



June 28, 2018

Kevin Schieffer
Vice President, South Dakota Board of Regents
Office of the Executive Director
306 East Capitol Avenue, Suite 200
Pierre, South Dakota 57501

RE: June 28, 2018 South Dakota Board of Regents Public Meeting on Free Speech Policies

Dear Vice President Schieffer and the distinguished members of the South Dakota Board of Regents:

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.

I write to you today to supplement the testimony my colleague Tyler Coward will be giving at the South Dakota Board of Regents (SDBOR) Public Meeting on Free Speech Policies on June 28, 2018. FIRE commends the SDBOR for prioritizing campus free expression by convening this discussion, and we welcome the opportunity to offer our perspective on the policies regulating expression at SDBOR institutions.

In this memorandum, I first discuss the adoption of a free speech policy statement modeled after the "Report of the Committee on Freedom of Expression" produced by the Committee on Freedom of Expression at the University of Chicago (known as the "Chicago Statement"). Secondly, this memorandum provides an explanation of the deficiencies in current SDBOR policies that restrict free expression.

Free Speech Policy Statement

In order to improve the climate for free speech at South Dakota's public institutions of higher education, we urge the SDBOR to adopt a free speech policy statement modeled after the Chicago Statement. Taking this step would ensure that the SDBOR institutions become leaders on free expression issues.

The Chicago Statement is an eloquent statement of principles endorsing freedom of expression and inquiry and clarifying that "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.” Since its introduction in January 2015, FIRE has endorsed the Statement as the gold standard for university policy statements regarding free speech and academic freedom.

The Chicago Statement provides, in relevant part:

Because 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.

...

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.

At the University of Chicago itself, as well as at the institutions that have adopted their own version of the Chicago Statement, this policy statement has proven to be a significant element in the improvement of the campus climate for free speech. Not only do its words better inform students, administrators, and others about the principles behind freedom of expression, but the very process of reviewing, deliberating over, and ultimately endorsing the Chicago Statement has led campus stakeholders to reflect on their approach to oftentimes thorny and difficult speech issues. As we have seen over and over, this has been a valuable experience for those involved.

Administrations and faculty bodies at over 40 institutions have adopted a version of the Chicago Statement.¹ This includes measures enacted at the university systems of the University of Nebraska, University of Wisconsin, and University of Missouri, which FIRE has been pleased to publicize and commend.² With the SDBOR’s guidance, the public higher education institutions in South Dakota could be the first schools in the state to prioritize free speech in such a proactive and comprehensive manner.

Currently, South Dakota higher education institutions lack an overarching policy

¹ The full list of institutions is available at www.thefire.org/chicago-statement-university-and-faculty-body-support.

² See, e.g., Mary Zoeller, *University of Nebraska Board of Regents approves ‘Commitment to Free Expression’ Statement*, FIRE NEWSDESK (Jan. 30, 2018), <https://www.thefire.org/university-of-nebraska-board-of-regents-approves-commitment-to-free-expression-statement/>; University of Wisconsin System Board of Regents’ 2015 Statement Reiterating the Board’s Commitment to Academic Freedom and Affirming its Commitment to Freedom of Expression (Dec. 11, 2015), <https://profs.wisc.edu/wp-content/uploads/2015/12/BoR-Academic-Freedom.pdf>; Azhar Majeed, *University of Missouri adopts commitment to free speech, new guidelines on campus expressive activity*, FIRE NEWSDESK (June 2, 2017), www.thefire.org/university-of-missouri-adopts-commitment-to-free-speech-new-guidelines-on-campus-expressive-activity.

statement committing themselves to free expression and academic freedom. When coupled with revising system policies to meet First Amendment standards, the system-wide adoption of a policy statement would solidify South Dakota public institutions as leaders on free speech issues. The SDBOR has an opportunity to join a group of well-respected colleges and university systems that have chosen to prioritize free expression by adopting a principled statement modeled after the Chicago Statement. FIRE would be pleased to work with the SDBOR to adopt such a free speech policy statement.

Speech Codes

I have provided below an explanation of the most common types of policies that restrict protected expression on SDBOR campuses, along with selected examples from SDBOR institution policies and corresponding recommended revisions. FIRE would be pleased to work with the SDBOR and constituent institutions to revise all of their policies to meet First Amendment standards.

I. Harassment Policies

Hostile environment harassment, properly defined, is not protected by the First Amendment. However, several of the SDBOR institutions maintain harassment policies that do not sufficiently track the Supreme Court of the United States' standard for student-on-student (or peer) hostile environment harassment in the educational setting.³

Under the Court's standard, alleged peer harassment must be conduct that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis v. Monroe County Board of Education*, 526

³ See, e.g., *Guide to Residence Life: Harassments/Physical Abuse*, NORTHERN STATE UNIVERSITY, <http://www.northern.edu/sites/default/files/reslifeguide1718.pdf> (last visited June 13, 2018); *Housing & Residential Life Residential Handbook: Harassment*, SOUTH DAKOTA STATE UNIVERSITY, <https://www.sdstate.edu/sites/default/files/Housing%20%26%20Residential%20Life%20Residential%20Student%20Handbook%202016-2017.pdf> (last visited June 13, 2018); *Roommate Bill of Rights: emotional harm*, SOUTH DAKOTA STATE UNIVERSITY, <https://www.sdstate.edu/residential-life/roommate-bill-rights> (last visited June 13, 2018); *Student Code of Conduct: Harassment*, SOUTH DAKOTA BOARD OF REGENTS, <https://www.sdbor.edu/policy/documents/3-4.pdf> (last visited June 13, 2018); *Student Handbook: Campus Harassment and Incitement*, NORTHERN STATE UNIVERSITY, <https://www3.northern.edu/flippingbook/StudentHandbook2017/sh2017/files/assets/common/downloads/publication.pdf> (last visited June 13, 2018). Black Hills State University previously maintained a policy titled "What is Sexual Misconduct" on the university's Title IX and Sexual Misconduct website, which was captured by the Internet Archive "Wayback Machine" on April 18, 2018, available at <https://web.archive.org/web/20180412233540/http://www.bhsu.edu/Faculty-Staff/Human-Resources/Title-IX-Sexual-Misconduct/What-is-Sexual-Misconduct>. The policy earned FIRE's worst, "red light" rating. This website now requires user login and password information in order to access this page, and several other Title IX resources were recently removed from the website, so it is FIRE's assumption that the policy has been removed. FIRE would be happy to provide recommended revisions to this policy if it is reinstated in any form, or if it is still active behind the username and password access wall.

U.S. 629, 651 (1999). As the Court’s only decision to date regarding the substantive standard for peer harassment in education, *Davis* is controlling on this issue.⁴

In contrast, for example, the SDBOR’s Student Code of Conduct policy includes the following provision on “Harassment”:

5. Harassment, which includes, but is not limited to:
 - a. Conduct towards another person that has the purpose or effect of creating an objectively and subjectively intimidating, hostile, or demeaning environment that substantially interferes with the individual’s ability to participate in or to realize the intended benefits of an Institutional activity or resource; and
 - b. Other conduct that is extreme and outrageous exceeding all bounds usually tolerated by polite society and that has the purpose or the substantial likelihood of interfering with another person’s ability to participate in or to realize the intended benefits of an Institutional activity or resource.

This policy differs from the Court’s standard from *Davis* in significant ways. First, the policy bans conduct that “has the purpose or effect of creating an objectively and subjectively intimidating, hostile, or demeaning environment,” a confusing standard that should be revised to simply ban conduct that is “so severe, pervasive, and objectively offensive that it creates . . .” (thus removing the “purpose or effect” language and adjusting the definition to fully track the Court’s standard from *Davis*).

Further, the policy bans other conduct that is “extreme and outrageous” and that has the “purpose or the substantial likelihood of interfering with another person’s ability to participate in or to realize the intended benefits of an Institutional activity or resource.”⁵ Again, rather than banning conduct that has the purpose or likelihood of interfering with a person’s education, the policy should only ban conduct that does effectively deny an individual equal access to institutional resources and opportunities.

In another example, South Dakota State University provides the following excerpted “Harassment” policy in its *Housing & Residential Life Residential Handbook*:

⁴ See generally HARVEY A. SILVERGLATE, DAVID FRENCH, & GREG LUKIANOFF, FIRE’S GUIDE TO FREE SPEECH ON CAMPUS 91–102 (Greg Lukianoff & William Creeley eds., 2nd ed. 2012).

⁵ The policy language banning “Other conduct that is extreme and outrageous . . .” from the SDBOR Student Code of Conduct also appears in the SDBOR Harassment Including Sexual Harassment policy, available at <https://www.sdstate.edu/sites/default/files/policies/upload/Harassment-including-Sexual-Harassment.pdf>. This policy should be similarly revised to remove this provision.

Harassment means behavior toward another person that has the purpose or perception of creating an intimidating, hostile, or demeaning environment in order to interfere with another person’s ability to participate in or to realize the intended benefits of a University activity, employment, or resource.

...

Sexual harassment may be established by showing that an individual has been subjected to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.

First, this policy defines harassment as behavior that “has the purpose or perception of creating an intimidating, hostile, or demeaning environment.” This should be revised to instead ban conduct that is “so severe, pervasive, and objectively offensive that an individual is effectively denied equal access to institutional resources and opportunities,” thus removing the confusing “purpose or perception” language and adjusting the definition to better track the Court’s standard from *Davis*. Additionally, the policy goes on to explain that sexual harassment may be established by showing that an individual has been subjected to “verbal . . . conduct of a sexual nature.” This portion of the policy should be adjusted to make clear that verbal conduct of a sexual nature must meet the standard for harassment in order to be punishable.

Broadly speaking, SDBOR institutions must revise all harassment policies to fully track the Court’s peer harassment standard from *Davis*, and must ensure that their policies make sufficiently clear that any illustrative examples of speech that may be labeled as a part of harassment are only punishable when they do in fact meet the Supreme Court’s definition of peer harassment.⁶

II. Expressive Activity Policies

Public universities may promulgate reasonable “time, place, and manner” restrictions on public expression in order to ensure the operation of the university campus. However, these restrictions must be content-neutral and “narrowly tailored” to “serve a significant governmental interest,” and they must “leave open ample alternative channels for communication.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Unfortunately, several SDBOR institutions maintain policies that unreasonably restrict expressive activities on campus.⁷

⁶ For examples of harassment policies at other institutions that earn FIRE’s highest, “green light” rating, see *Non-Discrimination, Equal Opportunity and Diversity Regulation*, UNIVERSITY OF NORTH FLORIDA, https://www.unf.edu/president/policies_regulations/01-General/L_0040R.aspx (last visited June 13, 2018); *Sexual and/or Relationship Misconduct Policy for Students of Michigan Technological University*, MICHIGAN TECHNOLOGICAL UNIVERSITY, <http://www.mtu.edu/conduct/policies/student-conduct/sexual-misconduct/index.html> (last visited June 13, 2018); *Student Handbook*, ALCORN STATE UNIVERSITY, https://www.alcorn.edu/uploaded/files/studaff/Student_Handbook2.pdf (last visited June 13, 2018).

⁷ See *Sales and Solicitation*, UNIVERSITY OF SOUTH DAKOTA, <https://www.usd.edu/-/media/files/policies/7005-sales-and-solicitation.ashx?la=en> (last visited June 13, 2018); *Student Handbook: University Affiliated Use*, NORTHERN STATE UNIVERSITY, <https://www3.northern.edu/flippingbook/StudentHandbook2017/>

For example, the University of South Dakota’s “Sales and Solicitation Policy and Request Form” broadly defines solicitation as “making a request or plea,” including “passing out literature” and “directly requesting . . . support or membership from individuals or groups.” The policy places the following restrictions on solicitation:

All sales and solicitations in the public areas of the Vermillion campus of the University of South Dakota will be restricted to the appropriate areas inside or near the Theodore R. and Karen K. Muenster University Center with the exception of number 12 in Procedure section of this policy and must be approved by the Muenster University Center Administration.

...

III. Areas available for sales and solicitation:

- a. Muenster University Center
- b. Muenster University Center Courtyard
- c. I.D. Weeks Library Courtyard

This policy forces students to obtain advance permission before engaging in a wide variety of expressive activity fully protected by the First Amendment. Requiring such expressive activity to be approved in advance is not a reasonable regulation. This requirement prevents students from engaging in spontaneous expressive activities, which are oftentimes necessary in order to respond meaningfully to immediate or still-unfolding events.⁸ Further, the policy confines these expressive activities to just three areas on campus. Instead, the policy should be revised to more narrowly define “sales and solicitation,” and to make clear that all publicly available outdoor areas on the campus will be available for expressive activities without prior approval, so long as such use does not cause a disruption to institutional functions or activities or otherwise necessitate coordination on the part of the university (for example, events expected to attract more than 100 individuals).⁹

Another area of potential concern is the SDBOR “Facilities Use by Private Parties” policy, which places reasonable restrictions on the use of the campus by individuals and entities that are not affiliated with the SDBOR institution. However, the policy defines those

sh2017/files/assets/common/downloads/publication.pdf (last visited June 13, 2018); *Student Organization Manual: Sales & Solicitation Policy*, BLACK HILLS STATE UNIVERSITY, <http://www.bhsu.edu/Portals/0/student-life/studentOrganizations/StudentOrgManual17-18.pdf> (last visited June 13, 2018).

⁸ See Samantha Harris, *Why You Should Care About Protest Waiting Periods*, FIRE NEWSDESK (Jan. 30, 2017), www.thefire.org/why-you-should-care-about-protest-waiting-periods.

⁹ For examples of expressive activity policies that earn FIRE’s highest, green light rating, see *Free Inquiry, Expression, and Assembly*, UNIVERSITY OF MISSISSIPPI, <https://policies.olemiss.edu/ShowDetails.jsp?istatPara=1&policyObjidPara=11079224> (last visited June 13, 2018); *Free Speech and Assembly*, MISSISSIPPI STATE UNIVERSITY, <http://www.policies.msstate.edu/policypdfs/91304.pdf> (last visited June 13, 2018); *Protection of Right of Peaceful Protest*, CENTRAL WASHINGTON UNIVERSITY, <https://www.cwu.edu/resources-reports/cwup-1-30-statement-rights-and-responsibilities-board-trustees> (last visited June 13, 2018).

affiliated entities that are not bound by the policy's requirements so narrowly that it potentially leaves individual students out of the definition. The definition is as follows:

A. "Affiliated entity," and its cognates, includes organizations, such as institutional foundations, whose legal purpose includes support of the institution and its activities, organizations that have been authorized by the institution to use its name and marks, and student organizations recognized by the institution, as well as the State of South Dakota and its political subdivisions, and their instrumentalities.

This definition includes "student organizations recognized by the institution," but it does not include individual students, or student groups that are not officially recognized by the institution, leaving open the question of which regulations apply to those students. Confusion about which policy applies under which circumstances may discourage students from engaging in expressive activities at all. This policy should be revised to include all students at SDBOR institutions.

Generally, the SDBOR institutions may put in place restrictions on expressive activities in order to prevent substantial disruptions to the university's functions and activities, yet the restrictions must be reasonable and must allow for students to conduct a wide range of expressive activities spontaneously (that is, without need for prior registration or approval) at publicly available outdoor areas of the campus.

III. Bias Incident Reporting Policies

"Bias incident" reporting policies direct students to report acts of alleged "bias" that they observe on campus, including speech that is subjectively perceived as showing bias against someone based on a particular personal characteristic such as race, ethnicity, or sexual orientation. As a result, these policies often subject protected expression to investigation or even punishment, and may have a chilling effect on campus speech. Unfortunately, they have become increasingly common on college campuses in the last few years; FIRE's *Spotlight on Speech Codes 2018: The State of Free Speech on our Nation's Campuses* report found that approximately 30 percent of schools surveyed maintain some form of a bias incident reporting policy.¹⁰

As of this writing, the only SDBOR institution that maintains a bias reporting policy is the University of South Dakota.¹¹ The university's "Bias, Discrimination or Harassment" policy is excerpted in relevant part below:

¹⁰ *Spotlight on Speech Codes 2018: The State of Free Speech on our Nation's Campuses*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <https://www.thefire.org/spotlight-on-speech-codes-2018/> (last visited June 13, 2018).

¹¹ *Bias, Discrimination or Harassment*, UNIVERSITY OF SOUTH DAKOTA, <https://www.usd.edu/diversity-and-inclusiveness/office-for-diversity/safe-zone-training/bias-discrimination-or-harassment> (last visited June 13, 2018).

A bias incident is an incident of verbal or nonverbal conduct or behavior that is threatening, harassing, intimidating, discriminating, or hostile and is based on a category that is protected under the Institutional Nondiscriminatory Policy.

To learn about bias incidents and reporting bias incidents, call 605-677-3925 or email diversity@usd.edu to report a concern or seek guidance about whether or not something should be reported.

By defining a bias incident, in part, as “an incident of verbal or nonverbal conduct or behavior that is . . . hostile,” the policy includes a great deal of protected expression, such as a single, subjectively “hostile” tweet. The policy should be revised to instead only direct students to report conduct that is not protected by the First Amendment, such as true threats, harassment, intimidation, and discrimination. Doing so would allow the university to address the types of unlawful behavior that prevent students from being able to obtain an education, while at the same time protecting the free exchange of ideas on campus.

Further, if the university wishes to respond to complaints that do not rise to the level of illegal conduct or a university policy violation through support for the victim, the policy must be revised to make clear that students will not be subject to investigation or discipline as a result of such complaints, and that the response to such complaints will instead be limited to providing support for those who have been affected by bias incidents on campus.

FIRE recommends that if other SDBOR institutions are considering implementing bias incident reporting policies, they do so only by providing a narrow definition of bias incidents that includes unprotected speech, such as hostile environment harassment, and by making clear that any bias reporting team will serve only to provide support to victims, rather than functioning as a parallel investigatory or disciplinary track.¹²

IV. Restrictions on Political Speech

Universities that are tax-exempt under 501(c)(3) of the Internal Revenue Code are prohibited from participating in political campaigns as institutions, yet individual students and student groups do not endanger that tax-exempt status by engaging in political activities where such activities are clearly not conducted on behalf of the university itself. The presumption is that student political speech *does not* represent the views of the university as an institution. Accordingly, partisan student groups may use institutional resources for political expression, without endangering the institution’s tax-exempt status,

¹² See Azhar Majeed, *UW-Madison Demonstrates What a ‘Green Light’ Definition of a Bias Incident Looks Like*, FIRE NEWSDESK (Oct. 6, 2016), www.thefire.org/uw-madison-demonstrates-what-a-green-light-definition-of-a-bias-incident-looks-like; *BERT – Bias Education and Response Team*, AUBURN UNIVERSITY, <http://wp.auburn.edu/studentaffairs/2016/11/17/bert-bias-education-and-response-team/> (last visited June 13, 2018); *Stop Bias*, UNIVERSITY OF FLORIDA, <http://www.umatter.ufl.edu/stopbias/team> (last visited June 13, 2018).

when the use of those resources is obtained in the same way that nonpartisan student groups obtain resources.¹³

However, the SDBOR “Recognition and Funding of Student Organizations” policy provides that student organizations that engage in partisan activities will not be eligible for student fee subsidies of operating expenses.¹⁴ The policy is excerpted below:

A. No student organization will be eligible for student fee subsidies of its operating expenses:

1. if its predominant activities involve sectarian ceremonies or exercises, promotion of candidates or ballot issues in general elections, or financing offcampus lobbying or political activities of non-students; . . .

B. The institution may distribute student activity fee proceeds to support on-campus cultural, social, recreational and informational activities and events that are open to all members of the campus community and that are sponsored by a recognized student organization, even if the organization would not be eligible for fees to support general operational expenses, but only if the activity or event does not have the primary effect of supporting sectarian ceremonies or exercises, promoting candidates or ballot issues in general elections, financing off-campus lobbying or political activities by non-students or generating income for the personal use and benefit of the sponsoring organization members or on behalf of for-profit entities.

This policy makes partisan student groups ineligible for student fee subsidies of their operating expenses, thus discriminating on the basis of content and viewpoint of speech. The policy should be revised to make partisan student groups eligible for funding.

In another example, the SDBOR “Acceptable Use of Information Technology System” policy¹⁵ seems to create an affirmative duty for students to disclaim the university when sending partisan political messages. The policy provides, in relevant part:

¹³ See generally Judith E. Kindell and John Francis Reilly, “Election Year Issues,” *Exempt Organizations Continuing Professional Education Technical Instruction Program for Fiscal Year 2002*, 365 (2002), available at <http://www.irs.gov/pub/irs-tege/eotopici02.pdf>; Ada Meloy, “Legal Watch: Political Activity on Campus,” available at <http://www.acenet.edu/the-presidency/columns-andfeatures/Pages/Legal-Watch-Litigation-and-regulation-in-academe.aspx> (former general counsel for the American Council on Education noting that “even openly partisan student groups may use an institution’s facilities without violating any rules” because such activities “further the goal of fostering students’ civic engagement while avoiding the perception of institutional bias”); *Policy Statement on Political Speech on Campus 2016*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <https://www.thefire.org/policy-statement-on-political-speech-on-campus-2016/> (last visited June 18, 2018).

¹⁴ *Recognition and Funding of Student Organizations*, SOUTH DAKOTA BOARD OF REGENTS, <https://www.sdbor.edu/policy/documents/3-18.pdf> (last visited June 13, 2018).

¹⁵ *Acceptable Use of Information Technology System*, SOUTH DAKOTA BOARD OF REGENTS, <https://www.sdbor.edu/policy/documents/7-1.pdf> (last visited June 13, 2018).

10. Using the information and communications system for partisan political purposes, other than the expression of private political views by participants in otherwise permitted communications, so long as the user specifically disclaims any support, endorsement, or opposition by the Board for the views so expressed;

While the presumption is that student partisan speech does not represent the views of the university as a whole, this policy indicates that students must specifically disclaim institutional support, endorsement, or opposition of views, seeming to shift that presumption. The policy should be revised to make clear that students do not in fact have an affirmative duty to specifically disclaim endorsement from the institution.

Generally, any policies at SDBOR institutions that regulate political speech should make clear that student groups may use institutional resources and facilities for partisan political purposes when such use is obtained in the same way that nonpartisan student groups obtain such use.

V. Posting Policies

The posting of written materials is a valuable avenue for expression for students on SDBOR institution campuses. Unfortunately, this avenue is often closed off by restrictive policies, which may discourage students from posting potentially controversial messages or from posting on campus at all.¹⁶

For one such example, the “On Campus Advertising/Campus Posting” policy at South Dakota School of Mines and Technology provides in part:

2. Posting Authorization

A. All recognized student organization postings must be approved by the Student Activities and Leadership Center.

B. All SD Mines department postings must be approved by the Surbeck Scheduling Office

C. All non-campus postings must be approved by the Surbeck Scheduling Office

3. Posting Requirements

¹⁶ See *Guide to Residence Life: Window and Door Decorations*, NORTHERN STATE UNIVERSITY, <http://www.northern.edu/sites/default/files/reslifeguide1718.pdf> (last visited June 13, 2018); *On Campus Advertising/Campus Posting*, SOUTH DAKOTA SCHOOL OF MINES AND TECHNOLOGY, https://www.sdsmt.edu/About/Office-of-the-President/Docs/Policy-Manual/Student/On-Campus-Advertising-Campus-Posting_pdf/ (last visited June 13, 2018); *Student Handbook: Posting Policy*, NORTHERN STATE UNIVERSITY, <https://www3.northern.edu/flippingbook/StudentHandbook2017/sh2017/files/assets/common/downloads/publication.pdf> (last visited June 13, 2018); *Student Organization Manual: Campus Posting Policy*, BLACK HILLS STATE UNIVERSITY, <http://www.bhsu.edu/Portals/0/student-life/studentOrganizations/StudentOrgManual17-18.pdf> (last visited June 13, 2018).

- A. All postings for events and services must show obvious sponsorship by an SD Mines department or recognized student organization and must be open to the SD Mines community.
- B. All postings must be hung by university staff on the appropriate locations
- C. Postings cannot promote alcohol or drugs, contain sexually explicit material or profanity or compete with dining services or the university bookstore.

This policy presents three concerns. First, the policy requires students to get materials for posting or display approved in advance. As a result, students are prevented from posting materials on any and all locations on campus without first going through this approval process, a hurdle that may discourage students from posting on campus at all. Instead, FIRE recommends that universities open areas on campus for postings that are not subject to a pre-approval requirement, for example, a designated bulletin board in a student union facility.¹⁷

Second, the policy requires all postings for events and services to show “obvious sponsorship” by a university department or recognized student organization. This means that students who are holding events that have not been sponsored by a university department or recognized student organization will be unable to post about their events at all. Further, the requirement raises concerns about anonymity in posting. Policies that require sponsorship or identifying information on posters prevent students from posting anonymous materials or materials that use a pseudonym. Such policies could be used to punish protected speech, and could have a chilling effect on the speech of students who feel they can only express their thoughts anonymously, a form of speech protected by the First Amendment.¹⁸

Third, this policy includes impermissible content-based restrictions. The policy explains that postings cannot contain “sexually explicit material or profanity,” yet both of these terms include constitutionally protected expression. Posting policies should instead only limit speech that is in violation of other applicable university policies, such as harassment policies, or state or federal law.¹⁹

¹⁷ For an example of a policy at another institution that uses this approach, see *Posting, Chalking, and Distribution of Information Materials Policy*, RADFORD UNIVERSITY, https://www.radford.edu/content/dam/departments/administrative/policies/StudentAffairsPoliciesandProcedures/SA-PO-1302_Posting%20and%20Chalking_FINAL.pdf (last visited June 13, 2018).

¹⁸ In *Talley v. California*, 362 U.S. 60, 64 (1960), the Supreme Court of the United States invalidated a Los Angeles municipal ordinance prohibiting the distribution of anonymous handbills. The Court wrote: “Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.”

¹⁹ For further examples of posting policies that earn FIRE’s highest, green light rating, see *Policy Manual: Facility Use*, APPALACHIAN STATE UNIVERSITY, https://policy.appstate.edu/Facility_Use (last visited June 13, 2018); *Student Organizations Handbook: Advertising and Posting Policy*, Arizona State University, https://eoss.asu.edu/sites/default/files/Student_Org_Handbook_2016-2017_FINAL_0.pdf (last visited June 13, 2018).

Generally, the SDBOR institutions' posting policies should allow for posting without prior approval in at least some locations on campus, and must provide content- and viewpoint-neutral criteria for circumstances where approval is required. With such a revision, administrators would not be not given unfettered discretion to approve or deny postings, and students may easily conform to the policy's requirements. Additionally, posting policies should allow for anonymous posting in at least some areas of the campus. Finally, posting policies should limit content-based restrictions to only those categories of speech not protected by the First Amendment.

VI. Electronic Communications Policies

As so much expression at universities now takes place online, maintaining electronic communications policies that do not infringe on protected speech is of utmost importance. However, several SDBOR institutions maintain electronic communications policies that could be applied to restrict protected expression.²⁰

For example, the Student Code of Conduct from the SDBOR Policy Manual includes the following prohibition:

7. Unauthorized use or abuse of technology, including, but not limited to: . . .
 - e. Use of technology to send harassing or abusive messages;

While banning the use of technology for harassment is reasonable, the ban on "abusive" messages is a broad prohibition that could be applied to punish constitutionally protected speech. Indeed, the Supreme Court long ago held that a Georgia statute prohibiting "opprobrious words or abusive language" was unconstitutional because those terms, as commonly understood, encompassed speech and expression protected by the First Amendment. *Gooding v. Wilson*, 405 U.S. 518 (1972). The policy should be revised to only ban conduct that is not protected by the First Amendment, such as harassment as legally defined.

In another example, Black Hills State University maintains an "Email/User Account Policy," which is excerpted below:

The Black Hills State University email system prohibits disruptive or offensive messages as electronic communications in violation of civil or criminal law at the local, state, and federal levels.

. . .

²⁰ See *Email / User Account Policy*, BLACK HILLS STATE UNIVERSITY, <http://www.bhsu.edu/IITS/Services/Policies/Email-User-Account-Policy> (last visited June 13, 2018); *Student Code of Conduct: Unauthorized use or abuse of technology*, SOUTH DAKOTA BOARD OF REGENTS, <https://www.sdbor.edu/policy/documents/3-4.pdf> (last visited June 13, 2018).

Using Black Hills State University resources for personal emails is prohibited by the South Dakota Board of Regents. Sending chain letters or joke emails from a Black Hills State University email account is prohibited.

First, this policy reasonably explains that communications that are in violation of civil or criminal law are prohibited, yet implies more broadly that “offensive” messages will not be permitted. Further, the policy goes on to explain that using university resources for personal emails is prohibited, including “chain letters” or “joke emails.” It is unreasonable to prohibit any use of technology for personal matters across the board; instead, the policy should more narrowly ban the use of university resources that disrupts the proper functioning of university resources or another individual’s ability to use such resources. This way, the policy will be enforceable against uses that are legitimately disruptive, while allowing emails of a personal nature that do not disrupt the university’s resources and do not violate other applicable university policies or state or federal law.²¹

In all electronic communications regulations at SDBOR institutions, policies must not restrict speech that is protected by the First Amendment simply because it takes place online, and must limit restrictions to conduct not protected by the First Amendment and to use that substantially disrupts the proper functioning of university resources or another individual’s ability to use such resources.

VII. Bullying and Cyberbullying Policies

While behavior that is often classified as “bullying” or “cyberbullying” can indeed rise to the level of unprotected conduct like hostile environment harassment, university bullying policies often set forth standards that are far broader than the legal standard for peer harassment, or, conversely, fail to define bullying at all.

For example, Northern State University’s “Title IX Policy & Procedure Guidelines”²² ban, as an example of “sexual exploitation,” “sexually based stalking, cyber-stalking, and/or bullying.” As the term “bullying” goes undefined here, students are left to wonder what speech or conduct is proscribed and may self-censor in order to avoid punishment.

²¹ For examples of electronic communications policies that earn FIRE’s highest, green light rating, see *Acceptable Use*, CLEVELAND STATE UNIVERSITY, <https://www.csuohio.edu/sites/default/files/3344-7-05%20-%20eff.%206-2-2014.pdf> (last visited June 13, 2018); *Information Technology Resource*, BOISE STATE UNIVERSITY, <https://policy.boisestate.edu/information-technology/information-technology-resource-use/> (last visited June 13, 2018); *Standard for Responsible Use*, UNIVERSITY OF NORTH CAROLINA AT CHARLOTTE, <https://itservices.uncc.edu/iso/standard-responsible-use> (last visited June 13, 2018).

²² *Title IX Policy & Procedure Guidelines*, NORTHERN STATE UNIVERSITY, <http://northern.edu/sites/default/files/titleixguidelines.pdf> (last visited June 13, 2018).

Instead, any references to bullying in policies maintained by SDBOR institutions should include a definition that fully tracks the Supreme Court’s standard for peer harassment from *Davis*.²³

VIII. Other Policies

Finally, the SDBOR Student Code of Conduct provides a “catch-all” provision that would benefit from clarification:

I. Other Conduct

Conduct not expressly prohibited may also subject Students or Organizations to conduct sanctions where such conduct has the purpose and effect of infringing interests protected by this Student Code or other provisions of Board Policy or Institutional Policy.

It is unclear what speech or conduct this vague provision seeks to address, making it confusing for students and a potential threat to free expression. Instead, FIRE suggests the policy be revised to simply ban any other conduct that is in violation of state or federal law. This way, the university has the flexibility to address obviously prohibited conduct that is not specifically enumerated, while eliminating the threat to free speech that a broader catch-all provision represents.

Conclusion

Thank you for inviting FIRE to provide our input regarding how the SDBOR could revise policies to better promote free speech on campuses throughout the state of South Dakota. We would be pleased to work with the SDBOR and SDBOR institutions to revise their policies to achieve this shared goal. The addendum to this written testimony provides specific recommended revisions to the policies excerpted in this testimony. FIRE would also be pleased to provide specific suggested revisions to any of the other policies maintained by the SDBOR institutions upon request.

Furthermore, we hope the SDBOR will consider adopting a principled statement on free expression in order to foster a climate of debate and dialogue on campus. This commitment, along with implementation of the policy changes detailed in this memorandum, would position SDBOR institutions as leaders on campus free expression in South Dakota and beyond.

²³ For examples of bullying policies that earn FIRE’s highest, green light rating, see *Bullying Policy*, OREGON STATE UNIVERSITY, <http://eo.oregonstate.edu/bullying-policy> (last visited June 13, 2018); *Code of Student Conduct: Bullying*, WESTERN CAROLINA UNIVERSITY, https://www.wcu.edu/WebFiles/PDFs/Catamount_Code_Final_Document.pdf (last visited June 13, 2018); *Student Code of Conduct: Bullying and Harassment*, YOUNGSTOWN STATE UNIVERSITY <https://cms.yzu.edu/administrative-offices/student-conduct/art-iii> (last visited June 13, 2018).

Respectfully submitted,



Tyler Coward
Legislative Counsel



Azhar Majeed
Vice President of Policy Reform

cc:

John W. Bastian, Secretary, Board of Regents

Jim Thares, Member, Board of Regents

Jim Morgan, Member, Board of Regents

Randy Schaefer, Member, Board of Regents

Pam Roberts, Member, Board of Regents

Joan Wink, Member, Board of Regents

David Mickelson, Member, Board of Regents

Paul Turman, Vice President for Academic Affairs, Board of Regents

SELECTED POLICY REVISION RECOMMENDATIONS

I have provided below recommended versions of each of the policy examples discussed in the attached written testimony, which have been revised to meet First Amendment standards. In addition, FIRE would be pleased to provide specific recommendations, upon request, for any of the other policies maintained by the SDBOR institutions.

I. Harassment Policies

SDBOR Policy Manual: Student Code of Conduct- Harassment

5. Harassment, ~~which includes, but is not limited to~~ **defined as:**

- a. Conduct towards another person that **is so severe, pervasive, and objectively offensive that it** ~~has the purpose or effect of creating~~ **creates** an objectively and subjectively intimidating, hostile, or demeaning environment that substantially interferes with the individual's ability to participate in or to realize the intended benefits of an Institutional activity or resource; and
- b. ~~Other conduct that is extreme and outrageous exceeding all bounds usually tolerated by polite society and that has the purpose or the substantial likelihood of interfering with another person's ability to participate in or to realize the intended benefits of an Institutional activity or resource.~~

South Dakota State University: Housing & Residential Life Residential Handbook- Harassment

Harassment means behavior toward another person that ~~has the purpose or perception of creating an intimidating, hostile, or demeaning environment in order to interfere with another person's ability to participate in or to realize the intended benefits of a University activity, employment, or resource~~ **is so severe, pervasive, and objectively offensive that an individual is effectively denied equal access to institutional resources and opportunities.**

...

Sexual harassment may be established by showing that an individual has been subjected to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature **that is so severe, pervasive, and objectively offensive that an individual is effectively denied equal access to institutional resources and opportunities.**

II. Expressive Activity Policies

University of South Dakota: Sales and Solicitation Policy and Request Form

1. All sales and solicitations in the public areas of the campus of The University of South Dakota will be restricted to the appropriate areas inside or near the Theodore

R. and Karen K. Muenster University Center and must be approved by the Muenster University Center Administration.

...

III. Areas available for sales and solicitation

- i. Muenster University Center
- ii. Muenster University Center Courtyard
- iii. I.D. Weeks Library Courtyard

...

Solicitation: as defined by USD, is asking for a donation or contribution of monies, goods or services or making a request or plea. ~~Soliciting includes, but is not limited to: distributing or promoting through advertising any material; passing out literature; affixing posters or literature on bulletin boards as well as directly requesting donations, contributions, support or membership from individuals or groups.~~

Non-commercial expressive activities not meeting the definition of sales or solicitation may generally be conducted at publicly available outdoor areas of the campus without prior approval from the university.

SDBOR Policy Manual: Facilities Use by Private Parties

A. "Affiliated entity," and its cognates, includes organizations, such as institutional foundations, whose legal purpose includes support of the institution and its activities, organizations that have been authorized by the institution to use its name and marks, **and students and faculty members**, and student and faculty organizations recognized by the institution, as well as the State of South Dakota and its political subdivisions, and their instrumentalities.

III. Bias Incident Reporting Policies

University of South Dakota: Bias, Discrimination or Harassment

A bias incident is an incident of verbal or nonverbal conduct or behavior that is ~~threatening, harassing, intimidating, discriminating, or hostile~~ **constitutes an unlawful threat, harassment, intimidation, or discrimination**, and is based on a category that is protected under the Institutional Nondiscriminatory Policy.

To learn about bias incidents and reporting bias incidents, call 605-677-3925 or email diversity@usd.edu to report a concern or seek guidance about whether or not something should be reported.

It is not the purpose of this policy to investigate, adjudicate, or take the place of other University of South Dakota processes or services; rather, the aim is to complement and work with campus entities to connect impacted parties and communities with appropriate support and resources.

IV. Restrictions on Political Speech

SDBOR Policy Manual: Recognition and Funding of Student Organizations

~~A. No student organization will be eligible for student fee subsidies of its operating expenses:~~

~~1. if its predominant activities involve sectarian ceremonies or exercises, promotion of candidates or ballot issues in general elections, or financing off-campus lobbying or political activities of non-students; ...~~

~~B. The institution may distribute student activity fee proceeds to support on-campus cultural, social, recreational and informational activities and events that are open to all members of the campus community and that are sponsored by a recognized student organization, even if the organization would not be eligible for fees to support general operational expenses, but only if the activity or event does not have the primary effect of supporting sectarian ceremonies or exercises, promoting candidates or ballot issues in general elections, financing off-campus lobbying or political activities by non-students or generating income for the personal use and benefit of the sponsoring organization members or on behalf of for-profit entities.~~

Federal statutes stipulate that non-profit, tax exempt institutions of higher education are prohibited from participating in, or intervening in, any political campaign on behalf of or in opposition to any candidate for public office. Partisan activities by recognized student organizations in no way jeopardize the institution's tax-exempt status, as long as those activities are not construed to express the position of the institution, and do not appropriate institution resources or public facilities for either the purpose of partisan fundraising or as donations to partisan organizations or individual candidates for public office.¹

SDBOR Policy Manual: Acceptable Use of Information Technology System

10. Using the information and communications system for partisan political

¹ Adapted from *Policy on Partisan Activity*, MUHLENBERG COLLEGE, <https://www.muhs.edu/media/contentassets/pdf/about/deanst/studentguide/partisanpolicy.pdf> (last visited June 15 2018).

purposes, **where the message could be reasonably construed as expressing the position of the institution itself.** ~~other than the expression of private political views by participants in otherwise permitted communications, so long as the user specifically disclaims any support, endorsement, or opposition by the Board for the views so expressed;~~

V. Posting Policies

South Dakota School of Mines and Technology: On Campus Advertising/Campus Posting

2. Posting Authorization

~~A. All recognized student organization postings must be~~ **Students may post materials on designated open use bulletin boards without prior approval. Students who wish to post materials elsewhere must have their postings** approved by the Student Activities and Leadership Center.

B. All SD Mines department postings must be approved by the Surbeck Scheduling Office

~~C. All non-campus postings must be approved by the Surbeck Scheduling Office~~

3. Posting Requirements

~~A. All postings for events and services must show obvious sponsorship by an SD Mines department or recognized student organization and must be open to the SD Mines community.~~

~~B. All postings must be hung by university staff on the appropriate locations~~

C. Postings cannot promote alcohol or drugs, ~~contain sexually explicit material or profanity~~ **include content that is in violation of state or federal law or of other applicable university policies,** or compete with dining services or the university bookstore

VI. Electronic Communications Policies

SDBOR Policy Manual: Student Code of Conduct- Unauthorized use or abuse of technology

7. Unauthorized use or abuse of technology, including, but not limited to: . . . e. Use of technology to send ~~harassing or abusive~~ messages **that constitute unlawful harassment;**

Black Hills State University: Email/User Account Policy

The Black Hills State University email system prohibits disruptive ~~or offensive~~ messages as electronic communications in violation of civil or criminal law at the local, state, and federal levels.

...

Using Black Hills State University resources for ~~personal emails~~ **to substantially disrupt the functioning of university email or individuals' ability to use university email** is prohibited by the South Dakota Board of Regents. ~~Sending chain letters or joke emails from a Black Hills State University email account is prohibited.~~

VII. Bullying and Cyberbullying Policies

Northern State University: Title IX Policy & Procedure Guidelines

Examples of sexual exploitation include, but are not limited to the following: . . .

Sexually based stalking, cyber-stalking and/or bullying, **defined as conduct so severe, pervasive, and objectively offensive that the individual is effectively denied equal access to university resources and opportunities.**

VIII. Other Policies

SDBOR Policy Manual: Student Code of Conduct- Other Conduct

I. Other Conduct

Conduct not expressly prohibited may also subject Students or Organizations to conduct sanctions where such conduct ~~has the purpose and effect of infringing interests protected by this Student Code or other provisions of Board Policy or Institutional Policy~~ **violates other applicable university policy or state or federal law.**