

**Proposition Number:** 24-14/15

**Sponsors:** Christopher Brown (A&S), Stuart Munson-McGee (ACES)

**Committee Assignment:** Government Affairs Committee

**Title:** A Memorial in Support of the Revised Freedom of Expression, Policy 3.63.

**Whereas** in response to tort claims claiming violation of students' free speech rights, President Carruthers appointed a Task Force to review the University's freedom of expression policies, and

**Whereas** this Task Force consisted of student, faculty and staff representatives, as well as members of the community, ASNMSU, Faculty Senate, the community colleges, university police department, office of general counsel, and attorneys who represented students who have exercised their 1<sup>st</sup> Amendment rights on campus, and

**Whereas** the Task Force met regularly throughout the Fall 2014 semester to study peer policies, hosted an October 16, 2014 Open Forum, and drafted a revision to Policy 3.36, and

**Whereas**, this draft was posted on-line and links to the posting distributed widely among the stakeholders via Hotline, Student Hotline, Faculty Talk, DACC Everyone List, as well as distributed to the community college presidents for further distribution at their campuses, and

**Whereas** the Task Force provided a centralized email address created specifically to receive comments and feedback, and

**Whereas** the Task Force addressed and/or incorporated that feedback into the revised policy, and

**Whereas** the revised policy recognizes, respects, and encourages the free exchange of ideas through written, spoken, and other forms of expression, including the right to peaceful assembly, as guaranteed by the First Amendment to the U.S. Constitution and the New Mexico Constitution, and

**Whereas** the revised policy defines public forums, limited public forums, and non-public forum and the corresponding content neutral, time, place, and manner limitations which may be placed on expression within each type of forum, and

**Whereas** the revised policy identifies some of the types of expression not protected by the U.S. and N.M. Constitutions, and

**Whereas** the revised policy prohibits retaliation against any person for having exercised First Amendment rights to free expression or peaceful assembly, and

**Whereas** the revised policy prohibits activities that materially or unreasonably interfere with the education, research, public service, and outreach missions of the university, office operations, or sleep of residents, and

**Whereas** the revised policy maximizes freedom of expression, including distribution and posting of literature and signs; group speech activities; political activities; the use of electronic sound amplification; the use of chalk; and electronic communication, consistent with the university's ability to accomplish its missions, and

**Whereas** the revised policy ensures the respect for the rights of others, and

**Whereas** the revised policy ensures the respect for University property and functions, and

**Whereas** the revised policy recognizes the limitations on expression contained in Federal and State statutes and regulations, and

**Whereas** the revised policy incorporates material from Policy 3.86 "Political Activity" which is now deleted, and

**Whereas** the Task Force continues to seek comments from individuals and interested parties to enhance the policy through their email [freespeech@nmsu.edu](mailto:freespeech@nmsu.edu), and

**Whereas** the Task Force will continue to develop the procedures necessary for the fair and consistent implementation of the policy, and

**Whereas** a copy of the proposed policy is attached to this Memorial;

**Now, Therefore,** be it resolved by the NMSU Faculty Senate this 2<sup>nd</sup> day of April, 2015, that the Senate recognizes the hard work and effort put forth by the Freedom of Expression Task Force, and

**Be it Further Resolved** that the Senate commends the Freedom of Expression Task Force for having balanced the legal requirements with the desires and needs of the University community and the public in updating the University's Freedom of Expression policy, and

**Be it Further Resolved** that to the extent the revised polices intersect with the academic mission of the university and the regular work of faculty, the Senate supports adoption of revised Policy 3.63, also repealing Policy 3.86, as drafted by the Freedom of Expression Task Force.

# NMSU Freedom of Expression Policy Revision

February 20, 2015

## 3.63 Freedom of Expression

### A. Purpose:

1. To recognize, respect, and encourage the free exchange of ideas through written, spoken, and other forms of expression, including the right to peaceful assembly, as guaranteed by the First Amendment to the U.S. Constitution and the New Mexico Constitution.
2. To distinguish and recognize traditional open public forums, designated public forums and non-public forums within the university's diverse campuses and other properties, as well as to describe the reasonable restrictions, if any, which may be imposed in order to protect the university's teaching, research and service operations, and student activities from significant disruption and interference.
3. To identify some of the types of expression not protected by the U.S. and N.M. Constitutions.
4. To prohibit retaliation against any person for having exercised First Amendment rights to free expression or peaceful assembly.

B. Scope: This policy applies to all people, and throughout the NMSU system (at all campuses, facilities and other real property under the operation and control of the NMSU Board of Regents, to include university sponsored events off-premises). Commercial solicitation is not covered by this policy and is governed by Policy 3.92.

C. Policy Administrator: The President and the Executive Vice President and Provost (or Chief Academic Officer at each campus) shall have primary responsibility for the administration of this policy, on behalf of the NMSU Board of Regents. Parties responsible for implementing and applying this policy also include, but are not limited to:

1. Dean of Students
2. Director of Housing and Campus Life
3. Director of Special Events
4. Associate Vice President of Facilities and Services
5. Director of Athletics
6. Manager or Building Monitor within any university facility
7. Deans of the Colleges and Libraries

D. Definitions:

1. **Commercial Speech** is speech that proposes a commercial transaction; the audience consists of prospective consumers, and the content of the message is business related in character.
  2. **Content Neutral** means without regard to the viewpoint or message. Content neutral restrictions are those based on reasonable time, place, and manner rather than the content or viewpoint of the message.
  3. **Social Media** means computer- mediated tools that allow people to create, share, or exchange information, ideas, videos, and pictures in virtual communities and networks.
  4. **University Premises**, sometimes referred to simply as “campus,” means all campuses, facilities, land, buildings, or other indoor or outside space owned, leased or otherwise under the operational control of NMSU. University owned property leased to other entities and not under the operational control of NMSU are not considered university premises for purposes of this policy.
  5. **Unprotected Speech** means speech that is not afforded First Amendment protection, such as commercial speech that is false or misleading. Other examples include fighting words, child pornography, defamation, and libel.
- E. Policy Statements: The university aspires to be an intellectually open campus. The free exchange of ideas, including written, spoken, and other forms of expression, reflects its public land-grant heritage, interest in diverse points of view, and commitment to excellence in education and research. Further, free expression and peaceful assembly are fundamental constitutional rights which NMSU wishes to recognize as fully as is consistent with the university’s mission. NMSU acknowledges that despite the high priority placed upon the right to freedom of expression, it is not without limits. Sometimes limitations are necessary to ensure public safety, prevent property damage, avoid undue disruption to university functions, or uphold federal and state laws prohibiting invidious discrimination.
1. **Public Forums** are areas that traditionally have been open to the public, such as parks, sidewalks, and lobbies as well as other areas that become public forums by university designation. Free expression and civil discourse are encouraged in public forums, and any regulation of expression within a public forum must be narrowly tailored to serve a compelling state interest. Some public forums may be reserved for specific events in accordance with the Procedural Guidelines, which may then convert the location to a limited or non-public forum during the time of the reservation.
  2. **Limited Public Forums** are areas open to the public or a segment thereof (including through the purchase of admission), but where there is a specific

purpose. The necessities of confining a forum to the limited and legitimate purpose for which it was created may justify some limitations that are narrowly tailored to allow the event or activity to continue and/or achieve its intended purpose. Any limitations must be consistent with the spirit of this policy. Legitimate limitations include subject matter and classification of participants (students, student government representatives, faculty, etc.). Limitations must be reasonably related to a definite and substantial university interest. Any limitations must be content neutral, and aimed solely at reducing or preventing disruption to the activity that would cause a definite and measurable interruption to the intended purpose, or protecting other clearly compelling university interests (e.g., public safety). If a limited public forum serves more than one purpose, the university may prioritize the purposes for which it may be used, e.g. a campus auditorium may give priority to theater productions. Expression within a limited public forum is permitted consistent with the Procedural Guidelines administered by the Office of Campus Activities.

3. **Non-Public Forums** are areas not open to the general public and where expression by those permitted to be there may be reasonably limited, in a content neutral manner, to that which is compatible with the purpose and nature of the location. (Examples include faculty and administrative offices, classrooms, residence hall rooms.)
4. **Restrictions on Expression for Special Situations:** Individuals who voluntarily join certain organizations, such as the university police department, ROTC, athletic teams, and confidential research projects, may be subject to additional restrictions on their freedom of expression, but such restrictions should be limited to what is necessary to the group's function or purpose.
5. **Disruption of other activities:** Regardless of the type of forum, free expression activities and events shall not materially or unreasonably interfere with the education, research, public service, and outreach missions of the university, office operations, or sleep of residents.
6. **Modes of Free Expression:** The following provisions reflect the university's efforts to maximize freedom of expression consistent with the university's ability to accomplish its missions. Any restrictions described herein are intended to safeguard the missions and personal safety, and not to unnecessarily hamper freedom of expression.
  - a. **Distribution and Posting of Literature and Signs:** Individuals or groups may petition, distribute non-commercial written material, hand out newspapers, or conduct speech acts.

- i. Literature may be distributed hand-to-hand, through the use of tables, or by posting on designated bulletin boards and kiosks.
  - ii. In-person distribution must be done without the touching of another person.
  - iii. Materials may not be affixed to any part of a university building or structure without university permission. Authorization or prohibition must be content neutral, and permission may not be withheld in contravention of E.1, E.2, and E.3. (*For authorization, see Procedural Guidelines*)
  - iv. Posting on traffic signs, power poles, trees, landscaping, or automobiles belonging to others is not allowed.
  - v. Tables are allowed as long as the tables do not unreasonably interfere with pedestrian traffic, to include blocking ingress or egress. While scheduling of tables is not required in advance, individuals who have reserved a site will be given priority. (*For reservations, see Procedural Guidelines*)
- b. Group Speech Activities, including rallies, parades and demonstrations:
- i. Any group speech activity, regardless of the number of expected participants, may be coordinated through the Office of Campus Activities or the University Police Department, at the discretion of the organizers.
  - ii. When activities are likely to draw 250 or more participants, necessitate road or parking lot closures or detours, or deny others access to or reasonable use of NMSU property, the organizers must schedule in advance and obtain a permit. (*For permits, see Procedural Guidelines*)
- c. Political activities must be conducted in a manner that does not imply the university officially endorses or supports a particular candidate or position.
- d. Electronic Sound Amplification: When consistent with the approved uses of these areas, the use of electronic sound amplification equipment is authorized in the open lots to the east of the Pan American Center and Aggie Memorial Stadium, the Corbett Center Outdoor Stage, and the Miller Field Gates area off Espina Street, from 8:00 a.m. to 7:00 p.m., Sunday through Thursday; and from 8:00 a.m. to midnight on Friday and Saturday. Sound amplification equipment may be allowed at other times and in other locations if coordinated and approved in advance through the Office of Campus Activities. If these areas are already in use for a scheduled activity or event, these areas may become limited forums and there may be restrictions as a result.

- e. Use of Chalk: Chalk may be used on university premises as long as it is restricted to exterior concrete walkways. All chalk used must be of a temporary or removable nature. The university's maintenance schedules relating to university facilities will not be deferred to protect chalk.
- f. Symbolic expression requiring a permit: Any individual or group who plans free expression activities that involve fire, weapons, or nudity must first obtain approval from the Office of Campus Activities and the University Police Department. The purpose of this is not to impede symbolic expression, but to ensure the safety of the university community, protection of property, and compliance with applicable laws and ordinances. For other types of symbolic expression that an individual or group believes might generate a safety concern, coordination with the University Police is recommended.
- g. Electronic communication (e.g, email, social media): Similar to public spaces, electronic communication may fall within a public, limited public, or non-public forum. **The protections set forth in this policy extend to electronic communication, with similar limitations. Where a site owned, operated, or otherwise controlled by NMSU is limited to certain members or subjects, speakers must be authorized participants whose communications are germane to the stated subject matter. With regard to communications using electronic and other media, speakers should be aware of federal, state and university anti-discrimination laws and policies, and NMSU's obligation to enforce such laws and policies. See, for example: Title IX (20 U.S.C. §1681 et seq. and 34 C.F.R. § 106.1 et seq.); Title VII (42 U.S.C. §2000e et seq., as amended; and NMSU Policies 3.25 (Discrimination, Harassment and Sexual Misconduct on Campus); 2.35.1.1.1 (Acceptable Use); 3.99 (Prohibition of Hazing and Hostile Misconduct).**

## 7. Respect for Rights of Others:

- a. Prohibition of Third Party Interference with Right to Free Expression: Except as provided elsewhere in this policy, university employees, students, and other members of the public shall not interfere with the rights of freedom of expression by others permitted by this policy. Alleged violations of rights afforded by the U.S. and N.M. Constitutions, recognized by this policy, will be taken seriously and investigated promptly and objectively.
- b. Retaliation Prohibited: Retaliation against individuals who have exercised the rights granted by the First Amendment, recognized through this policy, is strictly prohibited. Any such claim shall be reported immediately to the Assistant Vice President of Human Resource Services. Such claims will be taken seriously, investigated independently, and if substantiated, will be

grounds for corrective or disciplinary action, appropriate to the circumstances.

8. **Respect for University Property and Functions:** In exercising the right of free expression and peaceful assembly, individuals must also accept the responsibility of following the laws related to the safety of people and property. Outdoor and indoor activities must follow all applicable fire codes and other local, state, and federal laws.

a. Expressive activities in any type of public forum shall not:

- i. Unreasonably obstruct vehicular or pedestrian traffic;
- ii. Restrict public access to the entrances or exits to buildings and facilities;
- iii. Permanently occupy land areas;
- iv. Unreasonably interfere with or disrupt classes, university academic or administrative operations, including scheduled events;
- v. Cause damage to buildings, utilities, or landscaping;
- vi. Erect structures that are dangerous or cannot be easily dismantled and removed;
- vii. Cause injury or damage to persons or property;
- viii. Litter or stake on university premises unless authorized by this policy;
- ix. Affix materials to buildings or other structures unless authorized by this policy or the Procedural Guidelines.

b. If there is doubt about whether expressive conduct violates the above, university officials should take effort to resolve the doubt in favor freedom of expression. Such resolution should be based on objective evidence of actual disruption in accordance with E.1, E.2, and E.3.

9. **Sanctions:**

a. Individual Consequences for Conduct Not Protected by Constitution or This Policy: Nothing in this policy protects expressive activities which:

- i. constitutes criminal, defamatory, or discriminatory misconduct;
- ii. contains true threats of violence or imminent harm; or
- iii. seeks to incite, or intentionally incites, a fight.

Individuals engaging in such conduct may face criminal prosecution, civil lawsuit, and/or disciplinary action. (*For example, see Policies 3.10; 3.25; 5.47, 8.30*). This policy does not provide a defense to individual liability for such prohibited conduct.

- b. Disclaimer of Liability: NMSU shall not be liable for any injuries to participants or third parties caused by individuals or groups engaging in freedom of expression activities.
- c. Damage or Injury: If property damage or personal injury occurs, individuals or groups determined to be responsible may be subject to appropriate administrative, civil, or criminal action, for the purpose of covering the university's costs associated with the damages. Additionally, while generally NMSU wishes to facilitate free discussion, nothing in this policy is intended to eliminate any rights of persons to pursue any legal remedies they may have under local, state, or federal law.
- d. Unattended or abandoned materials: Materials used for free expression activities (literature, signage, etc.) shall not be left unattended. Any items that are left unattended for more than thirty (30) minutes may be removed by the university at the owner's expense. Signage promoting or providing directions to an event are allowed on the preceding day for a morning event or on the day of an afternoon or evening event, will not be considered to have been left unattended, and shall be removed by the event organizers at the conclusion of the event. Permission for posting or leaving of materials outside of the above restrictions may be granted on a case-by-case basis by the Office of Campus Activities.
- e. Consequences: Any person determined to have violated this policy may be subject to consequences that include, but are not limited to, the following. These are not required to be progressive nor sequential in order of application and will be imposed based on the severity of the infraction.
  - i. Non-punitive measures, to include an educational or training program, designed to bring conduct in compliance with this policy;
  - ii. Being asked to cease and desist or to relocate by appropriate university employees acting within the scope of their duties;
  - iii. Being ordered to leave the premises or property owned or controlled by the university by the police or a person in charge of the property;
  - iv. Applicable institutional disciplinary proceedings for students, faculty, staff and/or others, as appropriate;
  - v. Prosecution for violation of local, state, and/or federal law(s);
  - vi. Restriction of future use of, or access to, the university campus; and/or
  - vii. Reimbursement for damages.

#### **10. Interface with other laws and regulations:**

- a. Although a detailed examination of statutes and regulations which protect individuals from sexual harassment, invidious discrimination, hostile

environment and other discriminatory conduct is beyond the scope of this Freedom of Expression policy, nothing in this policy is intended to insulate those whose conduct may discriminate, harass or otherwise create a hostile environment based on gender, color, religion, age, national origin, disability, or sexual preference from being held accountable for the consequences of their actions, if they are found to violate state or federal laws or university policy proscribing invidious discrimination. Nothing in this policy is intended to provide, or should be interpreted to provide, a defense in any legal action against any third party by an alleged victim of defamation, libel, slander, invasion of privacy, assault, or any other civil claim.

- b. The offensiveness of speech, standing alone, is generally insufficient to establish a hostile environment. The harassment must be sufficiently severe, persistent, or pervasive to limit or deny the ability to participate in or benefit from an educational program or other university activity. The conduct will be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances.

- F. Cross References and Procedural Guidelines: To facilitate the implementation, administration and enforcement of this policy, the policy administrators identified above may develop and issue supplemental [Procedural Guidelines](#) (includes protocols, forms, flowcharts, etc.), consistent with the policy. The Chancellor/President's appointed ombudsperson will facilitate resolution of issues and community education regarding this policy. All procedural guidelines, forms, etc. utilized in the application or enforcement of this policy shall be posted at an appropriate NMSU website, and linked from this section. Other related reference material relating to freedom of expression, anti-discrimination laws, hate crimes, etc. may also be linked from this Section with the approval of the policy administrators.