FIRE
Foundation for Individual Rights in Education

April 3, 2018

President Dr. W. Hubert Keen
Office of the President
Nassau Community College
Tower Building, 10th Floor
One Education Drive
Garden City, New York 11530-6793

Sent via U.S. Mail and Electronic Mail (PresidentsOffice@ncc.edu)

Dear President Keen:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned about the serious threat upon faculty expressive rights posed by Nassau Community College's (NCC's) Policy 3100, governing "News Media Relations" and adopted by the Board of Trustees on February 14, 2017.[1] The policy threatens faculty members' ability to express themselves in conversation with the press and the general public in several significant respects, and its continued maintenance violates NCC's binding legal obligation to honor the First Amendment rights of its faculty. We review each of Policy 3100's troubling provisions in turn below.

As an initial matter, however, we remind you that the First Amendment is fully binding on public institutions such as NCC. *See Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms

[1] NASSAU CMTY. COLL., POLICY 3100: NEWS MEDIA RELATIONS (Feb. 14, 2017), *available at* http://www.ncc.edu/aboutncc/ourpeople/board_of_trustees/pdfs/Policy_3100_News_Media_Relations.pdf.

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is nowhere more vital than in the community of American schools.'"). The U.S. Supreme Court has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). With regard to faculty expression at public institutions, the Court has made clear that academic freedom is a "special concern of the First Amendment," stating that "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

Public employers like NCC may lawfully discipline employees for statements made "pursuant to their official duties"; in such circumstances, the Court has held that "the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). However, the *Garcetti* Court explicitly reserved the question of whether its holding is applicable to expression "related to academic scholarship or classroom instruction" voiced by faculty at public colleges and universities, carefully noting that such speech may "implicate additional constitutional interests . . . not fully accounted for by this Court's customary employee-speech jurisprudence." *Id.* at 425. Lower courts have recognized *Garcetti*'s reservation with respect to faculty speech.[2]

Instead, "academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering v. Board of Education*, 391 U.S. 563 (1968)." *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014). The *Pickering* test requires (1) that the employee's speech address "matters of public concern," and (2) that the employee's interest "in commenting upon matters of public concern" outweighs "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The Court made clear in *Pickering* that the negative impact of the teacher's expression must be substantial and material: If the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally," then "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public," and the teacher's speech enjoys First Amendment protection. *Id.* at 568, 573. (It is important to note that *Garcetti* also left intact the First Amendment rights of all public employees to speak as private citizens on matters of public concern.)

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[2] *See Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014) ("We hold that *Garcetti* does not apply to 'speech related to scholarship or teaching'"); *Adams v. Trs. Of the Univ. of N. Carolina Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011) ("Applying *Garcetti* to the academic work of a public university faculty member . . . could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment."). *But cf. Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (applying *Garcetti* to a professor's complaints regarding proposed use of grant money, because grant administration fell within his teaching and service duties).

In sum, then, NCC is bound by the First Amendment as a public, taxpayer-supported institution of higher education. Generally speaking, NCC may not lawfully punish faculty members for expression made pursuant to their official duties when such speech is related to academic instruction or scholarship, or for speaking as private citizens on matters of public concern. NCC may only discipline faculty for such speech in limited instances wherein (1) the expression does not involve a matter of public concern, or (2) the expression involves a matter of public concern, but the faculty member's interest in commenting is outweighed by NCC's substantial interest in avoiding the impediment of the teacher's performance or the interference with the regular operation of the institution.

With this binding legal framework in mind, we turn now to the specific problems presented by NCC's policy.

First, section (A) of the policy provides, in relevant part:

> Employees or trustees that seek to generate external media coverage about a College program, event or achievement must first contact the Office of Governmental Affairs and Media Relations.
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> [...]
>
> It is the responsibility of the Office of Governmental Affairs and Media Relations to initiate and/or respond to news media requests and to manage those interactions. When an employee, faculty member or trustee is contacted directly by the news media, he/she is
> to notify the Office of Governmental Affairs and Media Relations as soon as practical.
>
> [...]
>
> If a College event attracts news media interest, all press releases and statements to the news media must be routed through, approved and disseminated by the Office of Governmental Affairs and Media Relations.

Both individually and in the aggregate, these requirements impermissibly burden faculty expression protected by the First Amendment. By effectively requiring faculty members to obtain administrative approval prior to speaking to the media, NCC has imposed a prior restraint on faculty speech. Prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Any system of prior restraints of expression [bears] a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). As the Supreme Court has observed, a requirement that one inform authorities of their desire to speak, and obtain permission to do so, is "offensive—not only to the values protected by the First

Amendment, but to the very notion of a free society." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002).

Simply put, NCC has no authority to force faculty members to secure governmental permission or provide the institution with notice before speaking to the press or the general public about scholarly work, events, activities, expertise, accomplishments, or interests. NCC faculty are under no obligation to submit to the oversight of NCC administrators when "generat[ing] external media coverage about a College program, event or achievement," when "contacted directly by the news media," or when issuing "press releases and statements to the news media." To the significant extent that the policy dictates otherwise, it is at odds with binding First Amendment precedent and must be revised immediately.

The legal and practical problems with NCC's policy should be immediately apparent. Consider a faculty member who wishes to speak to media about the forthcoming publication of a book she has authored. Per the policy, NCC's Office of Governmental Affairs and Media Relations has the authority to "to initiate and/or respond to news media requests and to manage those interactions." This provision operates as a gag order on the faculty member and unacceptably subordinates her voice to that of the institution. Faculty contacted about their work by journalists must be free to answer their queries by themselves, without administrative management or fear of retaliatory punishment.

Likewise, both individual faculty members and faculty groups must be free to speak publicly about NCC's decision-making. While "not all speech by a teacher or professor addresses a matter of public concern," and may instead involve "purely private matters," NCC must recognize that "academics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring," and comment on these matters "may well address matters of public concern." *Demers v. Austin*, 746 F.3d 402, 415–16 (9th Cir. 2014); *see also Gardetto v. Mason*, 100 F.3d 803, 813 (10th Cir. 1996) ("The objectives, purposes, and mission of a public university are undoubtedly matters of public concern. Moreover, in general, speech about the use of public funds touches upon a matter of public concern . . . . Similarly, complaints about the proposed closing of a branch of a university or its spending priorities, when these decisions affect the basic functions and missions of the university, also constitute speech on matters of public concern.") As the U.S. Court of Appeals for the Ninth Circuit noted, "in *Pickering* itself the teacher's protected letter to the newspaper addressed operational and budgetary concerns of the school district." *Demers*, 746 F.3d at 416.

Accordingly, faculty members who comment upon or criticize the NCC (or related entities like the Nassau Community College Foundation) may not be punished for doing so simply because they did not obtain administrative permission to do so. As the *Pickering* Court made plain:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

391 U.S. at 572. Even if the faculty expression at issue is critical of NCC, it is protected if it involves a matter of public concern and can "neither [be] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Id.* at 572–73. In such circumstances, NCC's interest "in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 573.

The obvious potential for the application of this policy in a viewpoint discriminatory manner renders it still more troubling. Because the policy's several flaws include the lack of limiting language with regard to that provision's scope or application, an administrator is empowered to "manage" a dissenting, critical, controversial, or unpopular faculty member's interactions with the media in a way that effectively silences or fundamentally alters the faculty member's message. Again, NCC does not possess the legal authority to "make[] the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969).

Nor are these policy provisions merely advisory. Instead, the consequences of their violation are explicitly stated:

> ENFORCEMENT
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> Violation of this policy may result in disciplinary action as follows:
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> A. Employees who are part of a bargaining unit may, with due consideration of the severity of a violation, be subject to disciplinary action brought under their respective collective bargaining agreement.
>
> B. Employees who are not members of a bargaining unit may, with due consideration of the severity of a violation, be subject to discipline by their supervisor.

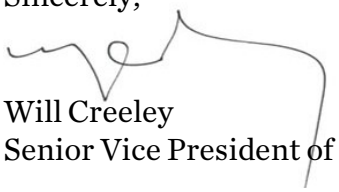
The chilling effect of the possibility of discipline for speaking to the media without NCC's permission or management compounds the policy's serious First Amendment problems. It is long-settled that "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" may violate expressive rights. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). The Supreme Court "has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). The U.S. Court of Appeals for the Second Circuit, the jurisdiction of which includes New York State, has made clear that an impermissible "chilling effect" may result from even the implied threat of discipline against protected faculty speech. *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992) ("the threat of discipline implicit in President

Harleston's actions was sufficient to create a judicially cognizable chilling effect on Professor Levin's First Amendment rights."). NCC's threatened enforcement of its constitutionally suspect policy ignores this established precedent and places the policy's legality in further doubt.

By establishing a policy that imposes a prior restraint on faculty speech, enforceable under pain of punishment, NCC has exhibited a deeply disappointing disregard for the expressive rights of its faculty. As a public college bound by the First Amendment, NCC may not condition its faculty members' right to speak to journalists on administrative approval or notice. FIRE asks that NCC immediately rescind this policy and publicly restate its recognition of the essentiality of freedom of expression and academic freedom on public university campuses, consistent with Supreme Court jurisprudence and the core tenets of higher education.

We request a response to this letter by April 17, 2018.

Sincerely,



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