee to know that the NDUS took the amendments from the Senate Education Committee very seriously. Before you today, attached to this testimony, is a draft policy for the consideration of the State Board of Education. To summarize, nearly all of the bill's original intent, the protection of free speech and expression, was transferred to the draft SBHE policy. The draft policy:

- Reaffirms students' constitutional rights to free speech and expression
- Prohibits institutions from shielding students from the free speech and expression of others, unless for legitimate pedagogical reasons

- Permits designation of campus spaces that are open, restricted or closed to the exercise of free speech or expression.
- Prohibits campuses from disinviting guest speakers or groups based on content or viewpoint.
- Prohibits or limits speech, expression or assemblies not protected by the First Amendment of the Constitution.

For the record, our campuses have not encountered any substantiated cases of restrictions being placed on free speech that point to the need for a law to replace what has proven highly effective. The NDUS contacted all 11 campuses to ascertain the number of complaints filed by students and/or the public documenting violations of First Amendment Rights to free speech and expression. A summary of those findings is enclosed for your review. There have been no reported incidents at any NDUS campus within the last five years. We have had no speakers shouted down, no visitors assaulted, no “disinvited” speakers and no student lawsuits.

Certainly, there have been and continues to be media attention on free speech. Like the bill’s sponsors, we are greatly concerned by anything that limits the free exchange of ideas. However, I would urge this Committee to not generalize from nationally publicized cases as to what is happening at public colleges and universities in North Dakota. No one can ignore that free speech has become a problem at some institutions in the U.S., but it should not be construed that our institutions perpetuate these same practices.

Free speech law is an ever-changing and deepening area of law. Every year the parameters of the First Amendment are further defined by court decisions across the country. You are probably well-aware of the Executive Order that was signed less than one week ago directing campuses to adopt a free speech policy or risk loss of federal funding from any of 12 federal grant-making agencies. The Federal Office of Management and Budget stated that, “...the OMB will work with each agency on implementation. That will be coming in the next several weeks and months.” That timeline poses a dilemma for a legislature that will not reconvene for approximately 18 months. NDUS colleges and universities receive federal funding from those federal agencies to include the National Institutes of Health, the National Science Foundation, U.S. Department of Agriculture, U.S. Department of Energy, U.S. Department of Defense and others. What are the institutions to do if it is determined that they are not in compliance with parameters that are yet to be released? Again, the NDUS believes that by moving the specific definitions and directives stipulated in the engrossed version of SB2320 to SBHE policy, the institutions will be able to respond more rapidly to the everchanging environment of campus free speech and expression.

As currently written, the North Dakota University System recommends a “do pass” on SB2320.

SB2320
3-26-19
#3

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

SUBJECT: STUDENT AFFAIRS

EFFECTIVE:

Section: 50X – Student Free Speech and Expression

PROPOSED DRAFT CATEGORY:	New
NDUS LIAISON:	Lisa Johnson
PRIMARY COUNCIL:	Student Affairs
SBHE COMMITTEE (if policy):	Academic and Student Affairs Committee

1. Definitions for Terms Used in this Section

- a. **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.
- b. **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.
- 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.
- 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 course at an institution.
- g. **Student-on-Student Harassment** – (1) Unwelcome conduct directed to an individual which a reasonable person would find offensive or defamatory and which does not constitute protected conduct, (2) conduct which violates North Dakota criminal laws prohibiting harassment, stalking, or similar behavior, or (3) 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).
- 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 where there exists a pedagogical reason to do so.
- d. Institutions under the control of the SBHE generally shall not seek to shield individuals from the free speech or expression of others, unless a pedagogical reason exists to do so within the classroom or other educational setting, or if an accommodation is requested in light of a mental health or other medical concern (including, but not limited to, post-traumatic stress disorder).
- e. Faculty at institutions under the control of the SBHE shall generally adhere to the 1940 Statement of Principles on Academic Freedom and Tenure adopted by the American Association of University Professors, which provides that “Teachers are entitled to freedom in the classroom in discussing their subject,

SB 2320
3-26-19
#3

but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject." Notwithstanding, faculty shall not face discipline or adverse employment action based on classroom speech unless such speech violates other institutional policy or procedure.

- f. 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 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 not designate an area of campus as a restricted or designated forum in the absence of an educational, safety or security, or health-related reason, including 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.
- g. 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.
- h. 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, and 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 logistic 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.

- i. 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.
- j. Institutions may prohibit materially and substantially disruptive conduct in closed forums, restricted or designated forums, and traditional public forums if that space has been reserved for the exclusive use of another student, faculty, or student organization.
- k. 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. **Student-on-Student Harassment** – Institutions shall adopt a policy on student-on-student harassment consistent with or substantially similar to the definition set forth in this policy. Institutions shall not utilize such policies to limit student free speech or expression.

REFERENCE:

HISTORY: New policy, SBHE minutes, XXXXXXXXXX

To: Chair Owens and Members of the House Education Committee
From: Lisa A. Johnson, North Dakota University System
Date: March 26, 2019
Re: Five Years of Data – Free Speech Complaints

The following is the number of complaints, the number of substantiated complaints, and the number of days to respond or resolve each complaint for the for the period of 2014-2018. There are no pending complaints as of this date.

Institution Name	Number of Complaints Received Related to an Alleged Violation of Free Speech/First Amendment Rights.	Number of Substantiated Complaints Related a Violation of Free Speech/First Amendment Rights.	Number of days or months to resolve each complaint.	Comments
Bismarck State College	0	0	NA	NA
Dakota College at Bottineau	0	0	NA	NA
Dickinson State University	0	0	NA	NA
Lake Region State College	0	0	NA	NA
Mayville State University	0	0	NA	NA
Minot State University	0	0	NA	NA
North Dakota State College of Science	0	0	NA	NA
North Dakota State University	0	0	Informal concerns are generally addressed within 1 day, but at most a few days.	NDSU has received no formal complaints related to its policies for free speech/first amendment rights. NDSU receives approximately 1 informal complaint/concern per year regarding these policies. NDSU works with the student or student organization to resolve their concerns. No student or student organization has been denied the opportunity for their expressive activity that we can recall.
University of North Dakota	0	0	NA	NA
Valley City State University	0	0	NA	NA
Williston State College	0	0	NA	NA

SB2320

House Education Committee

March 26, 2019

Lisa A. Johnson, Interim Vice Chancellor for Academic/Student Affairs, NDUS
701.328.4143 | lisa.a.johnson@ndus.edu

Chair Owens and members of the House Education Committee: My name is Lisa Johnson, and I serve as the Interim Vice Chancellor for Academic and Student Affairs of the North Dakota University System. I am here to supply testimony regarding the amendments introduced this morning to Senate Bill 2320.

You have a record of my comments and the University System's commitment to free speech and freedom of expression.

If the Committee prefers to proceed with this bill as presented today by the bill's sponsor, there are two key areas for which the NDUS seeks specific amendments:

Fees

As reintroduced again today, the bill prohibits the institution from charging the student organization security fees based on the content of the speech of the guest speakers or the anticipated reaction or opposition of the listeners, and we support restrictions on such content-based actions. However, the system's firm belief in this principle does not mean that institutions should incur significant unbudgeted costs as a result of student groups inviting guest speakers to campus, and the bill should not require the institution to subsidize those speakers. To clarify this concern, the NDUS instead seeks to clarify that institutions may use non-content-based factors to assess anticipated security costs. The NDUS proposes language that stipulates that "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....that institutions may, in their discretion, impose security and logistic fees based on venue, anticipated attendance, anticipated protest activity, and other non-content-based factors...and that objective criteria for calculating such fees shall be made publicly available in advance of their use."

Cause of Action

The bill, as reintroduced today, grants every individual the right to file a lawsuit against an institution if that institution violates any of the numerous and detailed provisions set forth in the bill. If that individual prevails in their lawsuit, this bill requires the institution to pay a sum of

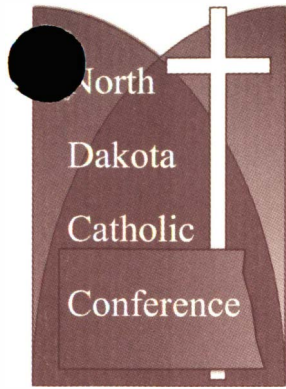
9

money to the individual. The campus would then also have to pay the individual's attorney fees. This would be a gift to trial lawyers who would have no incentive to limit their fees because they know that the taxpayers will be paying in the end. This potentially subjects institutions and North Dakota taxpayers to functionally unlimited liability and even if an institution follows the law perfectly, it would be forced to defend against meritless lawsuits. This part of the bill is particularly concerning where individuals already have two avenues to pursue if they contend that their First Amendment rights have been violated. First, they can file a complaint with their campus and seek policy changes to ensure that the alleged violation does not reoccur. Second, they can file a federal lawsuit under federal civil rights laws which also grant the ability to seek damages. The bill's creation of a new, expensive means for students to seek compensation from their institutions is redundant and unnecessary.

I respectfully discourage the inclusion of the amendments introduced today in SB2320 based on the fact that we do not know what guidelines will be released by the federal government in the following months—potentially placing the public colleges and universities in jeopardy of losing federal funding. At a minimum, the NDUS implores the Committee to strike language on page 3, lines 3-6 prohibiting the assessment of fees for security and logistics and lines 15-25 on that same page removing the cause of action.

SB 2320
3-26-19
#4

To: House Education Committee
From: Christopher T. Dodson, Executive Director
Subject: Senate Bill 2320 - Protection of Student Rights
Date: March 26, 2019



Representing the Diocese of
Fargo and the Diocese of
Bismarck

103 South Third Street
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Bismarck ND 58501
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ndcatholic.org
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Students should not lose their basic rights to speech, religious expression, and association when attending or on a public campus. Unfortunately, campuses across the nation have enacted policies that infringe on those rights. The purpose of Senate Bill 2320 is to prevent such policies from occurring at our public colleges and universities. We support those efforts and ask the committee to adopt amendments to better reflect the bill as introduced.

In addition, we urge the committee to include language to prevent campuses from adopting policies that would restrict the right of student organizations to choose leaders that reflect their beliefs and missions. These policies, sometimes called "all comers" policies, require student groups to accept anyone as a member and even leader, even if the individual disagrees with or is even hostile to the group's mission, purpose, or beliefs. Catholics could assume control over a Baptist group, Democrats and Republicans could take over each other's clubs, and racists could insert themselves into African-American student clubs.

In a closely divided and somewhat confusing opinion, the United States Supreme Court upheld these policies in *Christian Legal Society v. Martinez*. The task of preventing the creation of such policies, therefore, rests with the legislature. Senate Bill 2320, which is intended to protect student free speech rights, should be amended to also protect the right of association. College Republicans have the right to be Republicans, the College Atheists have the right to be atheists, and the College Christians have the right to be Christians.

This can be accomplished with the addition of: "An institution may not discriminate against a student organization with respect to a benefit available to any other student organization, based on that organization's requirement that its leaders or voting members adhere to the organization's viewpoints or sincerely held beliefs or be committed to furthering the organization's beliefs or religious missions."

Thank you for your consideration.

SB2320
3-26-19
#5

Birgit Pruess, Ph.D.
Professor, North Dakota State University
Faculty member, State Board of Higher Education

March 26, 2019

Re: SB2320

Members of the House Education Committee of the 66th Legislative Assembly,

I am a Professor for Microbiological Sciences within the North Dakota University System and currently serve as the Faculty Advisor to the State Board of Higher Education, which acts as the legislative body for our 11 institutions of higher education. As such, I am charged with representing the faculty of the Great State of North Dakota to the SBHE and other groups of stakeholders, including legislators. I am here to testify on bill SB2320 today on behalf of the North Dakota faculty.

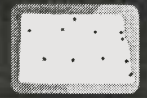
Free speech is an important topic to me. Of course, faculty in very general like academic freedom and for many of us, that is why we are in academia where salaries are lower and longer work hours than they would be if faculty had chosen to work in the private sector years ago.

I had several items of concern with the original version of SB2320, but am very appreciative of the amendments that Senate made to the bill, which in essence transfers the responsibility for revisions and enhancements of free speech on the NDUS college campuses to the system office and the SBHE. I will be more than happy to represent the faculty on the development of a new SBHE policy that puts the needs of the students and faculty under consideration. I support the Senate amendments and SB2320 in its current, engrossed version.

Sincerely and respectfully



Birgit Pruess, Ph.D.



North Dakota Student Association

Testimony for **Engrossed SB 2320**

Tuesday, March 26, 2019

Prepared by Jared M. Melville, President
701.200.6191 | jared.m.melville@ndus.edu

Chairman Owens, members of the House Education Committee, for the record my name is Jared Melville and I serve as the President of the North Dakota Student Association, an independent statewide organization that represents the voice of North Dakota's 45,000 public college and university students. Today I am here to provide testimony in support Engrossed Senate Bill 2320, relating to free speech on North Dakota college campuses.

NDSA supports Senate Bill 2320 as amended by the North Dakota Senate because the legislation calls upon the State Board of Higher Education to adopt a free speech policy that safeguards several fundamental free speech principles.

NDSA strictly prefers that any campus free speech policy remain subject to the final approval and revision by the State Board of Higher Education, rather than by the legislature, because North Dakota students will have a greater ability to provide input on policies that will certainly affect their collegiate experience.

SB 2320, as amended, creates an avenue for students to provide input on the final free speech policy. Students who sit on the University System's Academic Affairs Council and the University System's Student Affairs Council will be able to review the policy, identify its merits and shortcomings, and provide constructive input. Next, once the free speech policy reaches the State Board's Academic and Student Affairs Committee, it will be considered by the Board's student member for further review. And, of course, once the policy is considered for final adoption by the Board, the student member will be able to provide final input and vote.

This level of detailed analysis by North Dakota students would not occur if the free speech policy were to be codified explicitly into North Dakota Century Code.

NDSA supports Senate Bill 2320 as amended by the Senate because it will lead to the creation of Board policy that is more reactive to the unique needs of campuses and their students. Students in the North Dakota Student Association respect the fact that each of the 11 public institutions have unique needs, a unique culture, and would therefore be affected by a free speech policy in different ways. The Board can work with campuses to craft a policy that protects student and free speech rights while recognizing the uniqueness of 11 campuses.

If a strong free speech policy that was codified into North Dakota Century Code needed to be amended when the legislature was not in session, and the free speech policy adversely affected students and their rights, then students could be required to wait over a year before they could pressure the legislature to make necessary amendments to a broken free speech policy. A free speech policy that is governed by the State Board would be more reactive and would evolve more responsively to the needs of campuses and the regulatory environment.

Chairman Owens and members of the House Education Committee, I thank you for your time and your service to higher education and the state of North Dakota. NDSA urges you to submit a do pass recommendation on Senate Bill 2320 as amended by the Senate. I welcome any questions you have.

Testimony handed in
not physical testimony

SB 2320
3-26-19
#17



March 26, 2019

Dear Chair Owens and Members of the House Education Committee,

North Dakota University System faculty was asked to give feedback on Senate Bill 2320. Representing the North Dakota University System faculty, the Council of College Faculties Executive Committee met on March 21, 2019 and approved the following letter.

Our concerns regarding SB 2320 can be summarized into six key points:

1. SB 2320 appears to be a solution in search of a problem. Board policy as well as the Constitution of the United States protects free speech. Campuses in North Dakota have had no concerns or issues with restriction of free speech. With the laws and policies that are currently in place, North Dakota campuses clearly protect the rights of both speakers and protestors.
2. SB 2320 appears to be inspired by a national political agenda. We question whether the goal of SB 2320, despite its name, is to enhance free speech on campus or whether the goal is to threaten and possibly penalize free speech.
3. We strongly feel that the North Dakota University System has and will continue to monitor and adjust its policies on free speech as needed. Legislative interference can set a dangerous precedent on this issue (as well as others) and could lead to potential political bias.
4. SB 2320 seeks to limit the topics that faculty would be "allowed" to discuss in class. Violating the free speech of faculty would fly in the face of every tenet of open inquiry that is essential to the mission of the academy as well as the principles of academia. Scholars should have freedom to teach their students without the threat of litigation that SB 2320 would impose on our campuses.
5. SB 2320, in its original form, would open the North Dakota University System to frivolous lawsuits which would further compromise the financial footing of NDUS.
6. We would encourage the legislature to focus on real and pressing issues such as restoring adequate funding to higher education in North Dakota, student loan debt, and mental health issues in our campus populations.

In conclusion, the Council of College Faculties Executive Committee, representing the faculty of the North Dakota University System, asks that SB 2320 be given a "do not pass" in its originally proposed version. SB 2320, as amended, would support free speech rights and not impose financial burdens on the NDUS institutions. We would support these amendments.

Sincerely,

A handwritten signature in blue ink, which appears to read 'Debora Dragseth', is written over a faint, larger version of the same signature.

Debora Dragseth, Ph.D.
President of the Council of College Faculties

Professor of Business
Dickinson State University
291 Campus Drive, Dickinson ND 58601
701-483-2696
deb.dragseth@dickinsonstate.edu

Sixty-sixth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2320

SB 2320
4-2-19
#1

Introduced by

Senators Holmberg, Davison

Representatives Becker, K. Koppelman, Mock, Schreiber-Beck

- 1 A BILL for an Act to create and enact chapter 15-10.4 of the North Dakota Century Code,
2 relating to free speech at institutions under the control of the state board of higher education;
3 ~~and to provide a penalty.~~

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1.** Chapter 15-10.4 of the North Dakota Century Code is created and enacted as
6 follows:

7 **15-10.4-01. Definitions.**

8 As used in this chapter:

- 9 1. "Constitutional time, place, and manner restrictions" means restrictions on the time,
10 place, and manner of free speech which do not violate the First Amendment to the
11 United States Constitution or section 4 of article I of the Constitution of North Dakota
12 and which are reasonable, content- and viewpoint-neutral, and narrowly tailored to
13 satisfy a significant institutional interest, and leave open alternative channels for the
14 communication of the information or message.
- 15 2. "Faculty" means an individual, regardless of whether the individual is compensated by
16 an institution, and regardless of political affiliation, who is tasked with providing
17 scholarship, academic research, or teaching, including tenured and nontenured
18 professors, adjunct professors, visiting professors, lecturers, graduate student
19 instructors, and those in comparable positions. "Faculty" does not mean an individual
20 whose primary responsibilities are administrative or managerial, unless the individual
21 also teaches at least one credit-hour.
- 22 3. "Free speech" means speech, expression, and assemblies protected by the First
23 Amendment to the United States Constitution or section 4 of article I of the
24 Constitution of North Dakota, including all forms of peaceful assembly, protests,

demonstrations, rallies, vigils, marches, public speaking, distribution of printed materials, carrying signs, displays, or circulating petitions. "Free speech" does not include the promotion, sale, or distribution of a product or service, unless the promotion, sale, or distribution of the product or service is incidental to the exercise of free speech.

4. "Institution" means an institution under the control of the state board of higher education.

5. "Student" means an individual enrolled in at least one course offered by an institution.

6. "Student organization" means an officially recognized organization at an institution, or an organization seeking official recognition, comprised of admitted students receiving or are seeking to receive benefits through the institution.

15-10.4-02. Adoption of campus free speech policy.

The state board of higher education and each institution shall adopt a policy that:

1. Protects students' rights to free speech, assembly, and expression;

2. Permits institutions to establish and enforce reasonable and constitutional time, place, and manner restrictions on free speech, assembly, and expression;

3. Protects the academic freedom and free speech rights of faculty while adhering to guidelines established by the American association of university professors; and

4. Complies with the following principles of free speech:

a. An institution shall maintain the generally accessible, open, outdoor areas of its campus as traditional public forums for free speech by students, faculty, and invited guests, subject to reasonable time, place, and manner restrictions;

b. An institution may not ~~restrict students' free speech to particular areas of campus,~~ sometimes known as "free speech zones" confine the exercise of student free speech to area(s) set aside for that purpose unless adequate alternative means of communication are provided;

c. An institution may not deny student activity fee funding to a student organization based on the viewpoints the student organization advocates;

d. An institution may not establish permitting requirements prohibiting spontaneous outdoor assemblies or outdoor distribution of literature, except that an institution may maintain a policy granting an individual or organization the right to reserve the

1 exclusive use of certain outdoor spaces, and may prohibit spontaneous assemblies
2 or distribution of literature inside reserved outdoor spaces. An institution may
3 maintain a policy granting members of the college or university community the
4 right to reserve certain outdoor spaces in advance;

5 e. An institution may not charge students or student organizations security fees
6 based on the content of the student's or student organization's speech, or the
7 content of the speech of guest speakers invited by students, or the anticipated
8 reaction or oppositions of listeners to speech;

9 f. An institution shall allow all students, student organizations, and faculty to invite
10 guest speakers to campus to engage in free speech regardless of the views of
11 the guest speakers or the viewpoint or content of the anticipated speech; and

12 g. An institution may not retract, or compel a student, student organization, or
13 faculty member to retract, a guest speaker's invitation to speak at the institution
14 based on the guest speaker's viewpoints or the content of the anticipated
15 speech; disinvite a speaker invited by a student, student
16 organization, or faculty member because the speaker's anticipated speech may
17 be considered offensive, unwise, immoral, indecent, disagreeable, conservative,
18 liberal, traditional, radical, or wrongheaded by students, faculty, administrators,
19 government officials, or members of the public.

20 **15-10.4-03. Cause of action.**

21 The attorney general or a person whose expressive rights are violated by an action that is
22 not compliant with the policy provisions required under subsection 4 of section 15-10.4-02, may
23 bring an action in a court of competent jurisdiction to recover compensatory damages and
24 reasonable court costs and attorney's fees. If the court finds a violation of the policy provisions
25 required under subsection 4 of section 15-10.4-02 occurred, the court shall award the aggrieved
26 party a minimum of one thousand dollars. Excluding reasonable court costs and attorney's fees,
27 the total compensatory damages in a case arising under this section from a single violation may
28 not exceed one hundred thousand dollars, regardless of the number of plaintiffs awarded
29 damages. If there are multiple plaintiffs in an action under this section, the court shall divide any
30 compensatory damages equally among the plaintiffs.

UNIVERSITY

About (index.php) / Commitment to Freedom of Expression

COMMITMENT TO FREEDOM OF EXPRESSION

Because Purdue University (the “University”) is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. Except insofar as limitations on that freedom are necessary to the functioning of the University, the University fully respects and supports the freedom of all members of the University community “to discuss,” in the words of former University of Chicago President Robert M. Hutchins, “any problem that presents itself.”

Of course, the ideas of different members of the University community will often and quite naturally conflict. But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

The freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, wherever they wish. The University may restrict expression, for example, that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the University. In addition, the University may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the University. But these are narrow exceptions to the general principle of

freedom of expression, and it is vitally important that these exceptions never be used in a manner that is inconsistent with the University's commitment to a completely free and open discussion of ideas.

In a word, the University's fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose. Indeed, fostering the ability of members of the University community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University's educational mission.

As a corollary to the University's commitment to protect and promote free expression, members of the University community must also act in conformity with the principle of free expression. Although members of the University community are free to criticize and contest the views expressed on campus, and to criticize and contest speakers who are invited to express their views on campus, they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe. To this end, the University has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it.

ABOUT PURDUE UNIVERSITY

University Leadership

Colleges and Schools

Traditions

History

Past Presidents

Sixty-sixth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2320

Introduced by

Senators Holmberg, Davison

Representatives Becker, K. Koppelman, Mock, Schreiber-Beck

1 A BILL for an Act to create and enact chapter 15-10.4 of the North Dakota Century Code,
2 relating to free speech at institutions under the control of the state board of higher education.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1.** Chapter 15-10.4 of the North Dakota Century Code is created and enacted as
5 follows:

6 **15-10.4-01. Definitions.**

7 As used in this chapter:

- 8 1. "Constitutional time, place, and manner restrictions" means restrictions on the time,
9 place, and manner of free speech which do not violate the First Amendment to the
10 United States Constitution or section 4 of article I of the Constitution of North Dakota
11 and which are reasonable, content- and viewpoint-neutral, and narrowly tailored to
12 satisfy a significant institutional interest, and leave open alternative channels for the
13 communication of the information or message.
- 14 2. "Faculty" means an individual, regardless of whether the individual is compensated by
15 an institution, and regardless of political affiliation, who is tasked with providing
16 scholarship, academic research, or teaching, including tenured and nontenured
17 professors, adjunct professors, visiting professors, lecturers, graduate student
18 instructors, and those in comparable positions. "Faculty" does not mean an individual
19 whose primary responsibilities are administrative or managerial, unless the individual
20 also teaches at least one credit-hour.
- 21 3. "Free speech" means speech, expression, and assemblies protected by the First
22 Amendment to the United States Constitution or section 4 of article I of the
23 Constitution of North Dakota, including all forms of peaceful assembly, protests,

demonstrations, rallies, vigils, marches, public speaking, distribution of printed materials, carrying signs, displays, or circulating petitions. "Free speech" does not include the promotion, sale, or distribution of a product or service, unless the promotion, sale, or distribution of the product or service is incidental to the exercise of free speech.

4. "Institution" means an institution under the control of the state board of higher education.

5. "Student" means an individual enrolled in at least one course offered by an institution.

6. "Student organization" means an officially recognized organization at an institution, or an organization seeking official recognition, comprised of admitted students receiving or are seeking to receive benefits through the institution.

15-10.4-02. Adoption of campus free speech policy.

On or before August 27, 2019, ~~The~~ the state board of higher education and each institution shall adopt a policy that:

1. Protects students' rights to free speech, assembly, and expression;
2. Permits institutions to establish and enforce reasonable and constitutional time, place, and manner restrictions on free speech, assembly, and expression;
3. Permits students, faculty, or student organizations to invite guest speakers or groups to present regardless of the viewpoint or content of the anticipated speech of the guest speaker or group; and
4. Protects the academic freedom and free speech rights of faculty while adhering to guidelines established by the American association of university professors.

Upon adoption of the policy or policies set forth in this section 15-10.4-2, the state board of higher education shall provide a copy of the policy or policies to legislative management.

Sixty-sixth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2320

4.2.19
Attachment 2

Introduced by

Senators Holmberg, Davison

Representatives Becker, K. Koppelman, Mock, Schreiber-Beck

1 A BILL for an Act to create and enact chapter 15-10.4 of the North Dakota Century Code,
2 relating to free speech at institutions under the control of the state board of higher education;
3 and to provide a penalty.

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10 place, and manner of free speech which do not violate the First Amendment to the
11 United States Constitution or section 4 of article I of the Constitution of North Dakota
12 and which are reasonable, content- and viewpoint-neutral, and narrowly tailored to
13 satisfy a significant institutional interest, and leave open alternative channels for the
14 communication of the information or message.
- 15 2. "Faculty" means an individual, regardless of whether the individual is compensated by
16 an institution, and regardless of political affiliation, who is tasked with providing
17 scholarship, academic research, or teaching, including tenured and nontenured
18 professors, adjunct professors, visiting professors, lecturers, graduate student
19 instructors, and those in comparable positions. "Faculty" does not mean an individual
20 whose primary responsibilities are administrative or managerial, unless the individual
21 also teaches at least one credit-hour.
- 22 3. "Free speech" means speech, expression, and assemblies protected by the First
23 Amendment to the United States Constitution or section 4 of article I of the
24 Constitution of North Dakota, including all forms of peaceful assembly, protests,

demonstrations, rallies, vigils, marches, public speaking, distribution of printed materials, carrying signs, displays, or circulating petitions. "Free speech" does not include the promotion, sale, or distribution of a product or service, unless the promotion, sale, or distribution of the product or service is incidental to the exercise of free speech.

4. "Institution" means an institution under the control of the state board of higher education.

5. "Student" means an individual enrolled in at least one course offered by an institution.

6. "Student organization" means an officially recognized organization at an institution, or an organization seeking official recognition, comprised of admitted students receiving or are seeking to receive benefits through the institution.

15-10.4-02. Adoption of campus free speech policy.

The state board of higher education and each institution shall adopt a policy that:

1. Protects students' rights to free speech, assembly, and expression;
2. Permits institutions to establish and enforce reasonable and constitutional time, place, and manner restrictions on free speech, assembly, and expression;
3. Protects the academic freedom and free speech rights of faculty while adhering to the American association of university professors 1940 Statement of Principles on Academic Freedom and Tenure; and
4. Complies with the following principles of free speech:
 - a. An institution shall maintain the generally accessible, open, outdoor areas of its campus as traditional public forums for free speech by students, faculty, and invited guests, subject to reasonable time, place, and manner restrictions;
 - b. An institution may not restrict students' free speech to particular areas of campus, sometimes known as "free speech zones";
 - c. An institution may not deny student activity fee funding to a student organization based on the viewpoints the student organization advocates;
 - d. An institution may not establish permitting requirements prohibiting spontaneous outdoor assemblies or outdoor distribution of literature, except that an institution may maintain a policy granting an individual or organization the right to reserve the exclusive use of certain outdoor spaces, and may prohibit spontaneous assemblies or distribution of literature inside reserved outdoor spaces. An institution may maintain a policy granting members of the college or university community the

right to reserve certain outdoor spaces in advance;

e. An institution may not charge students or student organizations security fees based on the content of the student's or student organization's speech, or the content of the speech of guest speakers invited by students, or the anticipated reaction or oppositions of listeners to speech. 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;

f. An institution shall allow all students, student organizations, and faculty to invite guest speakers to campus to engage in free speech regardless of the views of the guest speakers or the viewpoint or content of the anticipated speech; and

g. An institution may not compel a student, student organization, or faculty member to retract, a guest speaker's invitation to speak at the institution based on the guest speaker's viewpoints or the content of the anticipated speech~~disinvite a speaker invited by a student, student organization, or faculty member because the speaker's anticipated speech may be considered offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrongheaded by students, faculty, administrators, government officials, or members of the public.~~

h. An institution may not discriminate against a student organization with respect to a benefit available to any other student organization, based on that organization's requirement that its leaders or voting members adhere to the organization's viewpoints or sincerely held beliefs or be committed to furthering the organization's belief's or religious missions.

15-10.4-03. Cause of action.

The attorney general or a person whose expressive rights are violated by an action that is not compliant with the law, may bring an action in a court of competent jurisdiction to recover compensatory damages and reasonable court costs~~and attorney's fees~~. If the court finds a violation of the law, the court shall award the aggrieved party a minimum of one~~five~~ thousand dollars. Excluding reasonable court costs~~and attorney's fees~~, the total compensatory damages in a case arising under this section from a single violation may not exceed twenty-five thousand dollars, regardless of the number of plaintiffs awarded damages. If there are multiple plaintiffs in

- 1 an action under this section, the court shall divide any compensatory damages equally among the
- 2 plaintiffs.

SECTION 2. EFFECTIVE DATE. This Act is effective beginning January 1, 2020.