

DRAFT Report on the “Recommendations from the Working Group on Free Speech”

Submitted by the AAC Subcommittee

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The AAC subcommittee was charged with reviewing the “Recommendations from the Working Group on Free Speech” and writing a response for discussion with the AAC as a whole. Our goal was to identify areas of agreement and disagreement with the Working Group report, as well as to provide suggestions for clarification of or amendments to their recommendations. In general, the subcommittee took a stance of permissiveness on free speech issues, that is, we believe there should be few, if any, free speech restrictions on the Syracuse University campus. Specifically, we believe that if speech is protected outside campus boundaries under the First Amendment, it should also be protected on campus. In what follows, we provide feedback on the various sections the Working Group Report, as well as on specific recommendations. Following the creation and delivery of a unified report from the Syracuse University Student Association, Graduate Student Association, Student Bar Association, and Senate Agenda Committee to the Chancellor, we believe that the University should proceed first with the development of a comprehensive free speech policy, and then make determinations about implementation.

Introduction and Mission

- The AAC subcommittee was pleased with these sections of the report. The introduction provided a compelling argument for the examination of free speech issues on university campuses.
- We applaud the Working Group for moving beyond a narrow examination of Syracuse University’s free speech policy as it relates to computer and electronic communication (which was the original charge from the Chancellor) to a broader examination of freedom of speech on campus.
- We agree with the Working Group that the same university rules ought to govern all forms of speech on campus.
- We believe that these sections of the report could be bolstered with some information about external perspectives on SU free speech policies and information on how current SU free speech policies compare to other campuses.

For example, The Foundation for Individual Rights in Education (FIRE) surveyed 437 colleges and universities about their speech codes – the policies governing student and faculty speech that would, outside the bounds of campus, be protected by the First Amendment (<https://www.thefire.org/spotlight-speech-codes-2015/>). FIRE then rated these colleges and universities as “red light,” “yellow light,” or “green light” institutions based on how much, if any, protected speech their written policies restrict.



A “red light” institution has at least one policy that both clearly and substantially restricts freedom of speech, or that bars public access to its speech-related policies by requiring a university login and password for access.



A “yellow light” institution maintains policies that could be interpreted to suppress protected speech or policies that, while clearly restricting freedom of speech, restrict only narrow categories of speech.



A “green light” institution has policies that do not seriously threaten free speech. This rating does not necessarily indicate that a school actively supports free expression; rather, it means that the school’s written policies do not pose a serious threat to free speech.

Of the 437 schools reviewed by FIRE, 241 received a red light rating (55.2%), 171 received a yellow light rating (39.1%), and 18 received a green light rating (4.1%). FIRE did not rate seven schools (1.6%).

Syracuse University received a “red light” rating overall. FIRE also assessed Syracuse University on a number of individual policies (<https://www.thefire.org/schools/syracuse-university/>). Syracuse University received “red light” ratings for three policies (Computing and Electronic Communication Policy; Information Regarding Sexual Misconduct and Other Types of Harassment and Discrimination; and Policy on Sexual Assault, Sexual Harassment, Stalking, or Relationship Violence). Syracuse University received “yellow light” ratings for four policies (Code of Student Conduct; Sexual Harassment, Abuse, and Assault Prevention; Bias Incident Reporting Form; and STOP Bias: What is Bias?). Syracuse University received a “green light” rating on its Campus Disruption Policy.

Working Assumptions

- We greatly appreciated that the Working Group laid out its assumptions regarding its work, and overall we agree with those assumptions. However, we have several suggestions for clarifications or amendments to some assumptions.
 - *The legal status of Syracuse University.* We strongly agree with the content and intent of this assumption, but would like to encourage the use of language that is more inclusive and accurate in reflecting the status of international students. For example, the text in this assumption reads: “We treated everyone on the SU campus as residents of the United States first, with full free speech rights under the First Amendment, as defined by the courts.” We agree wholeheartedly with this, but worry that some international students will be challenged by the use of the word “residents.” Similarly, the text reads, “We also believe that the best way to prepare Syracuse students to be citizens is to permit them to exercise their constitutional rights within the university setting.” While we strongly agree with the premise of this argument, the language of “citizens” could be problematic.
 - *The “reasonable person” standard.* We greatly appreciated that the Working Group included a standard for assessing claims about offensive speech. We understand that

the “reasonable person” standard is a legal test used in free speech and other cases, but would like to see more clarification and definition of this standard in the report.

Our concern stems from our inability to answer the question, “who is a reasonable person?” This standard is based on perceptions, which may make it hard to apply, particularly across groups, cultures, and societies. For example, what is reasonable to one group of people (e.g., men or American students), may not be reasonable to another group of people (e.g., women and international students). For these and other reasons, we believe the Working Group should investigate other legal standards applied to free speech and/or clarify the reasonable person standard.

- *When restricting speech is acceptable.* We understand that there may be times when restricting speech is acceptable, and greatly appreciate the Working Group’s efforts to outline those instances. The Working Group proposes that “the university is in the strongest position to restrict speech when that speech (or the freedom to assemble, also guaranteed in the First Amendment) threaten to undermine its educational mission.” They also note that the burden to demonstrate how such speech or assembly undermines the educational mission rests with the university. We believe these statements are very broad and more work should be done to flesh out and clarify the points. Without a clear statement about what constitutes a threat to the university’s education mission, all proposals to protect free speech are at risk.

Thus, we believe the Working group should identify specific activities that would constitute a sufficient threat to the educational mission to warrant limitations to the constitutional right of free speech. Syracuse University has a Campus Disruption Policy that may be useful for such purposes ([https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2002/08/07000000/Syracuse-University-Policies -Campus-Disruption-Policy.pdf](https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2002/08/07000000/Syracuse-University-Policies-Campus-Disruption-Policy.pdf)); however, it would also be useful to look to the work of other universities. For example, *The California State University Handbook of Free Speech* provides basic information and serves as a campus resource when questions about free speech arise (http://www.calstate.edu/gc/Docs/Free_Speech_Handbook.doc). Section IV.C.3 on equal access to facilities provides criteria for assessing speaker requests; these criteria could be adapted to generate a balancing test for “threats to the educational mission” of the university:

Courts have held that 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.¹ Such a requirement may be seen as furthering 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;

¹ *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).

(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 or students; or (5) other campus disorder of a violent nature.² 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."³

Proposals

- Overall, we agreed with the nature of the Working Group proposals and appreciated their breadth. We do, however, have several suggestions for clarifications or amendments. One simple recommendation is to change the language about "dormitories" and "eating halls" "residence halls" and "dining halls." Such changes would be in line with language used by residential life. A more challenging recommendation is to develop more clarity on what constitutes a threat to the university's education mission and could be used to restrict free speech. Again, we believe that most protections for and challenges of free speech on campus will hinge on this determination.
 - *Harassing Speech.* We agree with the Working Group that "One of the most difficult challenges is defining and combating speech that is offensive, harassing, bullying, or threatening." The Working Group proposed that the university community consider a guideline, adopted at Mississippi State University, which applies the 'reasonable person' standard. We believe that this guideline could work, and appreciate the language it includes about "severe, persistent, pervasive, and objectively offensive" conduct, which creates a high threshold for determining harassing speech. However, we believe that it is important to ensure that the rights of (potential) victims are protected. Moreover, given the lack of clarity on the "reasonable person standard" (see above), we would like more information on the process for making such determinations. That is, who in the university community will apply the reasonable person standard, and if that person/group determines that speech was harassing, what is the process for determining and applying sanctions? While we do not want to be overly regulative, we believe that it could be valuable to impanel a diverse and representative board to hear cases and make such determinations.
 - *The campus as a public forum.* We appreciate that the Working Group considered the SU campus as a public forum. However, we believe this recommendation could be strengthened with clearer demarcation and justification of what are considered public and private spaces on campus. These lines are often blurry, and without clear

² Stacy v. Williams, *supra*, at 973.

³ *Id.*, at 973-74.

definitions of public and private campus spaces, free speech might be unduly restricted.

- *The occupation of a campus building.* We appreciate the need to include this recommendation, particularly given historical events on this and other university campuses. However, we believe the term “occupation” requires a better definition and more elaboration, and that more work needs to be done to clarify the conditions under which an occupation would be considered a permissible act of free speech or a threat to the university’s educational mission. Syracuse University has a Campus Disruption Policy (https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2002/08/07000000/Syracuse-University-Policies_-_Campus-Disruption-Policy.pdf) which may be useful in such efforts. The policy is motivated by the university’s wish to “preserve freedom of discussion and to protect the rights of all.” It provides a list of 8 types of disruptive behavior whose prohibition is viewed as justified in overriding freedom of expression.
- *Posting Policies.* This recommendation suggests that posting policies should be set by an appropriate administrator in each building—dorms, classroom buildings, administrative buildings—where bulletin boards and other appropriate surfaces for posting exist.” We believe this recommendation merits more discussion. For example, is it acceptable to have a single individual (i.e., the “appropriate administrator”) make determinations about what can and cannot be posted? What are the campus-wide guidelines for making such determinations? Moreover, we believe that should this recommendation be adopted, the administrator in charge of such determinations should be publicly identifiable.
- *The exhibition of banners and signs.* We believe this recommendation is too broad and unclear. For example, one significant issue on university campuses, including SU, has been the hanging of flags, which is not covered in the recommendation. This is an extremely sensitive issue that requires exploration, research, and ultimately, clarification. At present, it does not appear that Syracuse University has a policy on this issue. We also found the distinction between banners and signs hung *inside* personal spaces, and those hung *outside* or hung to be *visible outside* of personal spaces to be confusing. Finally, we are concerned that this is a blanket and indiscriminate recommendation that ultimately restricts free speech. We would urge the Working Group to give this issue more consideration.
- *Disrupting Speakers.* We agree with this recommendation, but would like to see two changes. First, we believe that the recommendation about not assessing a special fee for security services should extend beyond student groups to also include faculty and administrative persons and groups. Second, we believe that the recommendation should make clear that non-disruptive forms of speech (e.g., picketing, silent protest in the room, etc.) are explicitly protected. At present, these protections are only implied. In addition, we recommend that the University develop language that optionally could be included on event marketing materials (e.g., fliers, posters, emails, etc.) and announced at the beginning of events so that the parameters of and ground rules for

speech and conduct are understood by all. The University of Michigan has language that could be used as a model.

- *Distribution of copyrighted material on the university's computing system.* We agree with this recommendation, but believe there should be more information on the referenced "fair use rules."

The United States Copyright Office explains: "Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances. [Section 107 of the Copyright Act](#) provides the statutory framework for determining whether something is a fair use and identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that may qualify as fair use." Section 107 also identifies four factors to consider when evaluating a question of fair use, including (1) purpose and character of the use; (2) nature of the work; (3) amount and substantiality of the portion used in relation to work as a whole; and (4) effect of the use upon the potential market for or value of the copyrighted work" (<http://copyright.gov/fair-use/more-info.html>).

Tampere University in Finland provides clear guidelines for determining fair use in a document titled, "Copyright vs. 'Academic Fair Use'" (<https://www15.uta.fi/FAST/PK6/REF/fairuse.html>). Columbia University also provides a useful 'Fair Use Checklist' (<https://copyright.columbia.edu/content/dam/copyright/Precedent%20Docs/fairusechecklist.pdf>).