Introduction

This Report summarizes the First Amendment rights of students and faculty at North Carolina's state-funded institutions of higher education, and the ways in which many of these institutions have violated these rights by promulgating and enforcing unconstitutional speech codes and student organization nondiscrimination policies.

This Report consists of three sections: first, an overview of First Amendment law as it relates to North Carolina's public universities; second, a school-by-school analysis of policies restricting freedom of speech and association in the University of North Carolina System; and finally, a set of recommendations for remedying these violations.

Overview of First Amendment Law

The Responsibility to Respect the Expressive Rights of Students and Faculty

North Carolina state colleges and universities have the responsibility to respect the free speech rights of their students and faculty members. A good rule of thumb is that if a state law would be declared unconstitutional for violating the First Amendment rights of North Carolinians, a similar regulation at a state college or university would be equally unconstitutional.

One of the primary ways in which colleges and universities restrict free speech is by enacting "speech codes." We define a "speech code" in a very straightforward manner: a speech code is any university regulation or policy that prohibits speech that would be constitutionally protected in society at large.

It is not necessary for a speech code literally to be labeled "SPEECH CODE"; indeed, university speech codes are seldom if ever found in a section of university regulations that labels itself as containing restrictions on speech. Most often, their components can be found in anti-harassment policies, policies governing on-campus living, policies governing computer use, and policies prohibiting disorderly conduct.

Speech codes gained popularity with college administrators in the 1980s and 1990s. As discriminatory barriers to education declined, institutions of higher education saw an unprecedented increase in female and minority enrollment. College administrators feared that these changes would cause tension, and that students who finally had full educational access would arrive at institutions only to be hurt and offended by other students. In an effort to avoid this friction, administrators enacted policies to restrict potentially offensive speech—in other words, they enacted speech codes.

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Despite numerous court decisions overturning speech codes at public colleges and universities, the majority of these institutions still maintain unconstitutional speech codes. Public universities in North Carolina are no exception: of the 16 institutions comprising the University of North Carolina System, 13 institutions have at least one policy that both clearly and substantially restricts freedom of speech.

A "clear" restriction is one that unambiguously infringes on what is or should be protected expression. In other words, the threat to free speech is obvious on the face of the policy and does not depend on how the policy is applied. A "substantial" restriction on free speech is one that is broadly applicable to important categories of campus expression.

Two schools have at least one policy that *could* be used to ban or excessively regulate protected speech. These restrictions will be discussed in greater detail later in this Report. Only one school—Elizabeth City State University—does not maintain policies restricting the free expression of its students and faculty. This is laudable, and Elizabeth City should serve as a model for the rest of the schools in the University of North Carolina System.

Federal Anti-Harassment Law

Anti-harassment policies are among the worst offenders in the realm of campus speech codes. Colleges and universities often try to justify these policies by arguing that federal law requires them to prevent harassment on their campuses. Title VI of the Civil Rights Act (which bans race-based discrimination at institutions receiving federal funds) and Title IX of the Education Amendments of 1972 (which bans sex-based discrimination in higher education) require schools to protect students against harassment. However, Title VI and Title IX do not—in fact, cannot—prohibit speech that the First Amendment protects. Rather, courts and federal agencies have limited harassment law, as it applies to students, to speech or conduct based on protected categories that is so repeated, pervasive, or severe that it actually prevents another person from obtaining an education.

As the Supreme Court stated, for student conduct to constitute constitutionally unprotected harassment, it must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 633 (1999). This is a stricter standard than that required for workplace harassment. Therefore, merely unpleasant behavior, even if the behavior is based on animosity towards a person's race or gender, is not enough. Harassment is extreme behavior.

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Colleges and universities often use their obligations under federal anti-harassment law to justify speech codes that violate the First Amendment rights of their students and faculty. In fact, this type of abuse of harassment regulations became so widespread that in July 2003, the federal Department of Education's Office for Civil Rights (OCR) issued a letter to all of America's colleges and universities. Assistant Secretary Gerald Reynolds wrote:

> Some colleges and universities have interpreted OCR's prohibition of 'harassment' as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.

Reynolds wrote that "OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution," and concluded that "[t]here is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment."

This letter forecloses any argument that federal anti-harassment law requires colleges to adopt speech codes that violate the First Amendment. *See* First Amendment: Dear Colleague Letter, *available at* http://www.ed.gov/about/offices/list/ocr/firstamend.html.

Overbreadth and Vagueness

The main constitutional problems with college and university speech codes are overbreadth and vagueness.

Overbreadth

Speech cannot be prohibited simply because someone might find it offensive. According to the U.S. Supreme Court, for conduct to constitute harassment, it must be *both* "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive" and "subjectively perceive[d]" as harassment. *Harris v. Forklift Systems*, 510 U.S. 17, 21–22 (1993). Unfortunately, many colleges and universities have abandoned the "objectively hostile" requirement and base punishment only upon whether conduct is subjectively perceived by another person as harassing or offensive. Many harassment policies prohibit verbal conduct that "offends" an individual, without reference to whether it was reasonable for that individual to take offense. Federal anti-harassment law, by contrast, requires "that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances, including the victim's age." *First Amendment: Dear Colleague Letter*.

In *Saxe v. State College Area School District*, the U.S. Court of Appeals for the Third Circuit struck down a public high school's anti-harassment policy on First Amendment grounds because it conditioned the permissibility of speech on subjective listener reaction. The policy at issue defined harassment as "verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment." *Saxe v. State College Area School District*, 240 F.3d 200, 202 (3d Cir. 2001).

One of the reasons that the court found the policy unconstitutional was that the policy did not "require any threshold showing of severity or pervasiveness," and thus "it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone." The court emphasized that to constitute unprotected harassment, "it is certainly not enough that the speech is merely offensive to some listener." *Saxe*, 240 F.3d at 217. *See also Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 369 (M.D. Pa. 2003) ("regulations that prohibit speech on the basis of listener reaction alone are unconstitutional both in the public high school and university settings").

Vagueness

In order to comport with due process, laws must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). "These concerns apply with particular force where the challenged statute affects First Amendment rights." *The UWM Post, Inc., v. Board of Regents of University of Wisconsin System*, 774 F. Supp. 1163, 1178 (E.D. Wis. 1991).

University speech codes often prohibit vague categories of expression, such as speech that "demeans" or "degrades" an individual, or speech that "can be interpreted" as harassing or intimidating. These policies require students to guess, under threat of punishment, at what exactly constitutes "demeaning" speech or what might "be interpreted" as harassing. As a result, students censor themselves, holding back from engaging in protected expression because they do not know exactly what their schools' policies prohibit. The result is an impermissible chilling effect on constitutionally protected speech.

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The Responsibility to Protect Religious Liberty on Campus

North Carolina's state colleges and universities are required by the First Amendment to protect the religious liberty of their students. Unfortunately, on many public campuses today, religious liberty is under assault by

administrators with a defective understanding of what the Constitution's guarantees of religious liberty and freedom of association mean when applied to the modern college campus. And once again, many of the problems stem from a misapplication of discrimination laws or regulations to activities that are protected by the First Amendment's guarantee that individuals and groups may freely exercise their religion.

Religious Groups Must Be Free to Choose and Limit Their Leadership and Membership

Religious student groups on North Carolina's state college and university campuses must be allowed to have religious requirements for the leadership and membership of their religious groups, and groups with such requirements must be treated by the university on an equal basis with other groups that lack such requirements. This has become a growing problem, with college administrators across the country withdrawing recognition from campus religious groups that restrict their leadership or membership to those who share their beliefs, typically Christian or Muslim. Administrators argue that since the groups discriminate on the basis of religion in their leadership or membership, they engage in illegal discrimination. The withdrawal of recognition from these groups not only generally means that they are ineligible for funding on an equal basis with secular groups but, also, that they often cannot reserve space to meet or even use the university's name in the name of the group.

Yet in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Supreme Court held that forcing the Boy Scouts to include an openly gay Scout leader would violate the organization's First Amendment right to freedom of association. The Court held that forced inclusion violates a group's freedom of association "if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648. Obviously, with religious student groups, the ability to choose members and leaders who share the same faith is essential to those groups' ability to express their religious messages.

A federal court in North Carolina has held that these nondiscrimination requirements probably violate students' right to freedom of association. In March 2005, a federal judge in North Carolina granted a preliminary injunction in favor of a Christian fraternity that filed suit against UNC Chapel Hill to challenge a nondiscrimination clause. The university tried to force the fraternity, whose mission is to train Christian leaders, to adopt a nondiscrimination clause that would have prohibited it from considering religion when determining "membership and participation" in the group. The fraternity members felt that the nondiscrimination clause would hinder the fraternity's ability to maintain its character as a group of believing and practicing Christian students. The court preliminarily enjoined UNC Chapel Hill from enforcing its nondiscrimination policy, holding that it "raises significant constitutional concerns and could be violative of the First Amendment of the United States Constitution…." *Alpha Iota Omega Christian Fraternity v. Moeser et al.* (M.D.N.C. Mar. 2, 2005). In spite of this, most schools in the UNC System still maintain nondiscrimination requirements for religious student organizations.