HANDBOOK OF FREE SPEECH ISSUES

OFFICE OF THE GENERAL COUNSEL
FLORIDA ATLANTIC UNIVERSITY
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*This handbook is for general information purposes only. To the extent any inconsistency exists between the contents of this handbook and applicable law or University regulation, policy, or procedure, such law, regulation, policy, or procedure shall supersede and apply accordingly.

I. INTRODUCTION[1]

As a state institution, Florida Atlantic University ("FAU" or "University") must uphold the protections guaranteed by the First Amendment to the Constitution of the United States, as well as the Constitution of the State of Florida. Free speech, free expression, and peaceable assembly are basic to the exchange of ideas and beliefs on campus. Academic progress and freedom flourish when the rights of free expression are assured through public debate and discourse on public affairs and social issues.

The University can place reasonable time, place, and manner restrictions on expression in order to maintain campus safety and prevent material and substantial disruption of the functioning of the University or infringement on the rights of others. Such restrictions, however, must be implemented in a viewpoint neutral manner.

"Freedom of speech, press, petition, and assembly guaranteed by the First Amendment must be accorded the ideas we hate, or sooner or later they will be denied to the ideas we cherish."
~Justice Hugo Black

Being offended by someone's speech is not sufficient justification for prohibiting it. To restrict or prohibit the content of one's expression just because it is offensive or insensitive does not receive judicial support except under narrowly defined circumstances such as defamation, unlawful threats of violence, intimidation or harassment.

Those interested in exercising their rights of expression are encouraged to schedule the desired location in accordance with FAU Policy 4.2.1 (Use of University Facilities). However, spontaneous and contemporaneous acts of expression are permitted on University grounds, except as prohibited by University regulations and policies, including University Policy 4.2.2, and applicable law.

Those who wish to sponsor demonstrations and rallies may do so as long as they do not materially and substantially disrupt or interrupt the regular and essential operation of the University, interfere with the rights of others, or destroy property. A routine registration of the event through the Division of Student Affairs, while not required, will help ensure the orderly scheduling of facilities and adequate preparation for the event. This process facilitates the coexistence of students' rights to speak and the rights of others to access academic programs and scheduled functions of the University.

The right to free speech, when applied in the University context, can be complicated and confusing. This handbook provides basic information and is intended to be a campus resource when particular questions arise. It does not serve, however, to replace existing law or University regulations, policies, or procedures, all of which shall govern as appropriate. The University's Office of the General Counsel is always available to help respond to questions from University employees about specific situations and circumstances.

II. FREEDOM OF SPEECH

[1] See http://www.purdue.edu/odos/aboutodos/speechandexpression.php. Portions of the website from the Purdue University Office of the Dean of Students have been incorporated into this Handbook.

The First Amendment of the United States Constitution provides that "Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble...." The Fourteenth Amendment extends this prohibition to the States. Accordingly, the First Amendment's freedom of speech protections apply when state universities regulate speech or expression on their campuses. The framers of the Constitution and the U.S. Supreme Court have recognized that the free flow of ideas on matters of public concern is of fundamental importance to this country and must be protected.

The Florida Constitution provides that "[e]very person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."[2] It further provides that "[t]he people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances." [3]

It is widely understood that freedom of speech prohibits the government from interfering with one's own speech. It is less well known that this same prohibition extends to interfering with the right to hear what someone else has to say, or compelling someone to express certain views, adhere to a particular ideological viewpoint, or subsidize speech to which one objects.[4]

III. WHAT IS PROTECTED SPEECH?[5]

"Speech" that is protected by law includes a broad array of expressive conduct -- oral, written, pictorial and other expressive means that convey an idea. "Symbolic speech," such as burning the flag at a protest rally, is also protected, so long as it is not intertwined with additional factors such as disruptive conduct, which is not protected. The First Amendment does not permit the University to censor an "offensive" display because it may cause students to feel "emotionally harassed." Nor does the First Amendment allow University officials to move such a display from the view of students due to its graphic images. Likewise, neither the size nor the emotional nature of the images in a display render it less protected speech.[6]

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[2] Fl. Const., Art. I, § 4.

[3] Fl. Const., Art. I, § 5.

[4] *See generally* Langhauser, "Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity," 31 Journal of College & University Law 481, 486-487 (2005).

[5] See the article by Steven J. Adamczyk from the University of Arizona, Tucson Arizona (2011) entitled "First Amendment Free Speech and the Public University - the Public Forum Doctrine." Portions of this article have been incorporated into this Handbook.

[6] After all, "[images of abortion] may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying 'otherwise inexpressible emotions. . . .' Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power." Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 805 (1996). Much that we encounter offends our esthetic, political, or moral sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975) (quoting Rowan v. Post Office Dep't, 397 U.S. 728, 736 (1970)). An image or presentation's "ability to attract attention and to deliver its message [may be] based almost entirely on its creativity in bucking norms of political correctness." College Republicans at San Francisco State University v. Reed, 523 F. Supp. 2d 1005, at 1018 n.7 (N.D. Cal. 2007). "For many speakers on religious or political subjects, for example, having their audience perceive and understand their passion, their intensity of feeling, can be the single most important aspect of an expressive act. And for many people, what matters most about a particular instance of communication is whether it inspires emotions in the audience, i.e., whether it has the emotional power to move the audience to action or to a different level of interest in or commitment to an idea or cause. For such people, the effectiveness of communication is measured by its emotional impact, by the intensity of the resonance it creates." College Republicans, 523 F. Supp. 2d at 1018-19. For those who find the expression of others disturbing, the constitutionally permissible response is simple and straightforward. As Justice Scalia observed, it is a "universally understood" statement of First Amendment law that

Four commonly recognized categories of protected speech include: political, religious, corporate and commercial. Political and religious speech, which are at the core of our historical and constitutional ideas of liberty, receive the greatest protection. Corporate and commercial speech, which generally relate to products, and not ideas, receive a lesser degree of protection.[7] Speech that is "de minimis"-- *e.g.*, a student's complaint about a seating assignment, or the fact that a theater student is compelled to recite certain lines for a play – is excluded from constitutional protection.[8]

The First Amendment does not protect speech or expression that threatens the health, safety or welfare of persons in the University community, nor does it protect speech that is unwelcome and sufficiently severe or pervasive to create an intimidating, hostile, or offensive learning or work environment, or that promotes an unlawful end.[9] Also excluded is speech such as:

- Incitements (provocation to engage in immediate violence or harm);[10]
- Fighting words (confrontational words or threats that provoke immediate violence);[11]
- True threats;[12]
- Disruptions;[13]

"[o]utside the home, the burden is generally on the observer or listener to avert his eyes or plug his ears against the verbal assaults, lurid advertisements, tawdry books and magazines, and other 'offensive' intrusions which increasingly attend urban life." Hill v.Colorado, 530 U.S. 703, 752-53 (2000) (Scalia, J., dissenting) (quoting Laurence Tribe, American Constitutional Law §§ 12-19, at 948 (2d ed. 1988)).

[7] Langhauser, *supra*, at 490-491.

[8]Id., *citing* Salehpour v. Univ. of Tenn., 159 F.3d 199, 208 (6th Cir. 1998); Axson-Flynn v. Johnson, 356 F.3d 1277, 1292 (10th Cir. 2004).

[9] In sum, speech that is directed to inciting or producing imminent lawless action and is likely to incite or produce such action is not protected by the First Amendment. See Brandenburg v. Ohio, 395 U.S. 444 (1969).

[10] The fact that the speech of a particular individual or group may in the past have resulted in violence or harm is not a sufficient rationale to prohibit that person or group from engaging in future speech activities on campus. The proper response to potential and actual violence is to ensure an adequate police presence and to arrest those who actually engage in such conduct, rather than to suppress legitimate free speech activity as a prophylactic measure. *See, e.g.,* Cox v. Louisiana, 379 U.S. 536, 551 (1965); Kunz v. New York, 340 U.S. 290, 294-295 (1951).

[11] Provocations by fighting words or incitements to engage in immediate violence are not protected. "Fighting words" are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572 (1942). "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." Chaplinsky, citing Cantwell v. Connecticut, 310 U.S. 296, 309 (1940).

Note, however, that even when government regulates an unprotected category of speech such as "fighting words," it cannot do so in a content-based manner. In R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), the Supreme Court ruled unconstitutional an ordinance that banned displaying symbols or objects such as a burning cross or Nazi swastika that arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender. The ordinance had attempted to carefully restrict only certain types of fighting words, but the Court held that government cannot pick and choose to regulate different types of fighting words based on content or viewpoint.

[12] "True threats" are those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals. Virginia v. Black, 538 U.S. 343, 344 (2003). True threats are evaluated based upon an objective standard, which is "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." U.S. v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir.1990), overruled in part on other grounds, United States v. Hanna, 293 F.3d 1080 (9th Cir.2002).

[13] Disruptive speech or expressive activity is not immunized by the constitutional guarantee of freedom of speech and may be prohibited if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others…." Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). Disruptive behavior is prohibited by University policy. The FAU Student Code of Conduct, Regulation 4.007, in addition to prohibiting violence and disorderly conduct, also prohibits acts of verbal, written (including electronic

- Expression that constitutes criminal or severe harassment;[14]
- Defamation (falsehoods that harm a person's reputation);
- Obscenity (appeals to carnal interests that are clearly offensive, and without redeeming social value);
- Commercial speech or advertising that is false or misleading;
- The use of public resources for partisan political activities; and
- Speech by public employees pursuant to official duties or related to matters not of public concern as a citizen.[15]

Speech that is otherwise protected may not be disallowed solely because the audience finds the message offensive, even where members of the audience react to the speech in a disruptive manner. In such circumstances, while there may be a legitimate need to take action against the disruptive members of the audience, the speech itself must be allowed to continue.[16]

Other content-based restrictions that promote the "censorship of ideas" are prohibited. As summarized by the Supreme Court: "…above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[17]

IV. FREE SPEECH ON PUBLIC UNIVERSITY CAMPUSES[18]

The First Amendment does not guarantee access to property that is owned by the government.[19]

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communications or internet activity) and physical abuse, threats, intimidation, harassment, etc., as well as the interference with academic freedom and freedom of speech). See also FAU Policy 4.2.2, Section III, regarding disruptive demonstrations.

[14] Unlawful discrimination and harassment are prohibited by Federal and State laws, and by University policy (see FAU Regulation 7.008 on Anti-Discrimination and Anti-Harassment). Harassing speech and conduct may take many forms, including verbal acts and name calling, as well as nonverbal behavior such as graphic, electronic, and written statements, or conduct that is physically offensive, harmful, threatening, or humiliating. Generally speaking, in order to constitute prohibited harassment, the behavior must be unwelcome, based upon a protected classification, and sufficiently severe or pervasive to create an intimidating, hostile, or offensive environment for academic pursuits, employment, or participation in University sponsored activities. Protected classifications include race, color, religion, sex, national origin, age, disability, veteran status, sexual orientation, or other protected category. To appropriately protect free speech rights, however, prohibited harassment cannot be premised solely upon the bare expression of speech with which some may disagree or find offensive. In its July 28, 2003 "Dear Colleague" letter, the U.S. Department of Education's Office for Civil Rights stated that "[h]arassment…must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive," and must be "sufficiently serious (i.e., severe, persistent or pervasive) as to limit or deny a student's ability to participate in or benefit from an educational program."

[15] Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951 (2006); Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983).

[16] Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dept., 533 F.3d 780, 788 (9th Cir. 2008), *citing* Bachellar v. Maryland, 397 U.S. 564, 567 (1970) ("[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, or simply because bystanders object to peaceful and orderly demonstrations."). General prohibitions against the use of "demeaning" or "offensive" language that might lead to subjective interpretations will not pass constitutional muster, as there are many instances when the use of such language on a campus would not by itself constitute harassment as defined under federal law (which generally requires some threshold showing of severity or pervasiveness). See Saxe v. State College Area School District, 240 F.3d 200, 202 (3d Cir. 2001) (striking down a public high school's anti-harassment policy because it "could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone"). "[I]t is certainly not enough that the speech is merely offensive to some listener." Saxe, 240 F.3d at 217.

[17] Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972). See also http://www.lib.udel.edu/ud/freedom/aaup.html.

[18] See the article by Steven J. Adamczyk from the University of Arizona, Tucson Arizona (2011) entitled "First Amendment Free Speech and the Public University - the Public Forum Doctrine." Portions of this article have been incorporated into this Handbook.

[19] United States Postal Service v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981).

No one, including "students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for unlimited expressive purposes."[20] However, because public institutions of higher education are considered to be the quintessential "marketplaces of ideas" – the rights of both the campus community and the general public to engage in free speech activities on the campuses of public universities are quite broad.

A. Conventional Forum Analysis

Under conventional United States Supreme Court analysis, the right to use particular locations on a campus of a public university for speech activities is largely a function of the character and location of the property, or forum, where the speech occurs – *e.g.*, if a speaker speaks on a campus walkway, the walkway is the relevant forum; if the speaker posts a flyer on a bulletin board on the same walkway, the bulletin board becomes the relevant forum.[21] Historically, the United States Supreme Court has identified three kinds of "forums" for expressive activities: (1) the traditional open or public forum, where free expression receives the greatest protection; (2) the limited or designated forum, where expression receives less protection; and (3) the closed or non-public forum, in which expression receives very limited protection.

A traditional, or open public forum is defined as public property that has traditionally been available to assembly or debate -- *e.g.*, streets, parks and lawn areas.[22] The government must meet a very high standard to enforce any content-based prohibitions (*i.e.*, prohibitions that reference the particular message to be delivered) in these areas. Any regulation must be necessary to serve a compelling interest and narrowly drawn to achieve that end.[23] According to the United States Supreme Court, the government may regulate the time, place, and manner of speech to occur in the forum if the regulations are content neutral, narrowly tailored to serve a significant interest, and leave open ample alternative channels of communication. Time, place and manner regulations are discussed below.

A limited or designated forum is an area that has not been traditionally public, but which has been specifically identified as such by the government, or in the context of higher education, a public university -- *e.g.*, an auditorium or a lobby.[24] In other words, unlike traditional public forums, a designated forum results from a purposeful action to open the location for public discourse,[25] and not from the characteristics of the location itself.

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[20] Grayned v. City of Rockford, 408 U.S. 104, 117-118 (1972).

[21] *See* Downs v. L.A. Unified School District, 228 F.3d 1003, 1013 (9th Cir. 2000); Rutgers 1000 Alumni Council v. Rutgers, 803 A.2d 679, 688 (N.J. Super. Ct. App. Div. 2002) (pertinent forum in dispute over right to compel publication of advertisement in college magazine was not the magazine itself, but more limited advertising section of magazine).

[22] *See* Hague v. CIO, 307 U.S. 496, 515 (1939).

[23] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 38 (1983), *citing* Carey v. Brown, 447 U.S. 455, 461 (1980).

[24] The designated public forum is created when the government intentionally dedicates a non-public forum for expressive conduct by a class of speakers. See Flint v. Dennison, 488 F.3d 816, 830 (9th Cir. 2007).

[25] A public forum may be created for a limited purpose such as use by certain groups (*e.g.*, Widmar v. Vincent, 454 U.S. 263, 267-268 (1981) (student groups were the authorized users of the created forum)), or for the discussion of certain subjects (*e.g.*, City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 176 (1976) (school board business)).

Under the United States Supreme Court's forum analysis, although there is no legal requirement to make a public university's facilities available to the public for uses other than for normal educational and administrative functions, as a practical matter, almost all universities designate some non-public property for free speech and expressive activities. Examples of such designations include university facilities held open for meetings of student groups or other organizations, and the designation of a university hall as a free speech or reserved free speech area. Once the government opens non-public property to the public for expressive activity, then such property becomes a designated public forum, open for that particular designated use.[26]

Once designated, speech in a designated public forum is subject to reasonable time, place and manner regulations, so long as those regulations are applied in a viewpoint-neutral manner.

Non-public forums which are not open for public speech by tradition or design receive very little protection.[27] The public university may reserve these spaces for their intended purposes only. If their intended purposes include speech-related activity, any regulation must be reasonable and not an effort to suppress expression merely because of the speaker's viewpoint.[28]

A good example of the distinction between a public or designated forum and a non-public forum is a campus bulletin board. A board on which anyone is allowed to post notices is a public or designated forum, and removal of material based on content is prohibited. A bulletin board that is specifically made available only for management postings is not a public or a designated forum (even though it is visible to the public) and can be cleared of material that does not meet the criteria set by management, based on its content.

B. Campus Free-Expression Act

In 2018, the Florida Legislature enacted the Campus Free-Expression Act, which expands the traditional public forum analysis to all outdoor common areas of the campus. [29] Pursuant to the Campus Free-Expression Act, "[o]utdoor areas of campus are considered traditional public

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[26] "A limited public forum is "a sub-category of a designated public forum that refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics." Flint v. Dennison**,** 488 F.3d 816, at 831 *citing* Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir.2001). In a limited public forum, the government may make distinctions in access and speech on the basis of: (i) subject matter; and (ii) speaker identity. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983). However, once the government has created a limited public forum, it must respect the lawful boundaries it has itself set, and not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum." *See* Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 830 (1995). In creating a limited public forum, "[t]he government has substantial leeway in determining the boundaries of limited public fora it creates." Cogswell v. City of Seattle, 347 F.3d 809, 817 (2003). "The necessities of confining a [limited public] forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." Rosenberger, 515 U.S. at 829, 115 S.Ct. 2510. However "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, then the government has engaged in impermissible viewpoint discrimination" Cogswell, 347 F.3d at 813.

[27] A non-public forum may be reserved for its intended purpose, as long as the regulation on speech is reasonable in light of the function of the property and not an effort to suppress expression merely because public officials oppose the speaker's viewpoint. *See* Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 811 (1985).

[28] United States Postal Service v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 131, fn7 (1981).

[29] Campus Free Expression Act, § 1004.097, Fla. Stat. (2018)

forums for individuals, organizations, and guest speakers."[30] The Act defines outdoor areas of campus as "generally accessible areas of campus of a public institution of higher education in which members of the campus community are commonly allowed, including grassy areas, walkways, or other similar common areas. The term does not include outdoor areas of campus to which access is restricted"[31] In essence, the Act prevents Florida's public universities from creating "free speech zones" in outdoor common areas, and limits the creation and implementation of policies that restrict expressive activities to particular outdoor areas of campus.

Under the Campus Free-Expression Act, persons wishing to engage in expressive activities in outdoor areas of campus may do so freely, spontaneously, and contemporaneously. However, persons exercising their rights of expression must do so lawfully and may not infringe upon the rights of other individuals, groups or organizations to engage in expressive activities. Similar to the conventional forum analysis, the Act expressly provides FAU with the ability to "create and enforce restrictions that are reasonable and content-neutral on time, place and manner of expression and that are narrowly tailored to a significant institutional interest."[32] The ability to create and enforce such restrictions assists FAU in ensuring that expressive activities are carried out in a fashion that does not materially and substantially disrupt the function of FAU. For more detail on FAU's outdoor areas of campus and expressive activities, see FAU Policy 4.2.2, Campus Free Speech.

C. Time, Place, and Manner Restrictions

Universities need to be able to ensure safety, security and order, prevent unlawful conduct, preserve architectural aesthetics, and limit the volume of commercial solicitations even in public forums.[33] To meet these goals, the United States Supreme Court has held that universities may impose reasonable time, place, and manner restrictions on the use of public forums, provided that they are carefully designed to (1) coordinate the appropriate use of a particular location for speech activities, and not to prohibit particular forms of expression; (2) "serve a significant government interest" and are not more extensive than necessary to serve that interest; and (3) "leave open ample alternative channels for communication of the information."[34] The restrictions must be clear and specific enough to place the public on notice as to exactly what is authorized and what is forbidden. Pursuant to the Campus Free Expression Act, FAU may "create and enforce restrictions that are reasonable and content-neutral on time, place and manner of expression and that are narrowly tailored to a significant institutional interest."[35]

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[30] Id.

[31] Id.

[32] Id.

[33] *See, e.g.*, Students Against Apartheid Coalition v. O'Neil, 838 F.2d 735 (4th Cir. 1988); American Future Systems v. Pennsylvania State University, 618 F.2d 252, 255 (3d Cir. 1980) and 688 F.2d 907, 912 (3d Cir. 1982).

[34] Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 648 (1981). City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46, (1986).

[35] Id.

Time, place, and manner policies must consider all of the following:

- Is the campus interest sufficiently significant? Interests that have qualified include: prevention of crime; maintenance of safety to persons or property; avoidance of disruption of University functions; maintenance of an educational rather than a commercial atmosphere; preservation of residential tranquility; maintenance of personal privacy; and preventing commercial exploitation of students.

- Does the restriction directly and materially advance the significant campus interests which have been identified?

- Is the restriction sufficiently narrow and tailored to accomplish the goal without adversely affecting other forms of protected free speech?

Such restrictions must also be routinely and even-handedly enforced. A policy that is only enforced against "objectionable" speech will be struck down. Examples of proper restrictions include those required to prevent material and substantial disruption; obstruction of traffic; excessive noise levels or noise that interferes with classroom, business or other University activities; interference with the rights of others to effectively use University facilities and property; blocking doorways; or an imminent threat of physical violence or destruction of property.

1. Equal Access to Facilities

Campuses must allow equal access to public forums as a venue for speech. For example, if a university rents an event hall to the public for weddings, conferences and other gatherings, it must also allow the same access to anyone else who is willing to agree to standard rental terms, notwithstanding their membership in a controversial group or intent to discuss controversial issues.

A widely-accepted standard adopted by the American Association of University Professors (AAUP) provides as follows:

> "Students should be allowed to invite and to hear any person of their own choosing. Those routine procedures required by an institution before a guest speaker is invited to appear on campus should be designed only to ensure that there is orderly scheduling of facilities and adequate preparation for the event, and that the occasion is conducted in a manner appropriate to an academic community. The institutional control of campus facilities should not be used as a device of censorship. It should be made clear to the academic and larger community that sponsorship of guest speakers does not necessarily imply approval or endorsement of the views expressed, either by the sponsoring group or by the institution."[36]

[36] "Joint Statement on Rights and Freedoms of Students," approved by the AAUP, United States Student Association, Association of American Colleges and Universities, National Association of Student Personnel Administrators, and the National Association for Women in Education. The

Furthermore, the AAUP, in its Statement on Academic Freedom and Outside Speakers (http://www.aaup.org/AAUP/comm/rep/A/outside.htm) provides:

> "Because academic freedom requires the liberty to learn as well as to teach, colleges and universities should respect the prerogatives of campus organizations to select outside speakers whom they wish to hear. The AAUP articulated this principle in 1967 in its Fifty-third Annual Meeting, when it affirmed 'its belief that the freedom to hear is an essential condition of a university community and an inseparable part of academic freedom,' and that 'the right to examine issues and seek truth is prejudiced to the extent that the university is open to some but not to others whom members of the university also judge desirable to hear.' . . . As part of their educational mission, colleges and universities provide a forum for a wide variety of speakers. There can be no more appropriate site for the discussion of controversial ideas and issues than a college or university campus. . . . Invitations made to outside speakers by students or faculty do not imply approval or endorsement by the institution of the views expressed by the speaker."

Public universities may legitimately require all speaker requests to come from recognized student or faculty groups to ensure that the speaker will address matters that are of interest to the campus community.[37] Such requirements further a university's educational mission by limiting speech to matters in which at least one campus group has an interest.

Speakers can only be restricted based on content where it reasonably appears that they will advocate (1) violent overthrow of the government; (2) willful destruction or seizure of campus buildings or other property; (3) disruption or impairment, by force, of the campus's regularly scheduled classes or other educational functions; (4) physical harm, coercion or intimidation or other invasion of lawful rights of campus officials, faculty members, or students; or (5) other campus disorder of a violent nature.[38] Before a campus speaker is barred there must be "a reasonable apprehension of imminent danger to the essential functions and purposes of the institution, including the safety of its property and the protection of its officials, faculty members and students."[39]

For specific information concerning speaking engagements, presence on campus, and participation in campus events by University and non-University persons, see FAU Regulation 6.005 (Use of University Property and Facilities), FAU regulation 7.006 (Trespass and Loitering), FAU Policy 4.2.1 (Use of University Facilities), and FAU Policy 4.2.2 (Campus Free Speech).

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statement is reprinted in AAUP, *Policy Documents and Reports*, (9th ed. 2001), and is available at http://www.aaup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm.

[37] Stacy v. Williams, 306 F. Supp. 963, 973 (N.D. Mass. 1969); Gilles v. Blanchard, 477 F.3d 466 (7th Cir. 2007); Gilles v. Miller, 501 F.Supp.2d 939 (W.D.Ky. 2007).

[38] Stacy v. Williams, *supra*, at 973.

[39] Id., at 973-74.

2. Sales and Distribution of Non-Commercial Materials

University policy governs the placement of posters, notices, signs and banners (FAU Policy 4.2.3), and the distribution of printed and promotional material (FAU Policy 4.2.4).

C. Commercial Speech

FAU has much greater latitude to restrict commercial speech. The U.S. Supreme Court has held that for commercial speech to be protected, (1) it must concern lawful activity and not be misleading; (2) the asserted governmental interest seeking to prohibit or limit the commercial speech must be substantial; (3) the regulation must directly advance the government interest asserted; and (4) the regulation must not be more extensive than is necessary to serve that interest.[40]

The following FAU policies and regulations apply to commercial transactions and commercial speech on FAU campuses: FAU Policy 4.2.3 (Campus Signage), FAU Policy 4.2.4 (Distribution of Printed Material), FAU Regulation 6.005 (Use of University Property and Facilities), FAU Regulation 7.006 (Trespass and Loitering), FAU Policy 4.2.1 (Use of University Facilities), and FAU Policy 4.2.2 (Campus Free Speech).

V. PUBLIC EMPLOYEE SPEECH

When FAU is acting in its capacity as an employer, it has more reason and authority to regulate employee speech than it does when acting as a sovereign (*e.g.*, regulating student speech). Because FAU employees are "public employees," they have greater rights than private sector employees to speak on matters of public concern in the workplace. When considering the First Amendment rights of public employees, there are four relevant types of protected speech: political speech, religious speech, labor-related speech, and matters that are of concern to the public at large.

Imposing discipline or taking an adverse work-related action against an employee for engaging in any protected form of speech is prohibited, as is threatening or intimidating employees in order to prevent them from engaging in protected speech. Prior restraint, such as a policy or rule forbidding certain types of speech, is also improper unless it serves a legitimate business necessity carefully balanced against the rights of employee speech.

A. Political Speech

Being a state employee does not require one to refrain from engaging in politic activity. The "right of political association" is a form of protected speech, and employers cannot control or prevent their employees from engaging in political activities or affiliations. Campuses may not prohibit or take any adverse action based on an employee's personal political affiliation, activity or beliefs.[41]

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[40] Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York, 447 U.S. 557, 566 (1980). See also Sorrell V. IMS Health, Inc. 131 S. Ct. 2653 (2011).

[41] Smedley v. Capps, Staples, Etc., 820 F. Supp. 1227 (N.D. Cal. 1993).

For example, FAU may not make job related decisions based solely on a person's political affiliation. Where the particular job duties require the public employee to support certain public policy positions, however, the employee may be required to conform to the chosen "message" while acting in their role as an employee. The political views we hold as citizens are distinct from what views we may legitimately express while "on the job."

Public funds may not be used for political campaign activity.[42] This means state resources cannot be used to promote a partisan position. For example, an employee cannot use the office photocopier to duplicate campaign flyers for their chosen political candidate. Likewise, a campus cannot choose to allow only one candidate to speak on campus while denying others simply because of their political message and/or affiliation.

While expressing one's political views as a public citizen is appropriate and protected, creating the perception that one's viewpoint is the official view of the University is not. So while it may be acceptable to wear a political button to work on Election Day, it would generally not be appropriate for a University employee to use their title and FAU letterhead to endorse a particular political candidate or link from an FAU website to that candidate's website.

B. Religious Speech

Numerous laws protect an employee's right to be free from religious discrimination, including the free exercise of religion at work.[43] At the same time, public institutions such as FAU are required by the Establishment Clause of the U.S. Constitution to maintain the separation of church and state and to avoid the appearance of endorsing religious views.[44]

Government employers are also obligated to run efficient business operations. As such, courts apply a "balancing test" which takes into account the public employee's interest in the free exercise of religion and the public employer's interests in the efficiency of public service and its limitations under the Establishment Clause.[45]

Each situation involving religious speech in the workplace must be carefully analyzed on its

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[42] *See, e.g.*, Stanson v. Mott, 17 Cal.3d 206, 210 (1976) ("[A] public agency may not expend public funds to promote a partisan position in an election campaign").

[43] For example, Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000d et seq.) requires that employers accommodate expression that is based on a sincerely held religious practice or belief, unless it threatens to constitute harassment of others or otherwise poses an undue hardship on the employer. See also FAU Regulation 7.008 (Anti-Discrimination and Anti-Harassment).

[44] The U.S. Supreme Court has made clear that avoiding an Establishment Clause violation may be a compelling state interest. *See, e.g.,* Lamb's Chapel v. Ctr. Moriches Union Free School District, 508 U.S. 384, 394 (1993) ("the interest of the State in avoiding an Establishment Clause violation 'may be compelling,' …justifying an abridgment of free speech otherwise protected by the First Amendment"); Good News Club v. Milford Cent. School, 533 U.S. 98, 112 (2001) ("We have said that a state interest in avoiding an Establishment Clause violation 'may be characterized as compelling,' and therefore may justify content-based discrimination").

[45] Berry v. Dept. of Social Services, 447 F.3d 642, 650-651 (9th Cir. 2006) (religious speech by employees in public workplaces can be limited in order to avoid violations of the Establishment Clause).

particular facts. Employer policies may restrict the exercise of religion in the workplace to prevent an employee's religious conduct or message from being interpreted as representing the (public) employer's views. For example, a display of religious items within the individual offices of a campus counseling center utilized for counseling sessions would generally be inappropriate, while such a display may be acceptable in the individual offices of a payroll or data entry department not utilized for meeting with others or open to the general public.[46]

Similarly, employers may not prohibit prayer in the workplace, but may enforce reasonable restrictions. It is permissible, for example, to prohibit the use of conference rooms for prayer meetings (assuming a similar prohibition against use of conference rooms for other non-work related activities), while allowing employees to pray in break rooms or outside during lunch.[47]

The appropriateness of religious messages in e-mail signature bocks is another common query. Universities may restrict the content of e-mail signature blocks for the legitimate business purpose of identifying the employee's position. FAU Policy 12.2 (Acceptable Use of Technology Resources) sets forth the University's requirements for e-mail signature blocks.

C. Labor-Related Speech

Campuses are prohibited under both state laws and FAU collective bargaining agreements from imposing discipline or threatening, intimidating or retaliating against an employee for engaging in protected labor-related speech and activities. However, even otherwise protected speech loses its protection where it is so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" as to cause "substantial disruption of or material interference with school activities."[48]

For example, in a case decided by the Public Employee Relations Board (PERB), a teacher was reprimanded for using profanity towards a superintendent in an impromptu conversation about contract negotiations.[49] While PERB ruled in favor of the union because the profanity involved was relatively innocuous, it explained that "an employee's speech may lose its protected status, thus leaving the employer free to impose discipline, if the speech is so disrespectful of the employer as seriously to impair the maintenance of discipline."[50]

"Maintenance of discipline" means that campuses can take action where necessary to control workplace functionality. If the conduct in question takes place during work hours, at the work place, employer action (*e.g.*, discipline) will likely be sustained. For example, where an employee helped prepare and signed a letter to a vice president in which she repeatedly called him a liar and charged him with having "an obvious contempt for the truth," her discharge was

[46] Id.

[47] Id.

[48] Santa Ana College Organizing Comm. v. CFT/AFT/AFL-CIO, 11 PERC 18021, 104 (1986) (citation omitted).

[49] Rio Hondo Faculty Assoc. v. Rio Hondo Community College Dist., 7 PERC 14010, 27 (1982).

[50] Id., at 28.

upheld, notwithstanding the fact that the letter was distributed just prior to an election regarding future union representation of the employees.[51] The court stated: "An employee, by engaging in concerted activity, does not acquire a general or unqualified right to use disrespectful epithets toward or concerning his or her employer… It is difficult to perceive of a situation that is further beyond the protected concerted activities of the [Labor] Act than this denunciation of the employer."[52]

A letter of warning issued to an employee was also upheld where a co-worker complained that the employee repeatedly approached her about filling out a union authorization card during her work hours.[53] Because management had received a complaint, the NLRB determined that the warning not to subject coworkers to "harassment of any kind" was appropriate and did not impinge on the employee's union rights.

D. Matters of Public vs. Private Concern

If the speech in question does not fall into any of the three categories discussed above, to be protected the employee's speech must involve a "matter of public concern" and the employee's interest in expressing themself as a private citizen must outweigh the campus' interests in promoting workplace efficiency and avoiding workplace disruption.[54]

Whether a particular matter is of public concern "must be determined by the content, form and context of a given statement, as revealed by the whole record."[55] To qualify for protected status, the speech must "relate to matters of overwhelming public concern – race, gender and power conflicts in our society,"[56] or be that which is "fairly considered as relating to any matter of political, social, or other concern to the community."[57] Speech is usually considered to be of public concern if it helps citizens "to make informed decisions about the operation of their government."[58] Speech is not of public concern when it "deals with individual personnel disputes and grievances [that] would be of no relevance to the public's evaluation of performance of governmental agencies."[59] A personal complaint or grievance that deals purely with workplace minutia is not protected speech.

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[51] NLRB v. Blue Bell, 219 F.2d 796 (5th Cir. 1955).

[52] Id., at 798.

[53] BJ's Wholesale Club, 318 NLRB No. 83, 6 (1995).

[54] Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 284 (1977), *quoting* Pickering v. Board of Ed., 391 U.S. 563, 568 (1968).

[55] Connick v. Myers, 461 U.S. 138, 147-148 (1983).

[56] Hardy v. Jefferson Comm. Coll., 260 F.3d 671, 679 (6th Cir. 2001).

[57] Connick, *supra*, 461 U.S. at 146.

[58] Roe v. City and County of San Francisco, 109 F.3d 578, 585 (9th Cir. 1997).

[59] Id.

The U.S. Supreme Court recently made clear that when public employees make statements as part of their official duties, they are not protected as private citizens, even if the subject is of public concern. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a deputy district attorney was disciplined because he wrote in a memorandum and testified in court that he believed a police affidavit used to obtain a critical search warrant contained serious misrepresentations. The Court held that the attorney's speech was not protected by the First Amendment because where a public employee makes statements pursuant to their official duties, they are speaking not as a citizen but for their employer, even if their speech relates to a matter of public concern.

The controlling factor in the Court's decision was that the deputy's "expressions were made pursuant to his duties as a calendar deputy . . . Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."[60]

Courts will be practical when determining the scope of an employee's official duties in a *Garcetti* analysis: "[f]ormal job descriptions often bear little resemblance to the duties an employee is actually expected to perform."[61] At least one court has held that a claimant's speech might be considered part of their official duties if it relates to "special knowledge" or "experience" acquired on the job.[62]

In *Garcetti*, the Supreme Court declined to answer whether the "official duty" analysis would apply in the same manner to a case involving a faculty member's speech related to scholarship or teaching (and traditional notions of academic freedom).[63] What might legitimately constitute speech "related to scholarship or teaching" has not yet been made clear; lower courts have differed over whether (and if so, when) to apply the "official duty" test to academic instructors.[64]

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[60] Garcetti, 126 S.Ct. at 1960. *See also* Battle v. Board of Regents for Georgia, 468 F.3d 755 (11th Cir. 2006). Battle worked in the university's office of financial aid and was responsible for verifying financial aid submissions and checking for and reporting inaccuracies and signs of fraud. When she discovered fraud that she thought was the doing of her superiors, she reported it and complained repeatedly to have it corrected. Nothing was done until after an audit revealed problems. Although she received good reviews, after two years in the position her contract was not renewed and she sued. The court denied her claim, stating "[w]hen an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny." Citing Garcetti, *supra*, at 1961, the court rejected the idea that the nature of public employment transforms a public employee's statements into a matter of public concern protected by the First Amendment: "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen . . . In this case, Plaintiff admitted that she had a clear employment duty to ensure the accuracy and completeness of student files as well as to report any mismanagement or fraud she encountered in the student financial aid files. . . . We conclude that because the First Amendment protects speech on matters of public concern made by a government employee speaking as a citizen, not as an employee fulfilling official responsibilities, Plaintiff's retaliation claim must fail." Id., at 760.

[61] Garcetti, *supra*, 547 U.S. at 424.

[62] Gorum v. Sessoms, 561 F.3d 179, 185 (3d Cir. 2009).

[63] Garcetti, *supra*, 547 U.S. at 425.

[64] *E.g*., Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008) (dismissing a professor's lawsuit against a public university on the grounds that the professor's complaints regarding "the proper administration of an educational grant fell within the scope of [his] teaching duties"); Lee v. York County School Div., 484 F.3d 687 (4th Cir. 2007) (declining to apply Garcetti in determining whether a high school teacher's bulletin board postings constituted protected speech under the First Amendment); Gorum, *supra* at 186 (applying the "official duty" test to dismiss a professor's lawsuit against a public university on the grounds that the speech in question did not fall within the professor's scholarship or teaching).

Finally, an employee's right to speak must be balanced against the FAU's right to effectively provide its services.[65] In conducting this balancing, courts give government employers "wide discretion and control over the management of [their] personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." Moreover, public employers need not allege that an employee's expression actually disrupted the workplace: "reasonable predictions of disruption" are sufficient.[66]

Legitimate campus interests that may justify restrictions on employee speech include maintaining discipline, promoting harmony among coworkers, securing confidentiality, performing the public function in an efficient manner and maintaining relationships between supervisors and employees that call for personal loyalty and confidence.

As in the labor-related speech cases discussed above, where otherwise protected speech crosses the line into disruptive behavior, it loses its protected status. If an employee's speech (regardless of the content/message) upsets the ability of the work environment to function, disciplinary action may be taken. Insubordination, false statements, and profanity need not be tolerated in the public workplace.[67]

VI. STUDENT SPEECH

A. The Concept of Student Academic Freedom

In 1967, representatives of five higher education associations drafted and approved the "Joint Statement on Rights and Freedoms of Students," which was then reprinted by the AAUP.[68] The statement addresses student academic freedom in the classroom and off campus, in student records and student affairs, and in disciplinary proceedings and access to higher education. The statement asserts that students have the right to be evaluated solely on an academic basis and not on their personal opinions or conduct that is separate from the course curriculum. It also provides that "students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled."[69]

B. Student Speech and Conduct Outside the Classroom

FAU does not take disciplinary action against students based solely on the content of their speech alone. Well-established judicial precedents prohibit discipline against students based on

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[65] Pickering v. Board of Ed., 391 U.S. 563, 568 (1968); Connick, *supra*, 461 U.S. at 140.

[66] Brewster v. Bd of Education of Lynwood Unified Sch. Dist., 149 F.3d 971, 979 (9th Cir. 1998).

[67] Rankin v. McPherson, 483 U.S. 378, 388 (1987).

[68] The statement is reprinted in AAUP, *Policy Documents and Reports* (9th ed. 2001) and is available on-line at http://www.aaup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm.

[69] Id.

speech alone. For example, students wearing black armbands to school in protest of the Vietnam War constituted "symbolic speech" that was deemed protected.[70] Other examples include "sit-ins" (where students occupy an area on campus), rallies, boycotts of classes or events, wearing a common item (ribbons, jeans, berets, etc.) or color, etc. Disciplinary action may be taken under the student conduct procedures where the symbolic speech in question crosses the line into conduct that materially and substantially disrupts the educational process.[71]

C. Student Classroom Speech

Students' right of free expression is not without limits in the classroom. The classroom is not an open forum and is, therefore, subject to reasonable speech regulation.[72] Students do not have a right to insist that a class be viewpoint neutral;[73] *e.g.*, students may be required to write papers expressing a particular point of view with which they may not agree as long as the assignment promotes legitimate pedagogical interests.[74]

Student behavior that "materially disrupts class work or involves substantial disorder or invasion of the rights of others is … not immunized by the constitutional guarantee of freedom of speech."[75] Faculty are in charge of their classrooms and can expect students to comport themselves in a manner that is consistent with a healthy learning environment. If a student continues after fair warning to engage in disruptive behavior, it may be necessary to involve the Division of Student Affairs and pursue possible discipline.

D. Student Groups[76]

The right to express a particular viewpoint necessarily includes the right to associate with others who share that view. "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."[77] "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."[78] "If the government were

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[70] Tinker v. Des Moines Comm. School Dist., 393 U.S. 503, 516 (1969).

[71] *See also* Pinard v. Clatskanie School Dist. 6J, 467 F.3d 755 (9th Cir. 2006), where the Ninth Circuit held that while student-athlete complaints about a basketball coach were protected, refusing to play basketball was not.

[72] Bishop v. Aronov, 926 F.2d 1066, 1071 (11th Cir. 1991).

[73] Edwards v. Aguillard, 482 U.S. 578, 586 n. 6 (1987).

[74] Brown v. Li, 308 F.3d 939, 953 (9th Cir. 2002).

[75] Tinker, *supra*, 393 U.S. at 513.

[76] See the article by Robert M. O'Neil and William E. Thro from the University of Virginia and Christopher Newport University, respectively, (2011) entitled "Institutional Speech, Civility, and Anti-Harassment Codes for Students and for Employees: Reconciling Equality and Free Speech." Portions of this article have been incorporated into this Handbook.

[77] Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

[78] Boy Scouts of America v. Dale, 530 U.S. 640, 647-48 (2000).

free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect."[79] This freedom of association "is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private."[80]

1. A Public University Must Recognize and Fund Student Groups That Espouse Views Offensive to the Administration or Student Body

Under existing Supreme Court precedent involving student organizations, there is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."[81] A public university may not favor those groups that support the institution's views and it may not penalize those groups with which it disagrees.[82] More than four decades ago the Supreme Court declared:

> "The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of 'destruction' thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."[83]

Since there is "no doubt that the First Amendment rights of speech and association extend to [public educational institutions],"[84] "the mere disagreement of the [institution] with the group's philosophy affords no reason to deny it recognition" [85] or funding. [86] In granting recognition and/or funding, the school or university does not adopt the group's speech as its own[87] or "confer any imprimatur of state approval" on the student group.[88] Consistent with this judicial principle, FAU Regulation 4.006(2) (Student Government and Student Organizations) provides "University recognition [of a Registered Student Organization] does not imply University endorsement of the activities of the Registered Student Organization or of Student Government. University recognition also does not imply that the Registered Student Organization has been granted status as an entity or agent of the State of Florida or Florida Atlantic University." If

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[79] Rumsfeld v. Forum for Academic & Inst'l Rights, 547 U.S. 47, 68 (2006).

[80] Boy Scouts of America v. Dale, 530 U.S. 640, 648 (2000).

[81] Widmar v. Vincent, 454 U.S. 263, 269 (1981).

[82] There is no obligation for a university to recognize or fund student groups, but if a university chooses to do so, then it must treat all student groups the same. *See* WILLIAM A. KAPLIN & BARBARA H. LEE, THE LAW OF HIGHER EDUCATION 516-20 (3rd ed. 1995).

[83] Healy v. James, 408 U.S. 169,187-88 (1972).

[84] Widmar v. Vincent, 454 U.S. 263, 269 (1981).

[85] Healy v. James, 408 U.S. 169, 187-88 (1972).

[86] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995).

[87] Board of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000).

[88] Widmar, 454 U.S. at 274.

there were disagreement with the message of the student groups, then, "[other] students and faculty are free to associate to voice their disapproval of the [student organization's] message."[89]

Indeed, in the higher education context, the practice of requiring students to pay mandatory fees that are distributed to student groups (as at FAU) is permissible only if institutions do not favor particular viewpoints.[90] Simply stated, the "avowed purpose" for granting official status to student organizations is supposed to be "to provide a forum in which students can exchange ideas."[91] Thus, groups with views that many may find offensive are nevertheless entitled to recognition, access to facilities, and funding if they follow the University's reasonable, content-neutral processes applicable to all student groups.[92]

To be sure, this mandate of viewpoint neutrality toward student organizations does not mean that the University must compromise its own viewpoints. While the University must accommodate the viewpoints of all student groups, "students and faculty are free to associate to voice their disapproval of the [student organization's] message."[93] The University may as well. If one finds a particular viewpoint disagreeable, the solution is to promote an alternative viewpoint, not to suppress the disagreeable viewpoint.

2. A Public University May Prohibit Student Groups from Discriminating in Membership

In *Christian Legal Society Chapter of California, Hastings College of Law v. Martinez*,[94] a sharply divided Supreme Court held that officials at a public institution in California may require an on campus religious group to admit all-comers from the student body, including those who disagree with its beliefs, as a condition of being recognized.[95]

See FAU Regulation 4.006 (6)(f), which states that "Student Organizations and Student Government shall be open to all currently enrolled FAU students, except if specifically exempted by law." In order for FAU student organizations to be eligible for official recognition by the University, such organizations must be open to membership on an "all comers" basis, except as otherwise exempted by law.

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[89] Rumsfeld v. Forum for Academic and Institutional rights, 547 U.S. 47, 69-70 (2006).

[90] Board of Regents of the Univ. of Wisconsin System vs. Southworth, 529 U.S. 217, 233-34 (2000).

[91] Widmar, 454 U.S. at 272 n.10. *See also* Southworth, 529 U.S. at 229 (student activity fee was designed to facilitate the free and open exchange of ideas by, and among, its students); Rosenberger, 515 U.S. at 834 (university funded student organizations to "encourage a diversity of views from private speakers").

[92] While institutions may not refuse to recognize student organizations due to their viewpoints, they may require organization to (1) obey the campus rules; (2) refrain from disrupting classes; and (3) obey all applicable federal, state, and local laws. 2 William A. Kaplin & Barbara H. Lee, THE LAW OF HIGHER EDUCATION 1051 (4th ed. 2007) (interpreting *Healy*). As a practical matter, this means that institutions can impose some neutral criteria for recognition such as having a faculty advisor, a constitution, and a certain number of members. Even so, institutions cannot deny recognition simply because officials or a significant part of the campus community dislikes the organization. Moreover, according to *Healy*, institutions may not deny recognition because members of organizations at other campuses or in the outside community engaged in certain conduct. *Healy*, 408 U.S. at 185-86.

[93] Rumsfeld, 547 U.S. at 69-70.

[94] 130 S. Ct. 2971 (2010).

[95] Christian Legal Soc'y, 130 S. Ct. at 2978.

VII. CONCLUSION

Public universities occupy a unique and essential position at the heart of our nation's marketplace of ideas. We best serve our students and our fellow citizens when we foster a safe environment where critical thought and the exchange of ideas flourish. This requires a careful balancing of the rights of those who wish to express themselves with the rights of everyone else in our community. This handbook is intended as a resource to help answer some of the questions that inevitably arise in the course of that balancing. Faculty and staff of the University are encouraged to contact the Office of the General Counsel for further assistance.

** For further information, please see the Handbook of Free Speech Issues from the Office of General Counsel at the California State University; the article by Steven J. Adamczyk from the University of Arizona, Tucson Arizona (2011) entitled "First Amendment Free Speech and the Public University - the Public Forum Doctrine;" and the article by Robert M. O'Neil and William E. Thro from the University of Virginia and Christopher Newport University, respectively (2011) entitled "Institutional Speech, Civility, and Anti-Harassment Codes for Students and for Employees: Reconciling Equality and Free Speech." Portions of each of these resources are incorporated into this handbook.