

First Amendment/Free Speech and Student Code of Conduct Policies

**North Carolina Association of Community
College Trustees**

By: Q. Shanté Martin, *NCCCS General Counsel*

21 April 2016

Overview

- **Review of cases dealing with student speech**
- **Summary of speech principles derived from cases**
- **Application of speech principles**

First Amendment/Free Speech and Student Code of Conduct Policies

➤ What do you think?

➤ Sample *hypothetical statements*:

➤ *Student T-shirt: "President Martin at XYZ Community College is a horrible President, and she needs to retire!"*

➤ *Facebook post: "I believe that all of the professors at XYZ Community College suck! If you are smart, you wouldn't go to that school."*

➤ *Instagram post:*



BY JOHN GIDUCK

"I go to XYZ Community College, and I love it when terrorists attack elementary schools!"



➤ *Tweet: "I go to XYZ Community College, and I would love it if every non-White would just die off the face of the earth!"*

➤ *Facebook post: "I think my XYZ classmate, Jane Doe, is so musty, she makes the whole Psychology class smell like hot garbage! #needsdeoderantandshowerNOW!"*

First Amendment/Free Speech and Student Code of Conduct Policies

*Now, let's see how many of the
above statements would potentially
violate XYZ Community College's
Student Code of Conduct*

First Amendment/Free Speech and Student Code of Conduct Policies

STUDENT CODE

All students and staff have the right to a safe, peaceful, and honest educational environment. Therefore, when in the judgment of college officials, a student's conduct disrupts or threatens to disrupt the college community, appropriate disciplinary action will be taken to restore and protect the safety, peace, and integrity of the community.

4. Any possession or display of, or attempt or threat to use, for any unlawful purpose, any weapon, dangerous instrument, explosive, or inflammable material in any college building or the college campus.
5. Prevention of, or attempt to prevent, by physical

specific situations. In addition to the Articles listed below, students who engage in acts such as stealing, gambling, profane language, offensive or inappropriate behavior, and personal abuses are liable for disciplinary action stated in the *Student Code*.

A student shall not, by use of violence, force, threat, or coercion, threat, intimidation, fear, passive resistance, or any other conduct intentionally cause the disruption or obstruction of any lawful mission, process, or function of the College. Further, a student shall not engage in any conduct for the purpose of causing a disruption or obstruction of any lawful mission, process or function of the College, if such a disruption or obstruction is reasonably certain to result. Neither shall he/she urge other students to engage in such conduct for the purpose of causing the disruption or obstruction of any lawful mission, process, or function of the College if a disruption or obstruction is reasonably certain to result from his/her urging.

The following, while not intended to be exclusive, illustrate the offenses encompassed herein, when done for the purpose of obstructing or disrupting the operation or function of the College.

1. Occupation of any building or part thereof, with intent to deprive others of its use;
2. Blocking the entrance or exit of any building or corridor or room therein with intent to deprive others of lawful access to or from, or use of, said building or corridor or room;
3. Setting fire to or by any other means destroying or substantially damaging any building or property of others on college premises:

entry or presence has been restricted.

2. Lewd or indecent conduct on college premises or at college-sponsored functions.
3. Setting off a fire alarm or using or tampering with any fire safety equipment on college premises or at college-sponsored functions except with reasonable belief in the need for such alarm or equipment.
4. Smoking and using other forms of tobacco products is prohibited in all campus buildings, facilities or property owned, leased or operated by XYZ, including outside areas; on campus grounds or facilities that are the property of the college; in school-owned vehicles; and at lectures, conferences, meetings and social/cultural events held on college property or campus grounds.
5. Forgery, alteration, or misuse of college documents, records, or instruments of identification with intent to deceive.
6. Failure to comply with instructions of college officials acting in performance of their duties.

B. Damage or Destruction of Private Property

A student shall not intentionally cause or attempt to cause damage to private property, or steal or attempt to steal private property, either on the campus or during a college activity, function, or event off campus. Damage, misuse, or theft involving private property shall be a basis for disciplinary action.

First Amendment/Free Speech and Student Code of Conduct Policies

- **Pursuant to XYZ Community College's Student Code of Conduct Policy, all of the above statements would be a potential violation and could subject the poster to disciplinary action under the Student Code of Conduct.**

First Amendment/Free Speech and Student Code of Conduct Policies

*Now, let's see what the law says about the above
statements.*

First Amendment/Free Speech and Student Code of Conduct Policies

➤ **First Amendment**

“Congress shall make no law . . . abridging the freedom of speech” (via the Fourteenth Amendment, this applies to government/publicly funded entities)

First Amendment/Free Speech and Student Code of Conduct Policies

➤ ***Doe v. University of Michigan*** (1989)

- Graduate student challenged university's hate speech policy that prohibited

“[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status” if the behavior “[i]nvolves an express or implied threat to” or “[h]as the purpose or reasonably foreseeable effect of interfering with” or “[c]reates an ***intimidating, hostile, or demeaning environment***” for individuals pursuing academics, employment, or extracurricular activities”

First Amendment/Free Speech and Student Code of Conduct Policies

➤ ***Doe v. University of Michigan*** (1989) – cont'd

➤ Federal District Court in Michigan held:

The policy was **overbroad** because the wording of the policy captured and sought to punish large amounts of constitutionally protected speech.

The policy was unconstitutionally **vague** because words like “stigmatize,” “victimize,” and “interfere with” made it difficult for students to discern what speech was protected and what speech was prohibited.

First Amendment/Free Speech and Student Code of Conduct Policies

➤ ***Doe v. University of Michigan*** (1989) – cont'd

➤ **Bottom line?** Broad, vague policies will not withstand constitutional scrutiny.

First Amendment/Free Speech and Student Code of Conduct Policies

- ***R.A.V. v. City of St. Paul*** (1992)
 - City ordinance made it a crime to place any symbol or graffiti on any public or private property that would *“arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”*
 - Juvenile burned cross in African-American family’s yard and argued the city ordinance violated his First Amendment rights
 - Supreme Court held: Ordinance was violation of First Amendment because *“it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses.”*

First Amendment/Free Speech and Student Code of Conduct Policies

- ***R.A.V. v. City of St. Paul*** (1992) – cont'd
 - Supreme Court held: Under the ordinance, displays that had abusive or offensive material on it, no matter how severe or vicious, was permissible as long as it was not on the basis of race, color, creed, or religion. However, “[t]he First Amendment does not permit [the city] to impose special prohibitions on those speakers who express views on disfavored subjects.”
 - 1st Amendment generally prevents government from proscribing speech, or expressive conduct, because of disapproval of ideas expressed.
 - **Bottom line?** – Government cannot restrict or prohibit speech based on its content.

First Amendment/Free Speech and Student Code of Conduct Policies

➤ ***R.A.V. v. City of St. Paul*** (1992) – cont'd

➤ **Bottom line?** – Government cannot restrict or prohibit speech based on its content.

First Amendment/Free Speech and Student Code of Conduct Policies

- ***Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University (4th Cir. 1993)***
 - Fraternity had “ugly woman” contest and one member had face painted black with padding and women’s clothes on to present what most people would deem an offensive caricature of an African-American woman
 - University imposed heavy sanctions on fraternity after several complaints, and fraternity claimed First Amendment violation

First Amendment/Free Speech and Student Code of Conduct Policies

➤ ***Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University (4th Cir. 1993)*** cont'd

- Court held: “The University certainly has a substantial interest in maintaining an environment free of discrimination and racism, and in providing gender-neutral education. Yet it seems equally apparent that it has available numerous alternatives to imposing punishment on students based on the viewpoints they express.”

First Amendment/Free Speech and Student Code of Conduct Policies

- ***Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University* (4th Cir. 1993) cont'd**
 - Court further held: “The First Amendment forbids the government from ‘restrict[ing] expression because of its message [or] its ideas.’ . . . The University should have accomplished its goals in some fashion other than silencing speech on the basis of its viewpoint.”

First Amendment/Free Speech and Student Code of Conduct Policies

- ***Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University (4th Cir. 1993)*** cont'd
 - **Bottom Line?** No matter how offensive or politically incorrect, colleges cannot prohibit or limit free speech or free expression.

First Amendment/Free Speech and Student Code of Conduct Policies

➤ ***Gerlich v. Leath (January 15, 2015)***

- Student group NORML ISU (National Organization for the Reform of Marijuana Laws – Iowa State University) is student chapter of national advocacy group supporting legalization of marijuana for responsible adult use
- NORML, like other campus groups are allowed to use school logos in connection with group’s activity
- NORML had t-shirt design with ISU mascot replacing the “O” in NORML, and a picture of a marijuana leaf below the phrase, “Freedom is NORML at ISU” and university approved design

First Amendment/Free Speech and Student Code of Conduct Policies

➤ ***Gerlich v. Leath (January 15, 2015) cont'd***

- After NORML student was pictured on front of newspaper article about legalizing marijuana with the t-shirt on, the school rescinded the school's approval of the design
- University was concerned that the t-shirt design suggested that Iowa State supported the legalization of marijuana, thereby causing the school to lose state and alumni funding

First Amendment/Free Speech and Student Code of Conduct Policies

➤ ***Gerlich v. Leath (January 15, 2015) cont'd***

- University revised guidelines to provide: “No designs that use University marks that suggest promotion of the below listed items will be approved:
 - dangerous, illegal or unhealthy products, actions or behaviors;
 - drugs and drug paraphernalia that are illegal or unhealthful.”
- Several NORML ISU t-shirt designs with marijuana shapes or pictures of marijuana leaves were denied by the university
- NORML ISU students filed claim alleging First Amendment violations for viewpoint discrimination

First Amendment/Free Speech and Student Code of Conduct Policies

➤ ***Gerlich v. Leath (January 15, 2015) cont'd***

- **Court held:** “Government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional.” “The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”

First Amendment/Free Speech and Student Code of Conduct Policies

➤ ***Gerlich v. Leath (January 15, 2015) cont'd***

Bottom line? – Colleges cannot restrict public speech or expression just because the college disagrees with what is being spoken.

First Amendment/Free Speech and Student Code of Conduct Policies

➤ **Exceptions:**

➤ ***Tatro v. University of Minnesota (2011)*** – State Court of Appeals upheld the right of the university to discipline a student for Facebook posts.

➤ Tatro was in the mortuary-science program and posted comments about the cadavers obtained through donations i.e., “Gets to play, I mean dissect, Bernie” (cadaver’s name assigned by Tatro); “lots of aggression to be taken out with a trocar” (tool used with embalming therapy); “I still want to stab someone in the throat ;” and “updating my Death List #5.”

First Amendment/Free Speech and Student Code of Conduct Policies

➤ **Exceptions:**

➤ ***Tatro v. University of Minnesota (2011) cont'd***

Posts raised questions about student safety and raised question of the integrity of the anatomy bequest program. Families of the anatomy bequest program were dismayed and concerned about the professionalism of the program.

First Amendment/Free Speech and Student Code of Conduct Policies

➤ ***Exceptions:***

- **Court held: Tatro’s Facebook posts “materially and substantially disrupted the work and discipline of the university,” so discipline was proper.**

Bottom line? – Speech that materially and substantially disrupts the university may be restricted.

First Amendment/Free Speech and Student Code of Conduct Policies

➤ ***Additional Exceptions:***

➤ ***Fighting words***

➤ ***True threats – statement “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.”***

➤ ***Assault***

➤ ***Obscenity***

➤ ***Violations of law***

➤ ***Private defamation***

First Amendment/Free Speech and Student Code of Conduct Policies

Take-aways from the sample court cases:

- **Colleges cannot prohibit speech or restrict expression based on its *content***
- **Colleges cannot prohibit speech that is offensive to any person or group**
- **Colleges cannot prohibit speech by adopting policies that are overbroad or vague**

First Amendment/Free Speech and Student Code of Conduct Policies

Given the overwhelming limitations on colleges' ability to regulate student speech, what recourse do colleges have?

- **Regulate conduct/behavior, not speech**
- **Regulate the time, place and manner of speech (in a non-discriminatory way)**

First Amendment/Free Speech and Student Code of Conduct Policies

Now, let's apply these free speech principles to the following sample community college's Student Code of Conduct.

Would the following policy excerpts withstand a constitutional challenge?

First Amendment/Free Speech and Student Code of Conduct Policies

Resources for students on and off campus, go to www.xyz.edu/.

■ **Student Conduct & Zero Tolerance**

The College reserves the right to maintain a safe and orderly educational environment for students and staff. Therefore, when in the judgment of College officials, a student's conduct disrupts or threatens to disrupt the College community, appropriate disciplinary action will be taken to restore and protect the safety of that community.

Students are expected to conduct themselves in accordance with generally accepted standards of scholarship and behavior. The purpose of this statement is to protect the rights of all students in their academic pursuits.

Student Conduct

Students at XYZ Community College are considered responsible adults; therefore, each student should use discretion and common sense in his/her appearance and behavior. All behavior which is prohibited

4. Violations of civility (e.g., rude, disrespectful, lewd, indecent, or offensive conduct or apparel) – See policy VI B 11 in the XYZ Personnel Handbook Policy manual at www.xyz.edu/ for specific details

4. Violations of civility (e.g., rude, disrespectful, lewd, indecent, or offensive conduct or apparel) – See policy VI B 11 in the XYZ Personnel Handbook Policy manual at www.xyz.edu/ for specific details.
5. Mental, physical, psychological, cyber or verbal abuse.
6. Harassment – See Student Grievance Procedures (Due Process), page 60, for specific details.
7. Possession or use of a firearm, incendiary device, explosive, or other weapons – See page 58 for specific details.
8. Forgery.
9. Unlawful conduct.
10. Other misconduct – This type of student behavior is deemed by a College official to be a violation of commonly accepted standards of decency and safety or threatens the learning environment of students or the working environment of College employees.

Zero Tolerance

XYZ Community College policy does NOT allow any individual(s) to disrupt or threaten its learning environment. While faculty and staff are authorized to handle minor violations of the Student Code of Conduct, there are behaviors that will be addressed by the appropriate College officials on a zero tolerance basis. The following types of student behavior will not be tolerated.

1. Weapons of any kind.
2. Illegal drug sales, transaction or use.
3. Gang activity – see details below.
4. Fighting.
5. Physical, cyber, or verbal abuse.
6. Threats of physical action against another individual.
7. Harassment (Title IX) - See Student Grievance Procedures, page 60, for specific details.

Corrective/Disciplinary Action

If a minor act of misconduct continues or occurs at the Zero Tolerance level and threatens the health, well-being, function, or orderly conduct of a class, person, activity, or the College as a whole, then the following actions should be taken:

1. The instructor or other College official should immediately suspend the student from the class, function, or activity.
2. If necessary, the school resource officer or sheriff's department (if the SRO is unavailable) should be contacted to escort the student off campus.
3. Information regarding the incident should be provided to the appropriate dean, staff director, or school resource officer, as soon as possible after the incident.
4. The dean, staff director, or school resource officer will immediately forward to the vice president for student services for further action. After investigating, the vice president for student services will make the decision as to whether the student may return to campus, is suspended for a period of

First Amendment/Free Speech and Student Code of Conduct Policies

COLLEGE POLICIES & PROCEDURES

Unacceptable activity includes, but is not limited to, the following:

1. Deliberately downloading, uploading, creating, or transmitting computer viruses
2. Destroying or modifying directory structures or registries; or interfering or tampering with another's data or files
3. Developing programs that infiltrate a computer or computing system, harass other users, and/or damage software
4. Attempting to obtain unauthorized computer access or privileges, or attempting to trespass in the work of another individual
5. Using hardware or software sniffers to examine network traffic, except by appropriate College personnel to diagnose the network for bottlenecks or other problems
6. Using another person's password or sharing of one's own password; users who choose to share their passwords are responsible for the outcomes resulting from the use of their password
7. Committing any form of vandalism on equipment, communications lines, manuals, or software; attempting to defeat or circumvent any security measures or controls
8. Consuming food and/or beverages in computer labs, computer classrooms, library or in any other areas restricted to protect systems

12. Using, distributing, or making accessible profane, obscene, pornographic, or discriminatory images or remarks, or other content which reasonably may be considered to be offensive to another user; or participating in other antisocial behaviors

12. Using, distributing, or making accessible profane, obscene, pornographic, or discriminatory images or remarks, or other content which reasonably may be considered to be offensive to another user; or participating in other antisocial behaviors
13. Using computer resources for political campaigns or distribution of political material
14. Using computer resources for fraud, financial gain, or for any commercial or illegal activity
15. Disclosing student information in violation of the provisions of the federal statute known as the Family Educational Rights and Privacy Act of 1974
16. Violating copyright laws and/or fair use provisions through 1) illegal peer-to-peer file trafficking, i.e., by downloading or uploading pirated or illegal material, including but not limited to software and music files; 2) reproducing or disseminating Internet materials, except as permitted by law or by written agreement with the owner of the copyright.

First Amendment/Free Speech and Student Code of Conduct Policies

➤ **University of Ohio Model Language:**

“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 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.”

First Amendment/Free Speech and Student Code of Conduct Policies

STUDENT CODE AND CONDUCT

Statement of Intent

Freedom to teach and freedom to learn are inseparable facets of academic freedom. The freedom to learn depends upon appropriate opportunities and conditions in the classroom, on the campus, and in the community. Students should exercise their freedom with responsibility. As members of the academic community, students are subject to obligations which accrue to them by virtue of this membership. As members of the larger community which includes the College, students are entitled to all rights and protection afforded them by laws of that community.

By virtue of their membership in the community, students are also subject to all laws, the enforcement of which is the responsibility of duly constituted authorities. When students violate laws, they may incur penalties prescribed by legal authorities. When students violate College regulations, they are subject to disciplinary action by the College whether or not their conduct violates the law. If a student's behavior simultaneously violates both College regulations and the law, the College may take disciplinary action independent of that taken by legal authorities. Additionally, students may be removed from classes pending action on charges during an investigation or appeal for reasons relating to his/her

records shall be made available to unauthorized personnel or groups inside or outside the College without the written consent of the student involved, except under legal compulsion.

E. All students and staff have the right to a safe, peaceful, and honest educational environment.

By entering classes at XYZ students take upon themselves certain responsibilities and obligations that include an honest attempt at successful academic performance and social behavior consistent with the lawful purpose of the College. Students maintain all legal rights of citizenship while enrolled and are expected to remember that they are present in a democratic and collegiate environment.

The reputation of the College rests upon the shoulders of students, as well as on the administration, staff, and faculty, and it is hoped that each student will maintain high standards of citizenship. The campus and College will not be a place of refuge or sanctuary for illegal or irresponsible behavior. Students, as all citizens, are subject to civil authority on and off the campus.

All students are responsible for meeting completion

B. Students have the right to freedom of expression, inquiry, and assembly without restraint or censorship subject to reasonable and non-discriminatory rules and regulations regarding time, place, and manner.

regulations regarding time, place, and manner.

C. Students have the right to inquire about and to propose improvements in policies, regulations, and procedures affecting the welfare of students through established student government procedures, campus committees, and college offices.

D. The *Family Educational Rights and Privacy Act of 1974* provides safeguards regarding the confidentiality of and access to student records. Students and former students have the right to review their official records and to request a hearing if they wish to challenge the contents of these records. Other than directory information, no

Disclaimer

- **The information herein is not exhaustive of all of the pertinent cases related to free speech. There are just enough cases to give you a snapshot of how courts have treated First Amendment speech issues. This presentation does not cover faculty and employee speech. There are meaningful distinctions between employee speech and student speech in public institutions.**