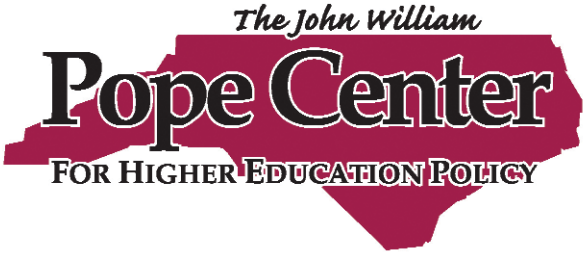
The State of the First Amendment in the University of North Carolina System

A Joint Report of the
Pope Center for Higher Education Policy
and the
Foundation for Individual Rights in Education



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January 10, 2006

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Executive Summary

> *If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.*
>
> —*West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)

U.S. Supreme Court Justice Robert Jackson's words were a ringing affirmation of the freedoms of conscience and expression that are central to American liberty. Unfortunately, however, the notion that the government may not dictate what people may express or believe about controversial subjects has remained hotly contested. Those in power inevitably find it convenient to restrict expression or even to dictate matters of conscience in order to ensure a more "just," "fair," or "orderly" society or organization.

Today, one of the most likely places to find rules and regulations that restrict expression or dictate matters of conscience is at one's local college or university campus—including at the 16 schools that comprise the University of North Carolina System. As public institutions—agencies of the State of North Carolina—the universities in the UNC System are legally bound to uphold the First Amendment rights of their students and faculty. They are failing miserably.

The Report on the State of the First Amendment in the University of North Carolina System serves to educate the public about the rampant abuse of First Amendment rights within the UNC System and to put North Carolina's public colleges and universities on notice that it is unlikely—if not impossible—that most of the policies discussed in the Report could survive a constitutional challenge. The Report summarizes the constitutional rights due to students and faculty in the University of North Carolina System, and details the ways in which many of the System's member institutions have run

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roughshod over these rights in the name of tolerance and civility. Our research revealed that 13 out of the 16 schools in the UNC System have at least one policy that both clearly and substantially restricts freedom of speech. Two schools have at least one policy that *could* be used to ban or excessively regulate protected speech. Only one school—Elizabeth City State University—does not maintain policies restricting the free expression of its students and faculty.

The following are some examples of unconstitutional policies in force in the UNC System:

- Appalachian State University prohibits "insults" and "taunts" directed at another person.
- Fayetteville State University prohibits "vulgar language."
- North Carolina Central University prohibits "statements of intolerance."
- UNC Greensboro prohibits "disrespect for persons."
- UNC Pembroke prohibits "offensive speech…of a biased or prejudiced nature related to one's personal characteristics, such as race, color, national origin, sex, religion, handicap, age, or sexual orientation."

The Report concludes with several recommendations for remedying the constitutional violations so prevalent in the UNC System, either through the legislature or in the courts. It is our hope that, in the wake of the publicity generated by the Report, North Carolina's institutions of higher education will not remain content to maintain a low standard in the area of fundamental American rights. Neither our nation's courts nor its people look favorably upon restrictions on basic American freedoms.

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.

A speech code is any university regulation or policy that prohibits speech that would be constitutionally protected in society at large.

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.

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.

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.

North Carolina's state colleges and universities are required by the First Amendment to protect the religious liberty of their students.

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.

The University of North Carolina Schools

Appalachian State University

Speech Codes

Appalachian State University maintains several unconstitutional speech codes. Its Department of Housing and Residence Life maintains a harassment policy that provides, in relevant part: "Bigotry has no place within the residence hall community, nor does the right to denigrate another human being…. Harassment or the use of abusive language, insults, taunts, or challenges directed toward another person are prohibited." This policy is unconstitutionally overbroad.

The Supreme Court has held that for student conduct to constitute unprotected hostile environment 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). By contrast, this policy requires only that the conduct "denigrate," "insult," or "challenge" another individual, without reference to whether the conduct is objectively offensive or to whether it interferes with that individual's access to educational opportunity. Moreover, this policy indicates that a single instance of insult or offense is sufficient to establish a violation. This contradicts both Supreme Court precedent and the federal government's interpretation of the relevant harassment laws. In its July 28, 2003, open letter to college and university administrators, OCR stated that "the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR." *First Amendment: Dear Colleague Letter*.

Appalachian State's Code of Student Conduct also defines harassment as "conduct that has the effect of emphasizing" sexuality or race "in a manner deemed offensive by a reasonable person…." Although Appalachian State makes an effort to comply with the First Amendment here by introducing a "reasonable person" standard into this policy, the policy is still unconstitutionally overbroad.

A school cannot prohibit merely "offensive" speech, even if a reasonable person would find it offensive. Rather, the applicable "reasonable person" standard is as follows: a school can prohibit only speech "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person

would find hostile or abusive." *Harris v. Forklift Systems*, 510 U.S. 17, 21–22 (1993).

Nondiscrimination Policies

Appalachian State maintains a nondiscrimination policy for student organizations that requires student organizations to "afford opportunities to members on the basis of personal merit and not race, sex, creed, sexual orientation, age, religion, national origin or ancestry." This policy is overbroad because it prohibits religious student organizations from having religious requirements for leadership and membership, as is their right under the First Amendment. As discussed earlier, a federal court in North Carolina recently held that these nondiscrimination requirements probably violate students' right to freedom of association.

East Carolina University

Speech Codes

East Carolina University prohibits "[u]sing obscene, vulgar, loud, or disruptive language or conduct directed toward and offensive to a member or visitor of the University community." This policy is unconstitutionally overbroad.

As an initial matter, "obscenities," as used in common parlance, are not unprotected obscenity. Rather, unprotected obscenity has a highly specific definition: obscenity must "depict or describe sexual conduct," and must be "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973).

Moreover, the Supreme Court has made clear that most so-called vulgar language is constitutionally protected. In *Cohen v. California*, 403 U.S. 15 (1971), the defendant was convicted under a California statute for wearing a jacket bearing the words "F*ck the Draft" into a county courthouse. The Court overturned Cohen's conviction, holding that the message on his jacket, however vulgar, was protected speech. The Court wrote that "one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id.* at 25.

In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), a journalism graduate student was expelled for distributing a newspaper that contained "indecent speech" in violation of university policy. The two objectionable items in the newspaper were a political cartoon depicting policemen raping the Statue of Liberty and a headline reading "Motherf*cker Acquitted," which discussed the trial of an individual who was a member of a group called "Up Against the Wall, Motherf*cker." The Supreme Court ordered that the student be reinstated at the university, holding that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Id.* at 670.

East Carolina also maintains a residence hall policy on "respect and courtesy" stating that students do not have the right "to denigrate another individual on the basis of age, physical challenge, national origin, sexual orientation, race, political affiliation, gender, or religious affiliation."

East Carolina's "respect and courtesy" policy requires no showing of severity or pervasiveness, thus conditioning the permissibility of speech on the subjective reaction of the listener. Moreover, the policy goes beyond the legally protected categories of federal anti-harassment law and prohibits "denigration" on the basis of "political affiliation." The policy requires students to guess at what it prohibits, likely leading to self-censorship. What, exactly, does it mean to denigrate someone on the basis of his or her political affiliation? Would a student's impassioned argument that Republicans don't care about

Students who don't want to risk punishment might censor themselves from engaging in these types of discussions and debates, which should form the heart of university life.

minorities or the poor "denigrate" a Republican student on the basis of political affiliation? Would a student's impassioned argument that Democrats tacitly support anti-American terrorism "denigrate" a Democratic student on the basis of political affiliation? In other words, would these exchanges, part of the "marketplace of ideas" that makes university life so unique, be prohibited conduct at East Carolina? Under the language of East Carolina's policy, they could be. And as a result, students who don't want to risk punishment might censor themselves from engaging in these types of discussions and debates, which should form the heart of university life.

Nondiscrimination Policies

At East Carolina, a registered student organization must have a statement in its constitution and by-laws to the effect that "there shall be no discrimination of race, religion, creed, color, national origin, sex, age, sexual preference, veteran status, or disability with regards to the purpose of the club." This policy is overbroad because it prohibits religious student organizations from having religious requirements for leadership and membership, as is their right under the First Amendment. As discussed earlier, a federal court in North Carolina recently held that these nondiscrimination requirements probably violate students' right to freedom of association.

Elizabeth City State University

Speech Codes

Our research indicates that Elizabeth City State University's speech-related policies are consistent with the First Amendment. Elizabeth City's Sexual Harassment Policy provides that to constitute sexual harassment, conduct must be "so extreme or constant that a reasonable person would find that it…creates a hostile or abusive working or educational environment." This policy is consistent with the Supreme Court's harassment jurisprudence: it requires both that the conduct be severe or pervasive, and that the conduct be objectively offensive.

Elizabeth City also maintains a Computer Use Policy providing that students' computer use must "not violate state or federal laws or University policies against race or sex discrimination, including sexual harassment." Since Elizabeth City's sexual harassment policy does not restrict protected speech, this related policy is also constitutionally acceptable.

Nondiscrimination Policies

Unfortunately, Elizabeth City does maintain an unconstitutional nondiscrimination requirement as applied to religious student groups, requiring that "all clubs and organizations must be open to all Elizabeth City State University students. Clubs may not discriminate on the basis of sexual orientation, ethnicity, gender, age, disability, or any other factors." This policy is overbroad because it prohibits religious student organizations from having religious requirements for leadership and membership, as is their right under the First Amendment. As discussed earlier, a federal court in North Carolina recently held that these nondiscrimination requirements probably violate students' right to freedom of association.

Fayetteville State University

Speech Codes

Fayetteville State University maintains one explicitly unconstitutional policy as well as several policies that could too easily be used to ban or excessively regulate protected speech.

Fayetteville State's Code of Student Conduct defines "racial harassment" as

> verbal or physical behavior that stigmatizes or victimizes an individual on the basis of race and involves an express or implied threat to another person's academic pursuits or participation in activities sponsored by the University or organizations or groups related to the University. Such behavior may also create an intimidating, hostile or demeaning environment for such academic pursuits or participation.

A federal court in Michigan held that a virtually identical policy at the University of Michigan was unconstitutionally vague. *Doe v. Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). The court first held that the words "stigmatize" and "victimize" "are general and elude precise definition." *Doe*, 721 F. Supp. at 867. The court also held that the phrase "involve an express or implied threat to an individual's academic efforts" was vague because "it is not clear what kind of conduct would constitute a

'threat' to an individual's academic efforts." *Id.* Although the *Doe* decision is not binding on North Carolina, it was a highly publicized decision, and it is surprising that Fayetteville State would continue to maintain such a publicly discredited policy.

Fayetteville State's Code of Student Conduct defines "harassment" as "any act that is abusive or threatening to another by means other than the use or threatened use of physical force." This policy is defective because it does not require that the act be threatening to a *reasonable* person in order to constitute harassment. Instead, it conditions the permissibility of speech on the subjective reaction of the listener.

FIRE handled a case at William Paterson University of New Jersey (WPUNJ) that illustrates how conditioning speech on subjective listener reaction can lead to the suppression of constitutionally protected speech. In March 2005, a women's studies professor at WPUNJ sent out a campus-wide e-mail about an upcoming showing of a film described as a "lesbian relationship story." The e-mail contained a "reply to" address. In response to this unsolicited e-mail, a religious Muslim student at the university replied to the professor as follows:

> Do not send me any mail about "Connie and Sally" and "Adam and Steve." These are perversions. The absence of God in higher education brings on confusion. That is why in these classes the Creator of the heavens and the earth is never mentioned.

William Paterson University: Punishment on Harassment Charges for Response to Mass E-mail, *at* http://www.thefire.org/index.php/case/682.html.

This student's e-mail is absolutely constitutionally protected speech. However, the professor complained to the university about the e-mail. She stated that the "message to me sounds threatening" and that "I don't want to feel threatened at my place of work…." As a result of the professor's complaint, the student was found guilty of violating New Jersey's policy against discrimination and harassment.

It is surprising that Fayetteville State would continue to maintain such a publicly discredited policy.

As this case demonstrates, prohibiting conduct that is "threatening to another" without reference to a reasonable person could easily be used to suppress protected speech as well as genuinely unprotected threats.

Fayetteville State also prohibits, as disorderly conduct, "using abusive and/or vulgar language…." As discussed earlier, however, most "vulgar language" is constitutionally protected.

Additionally, Fayetteville State maintains a housing policy that prohibits "any form of violence, threats, fighting, wrestling, or verbal confrontations." The term "verbal confrontations" is vague and overbroad. As discussed in detail earlier, a regulation is unconstitutionally vague if people of ordinary intelligence are left to guess at its meaning. What is a "verbal confrontation"? If two students are arguing loudly in the hallway about a controversial topic they discussed earlier in class, is that a verbal confrontation? When people are forced to guess at the meaning of a regulation, they censor themselves in order to avoid punishment. This leads to an impermissible "chilling effect" on constitutionally protected speech.

Nondiscrimination Policies

At Fayetteville State, in order to become a recognized student organization, the organization's president must sign a statement affirming that "[t]his organization will not practice nor condone discrimination, in any form against university or community members on the grounds of race, nationality, religion, sex, or handicapping conditions." This policy is overbroad because it prohibits religious student organizations from having religious requirements for leadership and membership, as is their right under the First Amendment. As discussed earlier, a federal court in North Carolina recently held that these nondiscrimination requirements probably violate students' right to freedom of association.

North Carolina A&T State University

Speech Codes

As does Fayetteville State, North Carolina A&T State University prohibits "using language that is abusive

and/or vulgar." It also prohibits "[a]ny vulgarity, obscenity, harassment or threats through E-mail." As discussed in detail above, a state actor such as North Carolina A&T State University cannot constitutionally prohibit vulgar language.

Nondiscrimination Policies

North Carolina A&T State's Student Handbook provides that "[r]egistered and approved student organizations do not discriminate on the basis of race, creed, color, religious affiliation, sex, national origin, age or handicap in any aspect of their functions and operations." This policy is overbroad because it prohibits religious student organizations from having religious requirements for leadership and membership, as is their right under the First Amendment. As discussed earlier, a federal court in North Carolina recently held that these nondiscrimination requirements probably violate students' right to freedom of association.

North Carolina Central University

Speech Codes

North Carolina Central University's Guide to On-Campus Living provides that "[s]tatements of intolerance and/or harassment due to race, ethnicity, sex, religion, disability, or sexual preference may be subject to disciplinary action." This policy is unconstitutionally overbroad because it prohibits a great deal of constitutionally protected speech. In fact, a federal court in Pennsylvania recently struck down a university policy prohibiting "acts of intolerance" on overbreadth grounds, holding that it prohibited speech protected by the First Amendment. *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370 (M.D. Pa. 2003).

Public institutions such as North Carolina School of the Arts and many others persist in attempting to ban "offensive" speech. It is unlikely, if not impossible, however, that a policy such as this could survive a constitutional challenge.

A prohibition on "statements of intolerance" is also unduly vague since the university does not define what constitutes a "statement of intolerance." Would a student's vocal opposition to proselytizing on campus be a "statement of intolerance" due to religion since some religions require their members to proselytize? This student's opinion is unquestionably protected speech. However, because it is difficult to know what is prohibited by this policy, students and faculty will likely censor protected speech themselves in order to avoid punishment.

North Carolina Central prohibits "public profanity," in direct violation of established Supreme Court precedent. In *Cohen v. California*, 403 U.S. 15 (1971), discussed in detail above, the Supreme Court held that the state could not lawfully make the "public display" of a "four-letter expletive" a punishable offense. *Cohen*, 403 U.S. at 26. North Carolina Central's "public profanity" policy directly contravenes this holding and is therefore unconstitutional.

North Carolina Central also prohibits employees and students from using the university computer network to "download offensive or derogatory material from the Internet." This is unconstitutionally overbroad. Although this policy clearly covers hardcore pornography, which the university can legitimately regulate, it also bans a great deal of constitutionally protected speech. As courts have held in cases too numerous to list, the state cannot ban communication simply because someone finds it offensive or derogatory. Rather, it must fall within one of the very narrow categories of speech that the Supreme Court has held are outside the protections of the First Amendment: obscenity (as legally defined), fighting words, or actual harassment.

North Carolina School of the Arts

Speech Codes

North Carolina School of the Arts maintains a harassment policy that could be used to suppress protected speech. Although it defines harassment as "behavior based on another person's status that creates an intimidating, hostile, or offensive working or educational envi-

ronment," it goes on to provide examples of harassment that could have a serious chilling effect on campus speech. It provides that "behaviors that may constitute discriminatory harassment include," among other things, "stereotyping the experiences, background, and skills of individual groups," making "inconsiderate or mean-spirited jokes," and, most disturbingly, "attributing objections to any of the above to 'hypersensitivity' of the targeted individual or group." This policy is probably saved from illegality by the fact that it says these behaviors "may" constitute harassment rather than that they *do* constitute harassment. Indeed, almost any behavior "may" constitute harassment if it is severe, persistent, and pervasive enough to effectively prevent an individual from obtaining an education.

These examples are misleading enough, however, that they are likely to have a chilling effect on students' constitutionally protected speech. For example, nearly all speech that "stereotypes the experiences" of others, and nearly all "mean-spirited jokes" are constitutionally protected. Most distressing is the suggestion that attributing objections to speech to "hypersensitivity" is prohibited. In fact, alleged harassment *must* be evaluated from the perspective of a reasonable person, and an argument that the alleged victim is not reasonable but rather has unreasonable sensitivities is an entirely legitimate defense to a claim of harassment.

North Carolina School of the Arts also prohibits "disorderly conduct including, but not limited to, verbally abusive or inappropriate behavior. For example: discrimination against another student by using offensive speech or behavior of a biased or prejudiced nature related to one's personal characteristics, including race, color, national origin, gender, religion, disability, age or sexual orientation.

The Supreme Court has held on numerous occasions that speech cannot be restricted simply because it offends people. In *Street v. New York*, 394 U.S. 576, 592 (1969), the Court held that "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." In *Papish v. Board of Curators of the University of Missouri,* 410 U.S. 667, 670, the Court held that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of conventions of decency." Federal courts across the country have echoed this. *See Saxe v. State College Area School District*, 240 F.3d 200, 206 (3d Cir. 2001) (there is "no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive…."); *Doe v. University of Michigan*, 721 F. Supp. 852, 863 (E.D. Mich. 1989) (the university could not "proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people").

The Department of Education's Office for Civil Rights, whose regulations govern harassment in the educational setting, has also made clear that merely offensive communications do not constitute unprotected harassment. *See First Amendment: Dear Colleague Letter*.

This policy is not saved by the fact that the prohibition is couched in terms of discrimination, since while actual discrimination can—indeed, must—be prohibited, "using offensive speech" is not a form of discrimination. Discrimination can occur in the form of actual (*i.e.* severe, persistent, pervasive) harassment or in the form of denial of equal opportunity. North Carolina School of the Arts cannot get around the First Amendment by redefining "discrimination" to include offensive speech. Nonetheless, public institutions such as North Carolina School of the Arts and many others persist in attempting to ban "offensive" speech. It is unlikely, if not impossible, however, that a policy such as this could survive a constitutional challenge.

North Carolina State University

Speech Codes

North Carolina State's policies are, for the most part, consistent with federal anti-harassment law and thus the First Amendment. It maintains one policy, however, that could too easily be used to restrict protected speech. North Carolina State's racial harassment policy provides that "[r]acial bias or harassment is a form of race discrimination in violation of federal and state law and North Carolina State University policy, and it will not be tolerated." The university's definition of racial harassment is acceptable; it provides that racial and other harassment "consists of unwelcome conduct when: 1. such conduct has the effect of unreasonably interfering with an individual's work or academic performance, or 2. such conduct has the effect of creating an intimidating, hostile or

offensive working or learning environment." On the other hand, the prohibition on "racial bias" could be used to suppress protected speech if the university applied it to expression as well as to discriminatory actions. Leaving this term undefined makes this policy too susceptible to abuse by overzealous administrators.

Nondiscrimination Policies

North Carolina State maintains a constitutionally appropriate policy that provides only that student organizations may "[n]ot practice illegal discrimination." This policy, which tells students only that they may not violate applicable law, is unobjectionable.

UNC Asheville

Speech Codes

UNC Asheville defines harassment as, among other things, "taunting, challenging or provoking any student or university official…." This is wholly unconstitutional, bearing little or no relationship to federal anti-harassment law. It prohibits certain types of speech outright, without reference to whether that speech is objectively—or even subjectively—offensive, and without reference to whether that speech is severe and persistent enough to create the necessary hostile environment.

UNC Asheville also violates its students' right to freedom of conscience by forcing them to "commit to a code of Civilized behavior" in the form of a Student Creed that provides, among other things, that "in joining this learning community," "I will respect the dignity of all persons…I will not condone bigotry…I will strive for the openness to learn from differences in people…." The final sentence of this Student Creed indicates that it is more than merely aspirational: "If you feel that you have experienced actions on campus which are not in accordance with the Student Creed, please contact the Academic and Student Affairs Office."

The U.S. Supreme Court has stated that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). In its Student Creed, UNC Asheville is actually forcing students to profess their belief in an officially approved ideology. This is a brazen intrusion into students' freedom of conscience.

Nondiscrimination Policies

UNC Asheville also maintains a nondiscrimination requirement for student organizations, which provides that "[f]ull membership and participation must be available to all UNCA Students without regard to race, religion, national origin, disability, age, veteran status, sexual orientation, or gender." This policy is overbroad because it prohibits religious student organizations from having religious requirements for leadership and membership, as is their right under the First Amendment. As discussed earlier, a federal court in North Carolina recently held that these nondiscrimination requirements probably violate students' right to freedom of association.

UNC Chapel Hill

Speech Codes

At first blush, UNC Chapel Hill appears to maintain a permissible sexual harassment policy, which provides that sexual conduct constitutes sexual harassment when "such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, hostile, or offensive environment."

Yet, UNC Chapel Hill goes on to provide "examples of sexual harassment" that include, among other things, "sexually explicit statements or questions"; "sexually explicit jokes or anecdotes"; "remarks about sexual activ-

In its Student Creed, UNC Asheville is actually forcing students to profess their belief in an officially approved ideology. This is a brazen intrusion into students' freedom of conscience.

ity"; and "sexually explicit emails, away messages, voice mails." This policy is unconstitutionally overbroad. By stating that these examples are sexual harassment, UNC Chapel Hill explicitly bans constitutionally protected speech, since the state cannot ban sexually explicit expression unless it meets the legal definition of obscenity or harassment. While these examples could constitute harassment if they were part of a course of conduct so severe, persistent and pervasive that it prevented someone from obtaining an education, they *are not*, standing alone, "examples of sexual harassment."

UNC Chapel Hill's network acceptable use policy provides that "users shall not harass or stalk others, post, transmit, or originate any unlawful, threatening, abusive, fraudulent, hateful, defamatory, obscene, or pornographic communication" over UNC computers. This is a textbook example of overbreadth. The policy legitimately regulates a number of types of communication, including harassment, fraud and other illegal activities, defamation, and obscenity. But mixed in with these legitimate regulations are unconstitutional prohibitions on "abusive" and "hateful" communications.

"Abusive" or "hateful" communications cannot be regulated unless they rise to the level of physical threats, fighting words, or actual harassment. These provisions are plainly unconstitutional.

Nondiscrimination Policies

UNC Chapel Hill has twice engaged in religious discrimination against student organizations, with the most recent instance resulting in a federal judge's issuing a preliminary injunction against the university.

In December 2002, UNC Chapel Hill attempted to force the InterVarsity Christian Fellowship, a campus student group, to remove a provision of its constitution that required that the officers of that Christian group be Christian. After FIRE publicized UNC Chapel Hill's unconstitutional and illiberal actions, the university quickly relented.

In the fall of 2003, UNC Chapel Hill derecognized a Christian fraternity that refused to sign the university's nondiscrimination statement for student organizations. The fraternity filed suit in federal district court in North Carolina, and in March 2005, the judge preliminarily enjoined UNC Chapel Hill from enforcing its student organization nondiscrimination clause. Although UNC Chapel Hill has not admitted any wrongdoing in its derecognition of the fraternity, it has changed its nondiscrimination policy since the case began.

As of August 2004, the student organization nondiscrimination policy provided that:

> In keeping with applicable law and University policy, membership and participation in your organization must be open without regard to age, race, color, national origin, religion, disability, veteran status, or sexual orientation. Membership and participation in your organization must also be open without regard to gender, unless exempt under Title IX.

Since that time, UNC Chapel Hill has added the following text to its policy:

> Student organizations that select their members on the basis of commitment to a set of beliefs (e.g., religious or political beliefs) may limit membership and participation in the organization to students who, upon individual inquiry, affirm that they support the organization's goals and agree with its beliefs, so long as no student is excluded from membership or participation on the basis of his or her age, race, color, national origin, disability, religious status or historic religious affiliation, veteran status, sexual orientation, or, unless exempt under Title IX, gender.

UNC Charlotte

Speech Codes

UNC Charlotte's Racial Harassment Policy prohibits "any verbal or physical behavior…that stigmatizes or victimizes an individual on the basis of race, ethnicity, or ancestry, and that involves an express or implied threat to or interference with any facet of an individual's University life or creates an intimidating, hostile or demeaning environment for that individual in the University community." This policy is unconstitutionally vague, leaving individuals to guess at what it prohibits and leading to a chilling effect on protected speech. As discussed earlier (see entry for Fayetteville State), this policy has already been held unconstitutional by a federal court in Michigan, and is unlikely to survive a constitutional challenge in North Carolina.

UNC Charlotte maintains a "sexual harassment prevention brochure" that provides examples of "verbal offensive behavior." These include "sexual innuendos and comments" and "jokes about sex or gender in general." This interpretive guide to UNC Charlotte's otherwise appropriate sexual harassment policy renders the policy unconstitutional, as it prohibits protected speech such as sexual innuendos, sexual comments, and jokes about sex or gender. Again, while these types of communication could theoretically be part of a course of conduct that constitutes harassment, the state cannot ban these types of communications outright in an effort to avoid harassment.

Nondiscrimination Policies

At UNC Charlotte, each registered student organization is required to include a clause in its constitution providing that it will not "discriminate in its membership policies or otherwise, against any person on the basis of race, gender, national origin, ethnicity, religion, sexual orientation, or disability…." This policy is overbroad because it prohibits religious student organizations from having religious requirements for leadership and membership, as is their right under the First Amendment. As discussed earlier, a federal court in North Carolina recently held that these nondiscrimination requirements probably violate students' right to freedom of association.

UNC Greensboro

Speech Codes

UNC Greensboro's Policy on Discriminatory Conduct provides that "UNCG will not tolerate any harassment of, discrimination against, or *disrespect for persons*." (Emphasis added.) This is overbroad. The university can legitimately prohibit harassment (consistent with the First Amendment, as defined by federal law) and discrimination. The university cannot, however, prohibit "disrespect"—as members of a free society, students at UNC Greensboro are free to express their respect or disrespect for other members of the community so long as they do so in a way that does not fall within the very narrow areas of speech not protected by the First Amendment (physical threats, harassment, fighting words). The university can advocate for respect and encourage all members of the community to treat one another with respect. It cannot, however, prohibit constitutionally protected speech in the name of this otherwise worthy goal.

Nondiscrimination Policies

At UNC Greensboro, all registered student organizations must include an "Anti-Discrimination statement" in their constitutions: "The Anti-Discrimination statement must include that student organizations may not discriminate on the basis of race, color, creed, religion, gender, age, national origin, disability, military, veteran status, *political affiliation* or sexual orientation." (Emphasis added.) In other words, to receive recognition, the College Democrats must open the membership of their group to staunch Republicans. That is both unconstitutional and absurd.

UNC Pembroke

Speech Codes

UNC Pembroke prohibits "discriminating against another student by using offensive speech or behavior of a biased or prejudiced nature related to one's personal characteristics, such as race, color, national origin, sex, religion, handicap, age, or sexual orientation." As discussed earlier (see entry for North Carolina School of the Arts), this is unconstitutionally overbroad.

UNC Pembroke also prohibits "[u]sing obscene, vulgar, loud, or disruptive language or conduct directed toward and offensive to a member or visitor of the University community." As discussed above (see entry for East Carolina University), this infringes on constitutionally protected speech.

Nondiscrimination Policies

UNC Pembroke maintains a policy that prohibits student groups from engaging in

> [d]iscrimination on the basis of race, ethnicity, national origin, religion, creed, age, disability, or honorable service in the armed services of the United States that impairs or may impair an individual's…participation in University-sponsored extracurricular activities….

This policy is overbroad because it prohibits religious student organizations from having religious require-

Unprotected harassment is more than simply embarrassing or humiliating conduct.

ments for leadership and membership, as is their right under the First Amendment. As discussed earlier, a federal court in North Carolina recently held that these nondiscrimination requirements probably violate students' right to freedom of association.

UNC Wilmington

Speech Codes

Until very recently, UNC Wilmington—like several other schools in the UNC System—unlawfully prohibited "[d]iscriminat[ing] against another student by using offensive speech or behavior of a biased or prejudiced nature related to one's personal characteristics." The university recently revised this policy to instead prohibit only "behavior of a biased or prejudiced nature related to one's personal characteristics, such as race, color national origin, sex, religion, handicap, age or sexual orientation." This policy is still dangerously ambiguous, as it is unclear whether "behavior" includes expressive activity. But it is certainly an improvement over the explicit prohibition on "offensive speech."

UNC Wilmington also maintains an overbroad definition of sexual harassment in its code of student conduct, which prohibits "displaying offensive visual materials which interfere or are intended to interfere with another person's work or study."

Nondiscrimination Policies

To become a registered student organization at UNC Wilmington, an organization must include the following "non-exclusionary membership clause" verbatim in its constitution: "This organization does not discriminate against any student, faculty, or staff based on race, color, national origin, religion, sex, age, handicap, or sexual orientation." This policy is overbroad because it prohibits religious student organizations from having religious requirements for leadership and membership, as is their right under the First Amendment. As discussed earlier, a federal court in North Carolina recently held that these nondiscrimination requirements probably violate students' right to freedom of association.

Western Carolina University

Speech Codes

Western Carolina University maintains a policy on "Discriminatory Personal Conduct" that provides as follows:

> It is the policy of Western Carolina University that speech or action by a university employee, occurring in the scope and course of university business, that gives offense by its clear expression of bias or prejudice toward an individual because of that person's or group's race, age, color, creed, national origin, religion, sex, disability, or political affiliation is subject to review on a case-by-case basis and may subject the offender to appropriate discipline if warranted by the entire record and totality of the circumstances.

This policy likely has a powerful chilling effect on faculty speech at Western Carolina. Although the policy states that in considering whether discipline is warranted, the severity and pervasiveness of the alleged harassment will be considered, the policy threatens "review" of *any* conduct that gives offense, without reference to whether the conduct was objectively offensive or whether it created a hostile and abusive working environment (since, as discussed earlier, mere "offense" cannot constitute harassment).

Western Carolina's sexual harassment policy prohibits "a pattern of conduct which embarrasses and/or humiliates and which includes one or more of the following: (i) comments of a sexual nature; or (ii) sexually explicit statements, questions, jokes, or anecdotes." Although this policy does properly require a "pattern of conduct," unprotected harassment is more than simply embarrassing or humiliating conduct. Rather, the conduct must be severe and pervasive enough to create an environment that a reasonable person would find hostile and abusive.

Nondiscrimination Policies

Western Carolina maintains a nondiscrimination requirement for student organizations that provides that

"[c]ampus organizations shall be open to all students without respect to race, color, national origin, religion, sex, age, handicap, or sexual orientation." This policy is overbroad because it prohibits religious student organizations from having religious requirements for leadership and membership, as is their right under the First Amendment. As discussed earlier, a federal court in North Carolina recently held that these nondiscrimination requirements probably violate students' right to freedom of association.

Winston Salem State University

Speech Codes

Winston Salem State University maintains several unconstitutional speech codes. Its racial harassment policy provides that "racial harassment is any behavior that would verbally or physically threaten, torment, badger, heckle, or persecute an individual because of his or her race." This policy is a textbook example of overbreadth: in addition to prohibiting unprotected conduct (physical torment), it also prohibits constitutionally protected speech. Again, the Supreme Court has held that for student-on-student conduct to constitute unprotected harassment, that conduct must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).

By contrast, Winston Salem State's racial harassment policy has no requirement of severity or pervasiveness; it does not even require that the conduct be repeated. Nor does it require that the conduct be "objectively offensive"; if an individual feels "badgered" or "persecuted" by the speech, that is enough to establish harassment.

Winston Salem State also maintains an e-mail policy providing that "[t]he use of profanity or offensive language is prohibited." As discussed earlier, this is entirely unconstitutional.

Nondiscrimination Policies

At Winston Salem State, "to be recognized on campus a student organization must [s]ubmit a statement signed by the organization president and faculty advisor that specifies that membership will be on the basis of individual merit, free from discrimination because of race, creed, national origin, or handicap." This policy is overbroad because it prohibits religious student organizations from having religious requirements for leadership and membership, as is their right under the First Amendment. As discussed earlier, a federal court in North Carolina recently held that these nondiscrimination requirements probably violate students' right to freedom of association.

Policy Recommendations

There are two potential avenues through which to address these abuses in the University of North Carolina System: through the judicial system or through the legislature.

Judicial

One way to address the unconstitutional policies in force in the University of North Carolina System is by mounting legal challenges to one or more of the policies. As discussed in detail in this Report, speech codes similar to those in North Carolina have been struck down in federal courts across the country, including in Michigan, Pennsylvania, Texas, and Wisconsin. Moreover, several public institutions in North Carolina maintain policies *nearly identical* to those struck down by other courts, and so they are particularly ripe for legal challenge.

Based on existing legal precedent, we believe that speech codes at the following institutions are particularly vulnerable: Appalachian State University, East Carolina University, North Carolina Central University, North Carolina School of the Arts, UNC Asheville, UNC Charlotte, UNC Greensboro, UNC Pembroke, UNC Wilmington, and Winston Salem State University. In FIRE's experience,[1] this type of litigation has an extremely high success rate, and litigation in the North Carolina system has the potential to set precedent for the whole region.

Legislative

Another potential avenue for addressing these unconstitutional policies is through North Carolina's legislature. The Pennsylvania House of Representatives recently created a committee on student academic freedom, before which then–FIRE President David French recently testified. In response to a legislator's question about how the legislature might address the numerous unconstitutional speech codes in Pennsylvania state schools, French suggested that one possibility was to craft a uniform anti-harassment policy, based on the state's constitutional

[1] *FIRE has an ongoing Speech Codes Litigation Project, in which cooperating attorneys from FIRE's Legal Network challenge unconstitutional speech codes at institutions across the country. To date, four institutions have been successfully sued as part of the Project, and there have been no unsuccessful lawsuits.*

Speech codes similar to those in North Carolina have been struck down in federal courts across the country, including in Michigan, Pennsylvania, Texas, and Wisconsin.

workplace harassment policy, which would replace the existing unconstitutional policies and would constitute the only such policy at each and every institution in the Pennsylvania system.

Perhaps if the abuses in the University of North Carolina System were brought to the attention of North Carolina's legislators, the legislature would be willing to consider a similar measure.

Conclusion

The foregoing Report illustrates the unfortunate reality that North Carolina's state-supported institutions of higher education are, in many cases, failing to uphold the most basic constitutional rights of their students and faculty.

In numerous cases across the country, federal courts have held that public universities' speech codes are unconstitutional. And a federal court in North Carolina recently held that the nondiscrimination policy in force at many North Carolina institutions is likely unconstitutional as well. North Carolina's public colleges and universities should know that it is unlikely—if not impossible—that most of the policies discussed in this Report could survive a constitutional challenge.

Unconstitutional restrictions of fundamental American freedoms are, of course, not confined to North Carolina's colleges and universities alone—this is a national scandal. Nonetheless, North Carolina's institutions of higher education should not be content to maintain a low standard in the area of fundamental American rights.

While North Carolina's state-funded institutions of higher education might seem at times to believe that they exist in a vacuum, the truth is that neither our nation's courts nor its people look favorably upon speech codes or other restrictions on basic freedoms.

The information contained in this Report was gathered from the University of North Carolina System schools' websites and from printed materials and was last checked in December 2005. The Pope Center for Higher Education Policy and the Foundation for Individual Rights in Education are not responsible either for changes made to the policies after this date or for changes that were made but not applied to the language of the policies before this date. Excerpted text reflects our judgment about what will be of interest to the general public. The excerpted text is only a small portion of a campus' policies. All policies cited in the Report are on file with the Foundation for Individual Rights in Education.