

# EAGLE BRIEFS

North Carolina Central University

OFFICE OF LEGAL AFFAIRS

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**Welcome** to the Spring 2019 edition of Eagle Briefs, a newsletter from the Office of Legal Affairs to the NCCU community! Eagle Briefs is your best source for receiving important updates from the OLA regarding changes in federal and state law; new NCCU policies, regulations and rules ("PRRs"); and more information regarding processes that you need to be familiar with as students, faculty, and staff.

As always, the newsletter does not replace your need to consult with the OLA regarding matters that arise within your respective departments and divisions in order to obtain advice regarding your specific matter. Please view (and use) the newsletter as an additional resource from the OLA.



## Hot Topics: Free Speech and Free Expression at NCCU

### Hot Topics: Campus Speech What's protected? What's not?

On December 15, 2017 the University of North Carolina Board of Governors adopted a policy entitled "Free Speech and Free Expression Within the University of North Carolina." So, what does this mean for public institutions within the UNC System? How does this policy impact you, as NCCU students, faculty, and staff?

The policy is designed to assist NCCU, and other constituent institutions, demonstrate commitment to First Amendment principles by embracing the free speech and free expression rights of members of university communities. The policy requires that each institution within the UNC System ensure the fullest degree of free expression and forbids universities from shielding individuals from speech protected by the First Amendment, including ideas and opinions found to be unwelcome, disagreeable, or even deeply offensive.

Pursuant to the policy, students, faculty, and staff have the freedom to discuss any problem or matter as permissible under the First Amendment. The rights of individuals within the university community must, however, be balanced against the university's right to enforce time, place,

and manner restrictions on speech, which is permitted so long as such restrictions do not limit the content or viewpoint of the speaker. Furthermore, the restrictions must be clear, published, and provide ample alternative means of expression. Members of universities are permitted to assemble and engage in spontaneous expressive activity as long as such activity is lawful and does not materially and substantially disrupt the functioning of the university.

While the policy provides protection for a wide latitude of free speech and free expression activities, there are certain expressions that are not protected by the policy. Speech and expressions that are unprotected include: (1) defamation (i.e., a statement that a court has ruled subjects a particular person to ridicule, hatred, or contempt and that statement is false); (2) unlawful harassment (i.e., conduct, including speech, which is based on a protected status that creates a hostile environment); (3) true threats or statements meant by the speaker to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals; (4) unjustifiable invasion of privacy or confidentiality not involving a matter of public concern; (5) an action that materially and substantially disrupts the functioning of the UNC System Office, a

constituent institution, or any other unit or entity of the university, or that substantially interferes with the protected free expression rights of others; (6) expression that violates reasonable time, place, and manner restrictions; and (7) speech that interferes with patient care environments.

A material and substantial disruption is defined by the policy as any action, including protests and demonstrations, that materially infringes upon the right of others to engage in and listen to expressive activity when the expressive activity has been scheduled pursuant to policy and is located in a nonpublic space.

NCCU adopted a "[Free Speech and Free Expression Policy](#)" that is comparable to the "Free Speech and Free Expression Within the University of North Carolina" policy and provides guidelines for free speech and free expression activities on campus. Within the policy, the University has designated certain areas on campus as designated public forums, or areas on campus where students can engage in spontaneous, expressive activity so long as the activity is lawful and does not materially and substantially disrupt the functioning of the University; Brant Street has been identified by the University as a designated public forum. The University has also designated limited public forums, or

spaces on campus where use of the space is restricted to members of the University community or certain topics; the Library Bowl has been designated as a limited public forum.

## Censoring Students' Speech on Campus

First Amendment principles are complex and can be difficult to interpret and understand. The following information regarding protests, trigger warnings, safe spaces, microaggressions, Internet and social media and egregious conduct are examples of actions a university may take in order to ensure that the First Amendment rights of all members of the campus community are protected.

**Protests:** A campus cannot prevent protestors from having a meaningful opportunity to get their views across in an effective way.<sup>1</sup> However, as discussed above, a campus can impose time, place, and manner restrictions on protests.<sup>2</sup> This means that the University may mandate that protests be held in a certain timeframe, location, or method. (For example, the University may impose limitations on the noise level of speech, limit the number of protestors who may occupy a particular forum, and/or prohibit early morning or late evening demonstrations.)

**Trigger warnings:** Faculty members may choose to provide students with warnings before presenting material that might be offensive or upsetting.<sup>3</sup> However, universities may NOT impose requirements that faculty members provide trigger warnings before presenting or assigning material that might be offensive or upsetting.<sup>4</sup> This means that the University cannot require that professors or administrators provide students with trigger warnings before presenting content that may invoke anxieties or other emotional/mental discomfort. However, faculty members may choose to provide such warnings on their own accord.

**Safe spaces:** A campus may create a safe space in educational settings to ensure that individuals feel free to express the widest array of viewpoints, and can support student efforts to self-organize in ways that reflect shared interests and experiences. However, universities cannot use the concept of safe spaces to censor the expression of ideas considered too offensive.<sup>5</sup> This means that the University may create and condone safe spaces for viewpoints, but the University may not censor the speech uttered in its safe spaces based on the offensive nature of the speech.<sup>6</sup>

**Microaggressions:** Universities may not prohibit students or faculty from using words that some consider to be examples of microaggressions.<sup>7</sup> Microaggressions are defined as statements, actions, or incidents regarded as instances of indirect, subtle, or unintentional discrimination against members of a marginalized group.<sup>8</sup> Campuses can sensitize students and faculty to the impact that certain words may have.<sup>9</sup> This means that while the University may not censor words considered to be microaggressions, the University may educate its members about the harmful effects microaggressions often have mentally, emotionally, and socially.

**Internet and social media:** Universities can punish speech over the Internet and social media that otherwise is not protected, such as true threats and harassment or speech inconsistent with professional standards.<sup>10</sup> In fact, the Supreme Court of the United States has held that an educational institution can be held liable if it is deliberately indifferent to harassment of its students.<sup>11</sup> However, campuses cannot punish speech over the Internet on the ground that it is offensive.<sup>12</sup>

**Egregious conduct:** A campus should expect university administrators to speak out against especially egregious speech acts.<sup>13</sup> A university should have principles of community expressing what it expects of students, i.e. a principle stressing the importance of an inclusive learning environment.<sup>14</sup> However, a campus should not expect university administrators to comment on or condemn every campus speech act that someone may consider offensive.<sup>15</sup> This means that while it may be impractical to expect university administrators to condemn every utterance of offensive speech, it is well within the University's power to condemn especially egregious speech acts.

## What Does Freedom of the Press Mean for Student-Led News Outlets?

In addition to freedom of speech, the First Amendment of the United States Constitution grants citizens freedom of the press.<sup>16</sup> This means the press has rights to gather news in order to improve the "marketplace of ideas." Campus newspapers function as a means to inform university members about issues of public concern within the university community by gathering university and community news. How does this affect the University's ability to influence the content of University-sponsored news outlets?

The freedom granted to private press sectors (i.e., local and national newspapers and news broadcasts) are virtually the same for university-sponsored press outlets.<sup>17</sup> This means, for example, that a university may not decrease or eliminate funding for campus publications due to disagreement with content.<sup>18</sup> Additionally, a campus cannot require that it pre-approve publications or censor the publication of certain content unless the publication would be incompatible with the school's obligation to order and discipline in the educational process.<sup>19</sup> This obligation supersedes protected speech or press if the expression would cause a material and substantial interference with schoolwork or discipline. For example, a university may censor advocacy directed at inciting or producing imminent lawless action and is likely to produce such action. The Free Speech and Free Expression Within the University of North Carolina policy has defined actions that qualify as materially and substantially disrupting the function of an institution.

In light of the Free Speech and Free Expression Within the University of North Carolina policy, universities are balancing university members' right to freedom of speech, press, and expression with the promotion of an inclusive culture of mutual respect, tolerance of diverse and controversial views, and working through differences through conversation rather than intimidation. Understanding campus "do's and don'ts" are essential to furthering this goal and creating a free and diverse university setting. It is important to understand why freedom speech and freedom of the press matter, and why the UNC System promotes these values.

<sup>1</sup>Erwin Chemerinsky, Howard Gillman, *Free Speech on Campus*, 125 (2017).

<sup>2</sup>Id.

<sup>3</sup>Id. at 136.

<sup>4</sup>Id.

<sup>5</sup>Id. at 138.

<sup>6</sup>Id.

<sup>7</sup>Id. at 140.

<sup>8</sup>Microaggression, Oxford Dictionaries, <https://en.oxforddictionaries.com/definition/microaggression>.

<sup>9</sup>Chemerinsky, *supra*.

<sup>10</sup>Id. at 143.

<sup>11</sup>Id. at 145.

<sup>12</sup>Id. at 143.

<sup>13</sup>Id. at 145.

<sup>14</sup>Id. at 146.

<sup>15</sup>Id. at 145.

<sup>16</sup>U.S. Const. amend. I.

<sup>17</sup>Lisa Bohman, *Freedom of the Press: How University Newspapers Have Fared in the Face of Challenges from Students, Administrators, Advertisers, and State Legislatures*, 2005 B.Y.U. Educ. & L.J. 231, 231 (2005).

<sup>18</sup>Id. at 235 (citing *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973)).

<sup>19</sup>Id. at 233-234 (citing *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970)).



# Compliance Reminders

Members of the NCCU community were reminded about policies, laws and regulations that support the University's goal of providing an inclusive and welcoming environment for students, faculty, and staff in [Eagle Briefs: Back to School Edition \(Vol. 1, Fall 2018\)](#). In this edition of Eagle Briefs, particular emphasis is placed upon the University's prohibition against retaliation. In recent years, the number of retaliation claims filed with the US Equal Employment Opportunity Commission (EEOC) has increased.<sup>20</sup>

Retaliation against any individual participating in an investigation of a grievance is prohibited at NCCU. NCCU's "[Resolution Procedures for Complaints of Discrimination, Harassment and Retaliation Regulation](#)" applies to all members of the University community and prohibits retaliation against anyone based on their protected status, such as race, gender, religion, national origin, etc. Retaliation is defined as any adverse action, including intimidation, threats, or

coercion, against an individual who files a complaint or participates in an investigation. Participation in an investigation includes: invoking a legal process by filing a charge, testifying, giving witness statements, or other conduct. Retaliation may include actions such as: co-worker harassment, transfers/reassignments/demotions without loss of pay or benefits, supervisor harassment/monitoring of job performance/disrespect, and warnings/counseling or other discipline without immediate consequence. Retaliation need not be so severe or pervasive as to violate Title VII, if it would "dissuade a reasonable employee from engaging in protected conduct."<sup>21</sup> An individual who retaliates against another may be disciplined, up to and including termination.

Individuals may file a grievance with the University's EEO office if they feel they have been retaliated against. The University's main contact for filing a retaliation complaint is Ms. Delores Harris who can be reached via email ([dharr226@nccu.edu](mailto:dharr226@nccu.edu)) or

telephone (ext., 6681). However, employees may also contact the main number for the Department of Human Resources at ext. 6334 for assistance. Concerns of retaliation will be treated with respect and questions or comments that could be perceived as a threat should be avoided.

The University is committed to investigating and resolving all complaints and proceedings related to discrimination, harassment, or retaliation. All such complaints will be kept confidential to the extent permitted by law. However, discrimination, harassment, and retaliation complaints may be shared where necessary to investigate, prevent, or remedy the prohibited conduct.

<sup>20</sup>Hage, G. and Sullivan, M. (2019). The Anatomy of a Retaliation Claim: Before, During, and After (stating of charges filed with EEOC in 1997, 22% contained a retaliation claim and today 46% of those charges contain a retaliation claim).

<sup>21</sup>Burlington Northern & Santa Fe Railway Company v. White, 548 U.S. 53, 126 S. Ct. 2405 (2006).



## A Word About the Contract Review Process

### Contract FAQs

The OLA provides support to the University in the contracting process. To facilitate the ease of entering into contracts for services, the OLA and the Purchasing Department have developed several standard form contract documents. Generally, the OLA does not need to review an NCCU Standard Form contract, including a Hotel Contract Addendum approved by the Purchasing Department. If a division or department desires to enter into a non-standard contract, or if a vendor makes significant changes to an NCCU standard form contract, that division/department should first submit the proposed contract to the Purchasing Department. The Purchasing Department will then submit the contract for review by an attorney in the OLA. The general time required for legal review of a non-standard contract is two weeks. Please note that this process may conclude in a longer or shorter period of time. This step

of the process is important due to several factors. For example, sometimes a vendor will include provisions in its contract that the University, as a state entity, CANNOT agree to by law. (A listing of [prohibited contract clauses](#) is included on the OLA website.) Other factors that may increase the time required for legal review include the unavailability of all relevant documents related to the contract with the initial contract submission to the OLA, untimely responses to OLA inquiries, and contracts consisting of complex terms and conditions.

Once the OLA approves the final version of the contract, the OLA will return the contract to the Purchasing Department and the appropriate department entering the contract, with instructions to have the vendor sign the contract first. After a non-standard contract has been executed by a vendor, it should be presented to an individual [with signatory authority at NCCU](#). All fully executed contracts should be sent to [legalreview@nccu.edu](mailto:legalreview@nccu.edu) to be included in

the OLA's contract repository.

**Q: What if the attorney I originally spoke to in the OLA regarding my contract is out of the office?**

A: All members of the OLA have access to contracts. Any attorney or staff member in the OLA office may answer questions regarding the status of your contract.

**Q: Who should I contact first about a potential contract?**

A: After you have filled out a [contract review form](#) and had it signed, you should send the contract to the Purchasing Department to ensure that there will be funding for the performance of the contract.

**Q: When sending a contract or inquiring about a contract to the OLA by email, what should I include in the subject line?**

A: Make the subject line of your email about

the contract VERY SPECIFIC. Email subject titles such as, "Contract", "Contract Review", or the contract number are not sufficient subject lines. Describe with specificity the subject of the contract in your email subject line.

**Q: Initially, should I send a nonstandard contract to the Purchasing Department or the OLA?**

A: Send ALL contract inquiries to the Purchasing Department initially. The Purchasing Department will determine if the contract is standard or nonstandard.

**Q: What happens if the Purchasing Department determines that my contract is a nonstandard contract?**

A: If the Purchasing Department determines that a contract is a nonstandard contract, it will forward the contract to the OLA for review.

**Q: What if the performance of the contract involves software?**

A: If performance of the contract involves novel software, the contract will be sent to the Office of Information Technology Services (ITS) to ensure that NCCU has the capacity to install such software.

(Departments are also encouraged to engage ITS during the initial stages of a procurement involving software.)

**Q: What happens if the vendor has an insurance provision in the contract?**

A: If the vendor contract has an insurance provision, the contract will be sent to Mr. Timothy Moore, the Director of Business and Auxiliary Services, for review.

**Q: What happens if the OLA adds revisions to the vendor contract?**

A: If the OLA revises the contract, the OLA will provide the department with the revisions. It is the department's responsibility to provide the vendor with the revisions. Once the vendor consents to the contract with the revisions, the OLA must perform a final review.

**Q: What happens once the contract is approved by the OLA?**

A: Once the contract is approved by the OLA, the OLA will notify the department of the proper signatory authority to sign the contract.

**Q: Does OLA need a copy of the contract once both parties sign it?**

A: Yes. The contract will be kept on file by the OLA.

**Q: Is it okay if a vendor contract is subject to the law of a state other than North Carolina?**

A: No. As a state entity, the University can only bind itself to contracts under North Carolina law. Please see the [listing of prohibited contract clauses](#) for more information.

**Q: Are there any steps I should take before sending my contract to the Purchasing Department?**

A: Before sending a contract to the Purchasing Department for review, a "Contract Review Form" (located on the OLA website) should be completed. The Dean or Director of the respective department, college or school should sign this form. Once the form is completed and signed, the contract may be sent to the Purchasing Department.

More information about the contract review process is included on the [Contracting Resources](#) page of the OLA website and the [Contract Review Flowchart](#).

## Policies, Regulations and Rules (PRR) Update

### Potential Changes to Federal Guidelines on How School's Respond to Sexual Assault

The U.S. Department of Education published proposed [Title IX regulations](#) on November 29, 2018. The proposed regulations require educational institutions "with actual knowledge of sexual harassment in an education program or activity to respond in a manner that is not deliberately indifferent." An institution will be considered "deliberately indifferent" under the proposed regulations if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

The definition of sexual harassment under the proposals encompasses: (1) quid pro quo harassment by an employee of the institution; (2) unwelcome conduct on the basis of gender that is so "severe, pervasive,

and objectively offensive that it effectively denies an individual equal access" to education programs or activities; and (3) sexual assault, as defined by the Clery Act. An institution is deemed to have actual knowledge, under the proposed regulations, if the allegations are reported to the institution's Title IX Coordinator, or another institution official with the authority to take corrective action. Additionally, under the proposals, a response is would be deemed deliberately indifferent if it was clearly unreasonable. The proposals do not define the standard for actions that are "clearly unreasonable."

Under the proposed regulations, respondents would be entitled to receive details regarding the allegation including: (1) details about the alleged incident(s) (such as the names of the people involved), (2) the specific policy violation at issue, (3) the conduct that is alleged to have violated the policy, and (4) the date and location of the

incidents. All parties would be informed that they have the ability to request and inspect evidence. Additionally, neither party would be able to limit the ability of the other party to discuss the allegations or gather their own evidence.

The proposed regulations would also permit both parties to have an advisor present during a hearing or other proceeding, including attorneys. In the event that a party does not have an advisor, the institution would be required to provide one who is "aligned with that party." For universities and other institutions of higher education, live hearings would be mandatory and cross-examination of both parties would be permissible. Cross-examinations could include questions about credibility. However, questions posed during cross-examination could not include questions about a complainant's past sexual conduct. Under the proposed regulations, institutions would be permitted to offer the parties

an informal process, such as mediation, at any time prior to reaching a final determination, including for allegations that were previously required to be adjudicated, or heard by a court or hearing. After making a determination regarding responsibility, the institution would be required to provide involved parties with a written determination detailing the specific violation, the procedural steps the institution took to reach its decision, all findings of fact supporting the decision, conclusions reached after reviewing the institution's policy and applying the facts at hand, and any appeal procedures available to the parties.

The US Department of Education provided the public with 60 days from the date the proposed regulations were published to review and provide comments. By the end of the formal comment period which closed on February 15, 2019<sup>22</sup>, over 100,000 comments were submitted in response to the proposed regulations. Many of the comments submitted are from individuals

who have been involved in campus sexual misconduct proceedings and discuss how the proposed regulations may impact the student community. Pursuant to the Notice of Proposed Rulemaking procedures, the US Department of Education must review each comment received. At this point, it is unclear when, or if, the proposed rules will actually become law. The OLA will continue to keep the University community updated regarding any changes regarding Title IX.

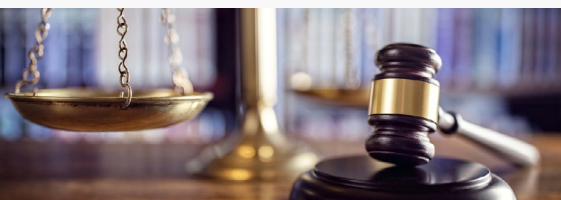
In summary, the proposed regulations are merely proposals; members of the University community should continue to follow NCCU's current [Sexual Misconduct Policy](#) regarding any allegations of sexual misconduct. This policy outlines the University's process for investigating and responding to allegations of sexual misconduct, as well as useful resources for the University community. NCCU's existing process already includes several aspects of the proposed regulations, such as a definition of sexual harassment and various other behaviors that qualify as

sexual misconduct, the requirement that a respondent receive notice about the allegations against him or her, and the ability for any party to be accompanied by an advisor or support person throughout the entire process. However, NCCU's current process does not include informal resolution, mandatory hearings, or direct cross-examination between complainants and respondents at this time. All reports of sexual misconduct at North Carolina Central University—whether they are made by complainants, bystanders, or responsible employees—should be reported to the Title IX Coordinator, Mr. Selby Lo, who can be reached via email ([TitleIX@nccu.edu](mailto:TitleIX@nccu.edu)) or telephone (ext. 7944). Reports are also accepted via an online [Title IX reporting form](#), and can be made anonymously.

<sup>22</sup>The original ending date for the comment period was January 28, 2019. The US Department of Education thereafter extended the comment period to January 30, 2019. Due to technical difficulties, the comment period was again reopened for one day on February 15, 2019. The comment period is now closed.

## Facilities Use Agreement-UPDATED!

Please note that the University "[Facilities Use Agreement](#)" has recently been revised. This agreement is to be utilized when an external organization wishes to use a campus facility to host an event. The agreement must be signed by both the organization and the Vice Chancellor for Administration and Finance prior to the use of any University facility. For more information about the facility use process, contact Ms. Lucretia Pinckney in the Office of Special Events via email at [lpinckney@nccu.edu](mailto:lpinckney@nccu.edu) or telephone (ext. 7893).



## The Office of Legal Affairs

The OLA is accepting applications for interns/externs for Summer 2019 and the 2019 Fall Semester. The mission of the OLA is to serve as a valued, collaborative, and strategic partner to the University and to provide timely, thorough, and accurate legal advice consistent with applicable laws, policies, rules, and procedures. To further this mission, the OLA offers experiential learning opportunities to students currently enrolled at the NCCU School of Law. OLA interns/externs are expected to work at least 10 (ten) hours per week on a range of assignments, including but not limited to: policy review and development; research and legal writing on various topics; attending meetings and participating in interviews; reviewing contracts; and developing presentations, trainings, and publications on behalf of the OLA. To apply for an internship/externship with the OLA,

please send the following information to [legalaffairs@nccu.edu](mailto:legalaffairs@nccu.edu): (1) a cover letter indicating your interest in either Summer 2019 and/or Fall 2019, (2) a writing sample, and (3) a copy of your unofficial transcript. All OLA interns must be enrolled in law school at the time of the application submission. Application materials will be accepted on a rolling basis.

The Office of Legal Affairs  
The OLA is currently comprised of three staff members. You can learn more about the OLA, its staff and the work that the OLA performs for the University on the [OLA website](#). Please keep in mind that OLA staff members are available to answer any questions that you may have regarding your work-related duties should the need arise. Please do not hesitate to [contact us!](#)

### SPECIAL NOTE:

The Office of Legal Affairs would like to recognize Ms. RaShawnda Murphy, a third-year law student at the NCCU School of Law and current OLA intern, for her significant and comprehensive contributions to this edition of *Eagle Briefs*. We sincerely appreciate all of Ms. Murphy's hard work and wish her the very best in her future endeavors.