



University of Maine at Augusta

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TO: Members of the Board of Trustees of the University of Maine System
FROM: Concerned Staff and Faculty of UMA
REGARDING: Proposed University of Maine System Speech Policy

March 16, 2018

The following is a response to the latest draft of a proposed University of Maine System policy regarding the limitation of constitutional First Amendment rights of assembly, speech and petition within University of Maine System campuses. This draft was provided to University of Maine at Augusta representatives to the Board at 8:18 PM on the night of Thursday, March 15 2018. It should be noted that only 8 working hours on an official university break week lies between that release time and the Board of Trustees' Monday morning meeting in Portland at which a vote on the policy is anticipated. As a consequence, a fully consultative process for obtaining feedback from UMA students, staff and faculty is impossible. This statement therefore should be read as the feedback of a set of active UMA community members, not necessarily representative of the sentiment of the whole.

We have significant concerns regarding the proposed policy in the areas of process, policy clarity, restriction of freedom, and institutional impact.

Concerns Regarding Process

As noted above, the release of the text of a significant policy only 8 working hours before an anticipated March 19 vote on its final passage makes full consideration of and consultation regarding the policy a practical impossibility. The release of this text during an official university break week, with all students and most faculty absent from campus, is especially concerning.

It should be noted that the UMA Faculty Senate forcefully articulated this concern to UMS Counsel James Thelen during his sole consultative visit to the UMA campus on the subject on February 16. Mr. Thelen pledged to the Faculty Senate that a draft would be made available for general review between March 6-9. The Faculty Senate unanimously passed an official resolution on February 16 calling on the Board of Trustees to postpone any vote on the policy until the Board's meeting in May to allow for a more reasonable feedback period. The text of this resolution reads:

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“The University of Maine at Augusta Faculty Senate thanks Jim Thelan for explaining the policy on political speech and for providing us the opportunity for feedback. We respectfully request that the vote on this policy be postponed until May, thus providing us the opportunity for feedback on the draft expected to be released prior to the March break.”

To the best of our knowledge, the Faculty Senate has received no response to its resolution.

The dates of March 6-9 passed without the pledged release of a policy draft, although a Board of Trustees agenda was posted for review on the Internet at the beginning of official university break week without any reference to UMS speech policy, appearing to place the speech policy out of consideration. At 4:30 PM on Thursday, March 15, eight and one-half working hours before the Board of Trustees meeting, a revised agenda including a speech policy vote was posted to replace the prior agenda.

In a further process matter, the italicized “discussed” text appearing at the end of the policy draft document is misleading. The latest draft of the policy is much changed from prior drafts; the current draft was not discussed with any bodies outside the Board of Trustees before March 14, 2018. “3/15/18 (via email)” is listed as a point of discussion, but more accurately it represents a moment at which the draft was released, not discussed. As of the morning of March 16, the sum total of known discussion on this draft is a small handful of private e-mail messages to the UMS counsel.

Were the subject matter of this policy inconsequential, the lack of full notice and the lack of allowance for full feedback might be of little concern. However, in order to thrive universities rely on constitutional First Amendments freedom of speech, freedom of assembly, and freedom of petition. The considerable possible impact of this policy on the health of the intellectual and civic community of the University of Maine at Augusta makes a process of full consultation and feedback especially important.

In its March 2007 statement on shared governance, the Board of Trustees declares:

“Effective decision-making depends on accountability and the development of trust among the parties. This trust then provides the foundation for effective activities and efficient use of participants’ time and reflects the collective knowledge of both faculty members and administrators....

“Those involved in shared governance need to be sufficiently informed to participate effectively....

“the University of Maine System Board of Trustees strives to strengthen communication and participation of faculty, students and staff....

“In major decisions regarding the direction of the university, such as mission, strategic plans and budgets, it is desirable that input be sought from all involved groups early in the process and that

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final decisions be communicated to all parties. Channels for communication, consultation and information dissemination should be widely known and documented. Faculty participation in discussion of these topics should be encouraged.”

We firmly support the model of shared governance outlined by the Board of Trustees as essential to the maintenance of trust within the University of Maine System. We firmly believe that a vote on the draft speech policy on Monday, March 18 would be viewed by many as undermining that trust. For that reason, and to ensure a policy that works best for the communities of the University of Maine System, we second the UMA Faculty Senate’s request for a delay of a final vote on this speech policy until the Board of Trustees’ meeting in May.

Concerns Regarding Policy Clarity

In addition to concerns regarding process, we also have concerns regarding the clarity of the policy. In general, the policy shifts between language indicating on the one hand that it is a rhetorical resolution regarding UMS *values* and language indicating on the other hand that it is a policy document permitting only some courses of *action*, mandating others, and forbidding yet others. We note that celebrations of “constitutionally protected free speech rights, individual rights as citizens, and faculty academic freedom” are worded as rhetorical values, but then are contradicted by policy language that appears to restrict these constitutional rights and freedoms in action.

For instant, the third paragraph of the latest draft of the proposed policy reads “UMS and its constituent universities fully embrace the First Amendment rights of all citizens, including *all students and employees, to hold and express* political, social, or religious views *of any kind.*” But the sentence before this passage declares two limitations on expression of views, and the text that follows this passage places many limitations and prohibitions on the expression of political and social views of many kinds. In another contradiction, the first sentence of the second paragraph of the policy draft indicates that “this policy is subject to Board Policy 212.” What does “subject to” mean? Does it mean that all provisions of the new policy that are contradicted by Board Policy 212 are canceled? Or does “subject to” mean something else? If so, what? Problems of consistency with Board Policy 212 become clear with a cursory review of that policy’s text, which declares:

*“The Board of Trustees is committed to protecting the rights all University community members share to free speech, which includes free expression and assembly, as enshrined in the U.S. and Maine State Constitutions. There **shall be no restriction at any System institutions on these fundamental rights**....*

*“Academic freedom is the freedom to present and discuss all relevant matters in and beyond the classroom, to explore all avenues of scholarship, research and creative expression, and to speak or write **without any censorship, threat, restraint, or discipline by the University** with regard to the pursuit of truth.”*

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As drafted, however, this current Board proposal would restrict and restrain speech and expression by university members in a number of ways. If this document is to be read as an actionable policy, which of these contradictory passages take precedence?

Other unclear language:

- Page 1, Paragraph 2: “responsibly disseminate their research and knowledge.” What does “responsibly” mean? How is responsibly operationally defined? How are faculty supposed to be responsible, and to what bodies? What sort of response by faculty is envisioned? When faculty research findings or the state of knowledge in an academic literature contradict politics, what is the envisioned “responsible” course of conduct?
- Page 2, Paragraph 2: “participate” and “intervene” in a “campaign.” These terms are similarly undefined and yet highly consequential. The dissemination of research and knowledge often “intervenes” in political activity, changing its course. And what is a “campaign?” Modern “campaigns” often involve the “participation” of ancillary communications that are not part of a candidate committee’s official organization. In our modern media environment, any communication of substance has the potential to “intervene” in a “campaign” by shaping its fate. This sentence could be reasonably read as permitting the dissemination of research and knowledge so long as such research and knowledge has no intervening effect upon the trajectory of any candidate’s run for office.
- Page 2, Paragraph 3: “interfere with or impair.” Yet again, undefined. What is an impairment? Is generating complaints by students who disagree an “interference” or an “impairment”? Is harassment campaign waged by bots or trolls against a university or its employees an “interference” or “impairment” of the university’s actions? It could be reasonably concluded that the only way to ensure that the smooth functioning of a system is not “interfered” with or “impaired” is to remain non-controversial and offend no one. On the contrary, it could be reasonably concluded that to “interfere with or impair” a placid university environment is an often natural, important and even productive consequence of free speech (see, for instance, the sentiment of Policy 212 Section 2, Paragraph 3). And who decides what constitutes “interference?” Who decides what constitutes “impairment?” On what basis?

The answers to these questions are not clear in the draft policy, making the policy as written at best a poor guide and at worst an instigator of future conflict. When language is unclear in a policy with implications for action, greater rather than lesser uncertainty may result.

Concerns Regarding Restriction of Freedom

Despite the assurance of the second paragraph of this draft policy, subsequent paragraphs appear to place significant restrictions on the speech of UMS faculty, staff and even students.

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Consider the phrase “UMS Legislative Advocacy.” The declaration is made that “system legislative advocacy... may only be pursued by individuals authorized by UMS for that purpose.” But “UMS Legislative Advocacy” is defined with astonishing breadth to include interaction with:

- Individual legislators
- Legislative committees
- Legislative staffers
- The office of the Governor
- The staff of the Governor
- The executive branch of the United States government
- United States government agencies
- Federal regulatory bodies
- “Any other public official”
- “The general public”

Defined this broadly, “UMS Legislative Advocacy” consists of talking to human beings. When the provision of “advocating for a specific UMS institutional position or outcome is added,” the prohibition can be literally taken to mean that no employees are permitted to talk to any human beings about how they feel about UMS policies or about how they would like to see the university to develop toward desired outcomes.

Further paragraphs partially contradict this text by indicating that UMS employees and bodies may engage in contact with the above bodies, but only “when required to do so by grant, contract or legal mandate.” Employees who feel bound by honor, principle, or moral scruple to contact such bodies are by this policy’s language not permitted to make contact with political bodies. Similarly, professionals who are bound by codes of ethics in their professions are not permitted to use their professional codes of ethics as a basis for political advocacy within and regarding the University of Maine System. This restriction has the dangerous potential to force UMS professionals to choose between violating UMS policy and violating their profession’s ethical code.

Application: Student Organizations and Civic Engagement Activity

Moving on to restrictions on “partisan political activity,” we note the restriction on First Amendment rights stipulating that “university employees” “cannot participate or intervene in any partisan political campaign on behalf of, or in opposition to, any candidate for public office” unless they “do so on their own time, without using System or University funds or resources of any kind.”

One simple problem identified in previous feedback but nevertheless unresolved in the current draft has to do with the notion of “their own time” as refers to salaried employees, who do not work on any clock and who wear the title of their profession at all times. This phrase would appear to ban political activity by all salaried employees.

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In addition, as currently written, the draft policy's prohibition on the use of resources would:

- Ban faculty advisors of clubs such as College Democrats and College Republicans;
- End Student Life personnel or budgetary support for such student clubs;
- Require that such student clubs lose official status and move exclusively off campus for meetings and activities;
- End the practice of universities hosting candidate forums and debates;
- Threaten voter registration drives on campus to the extent that students tend to predictably vote in a certain partisan direction;
- Prohibit classroom discussions or co-curricular campus events that might change the minds of participants when it comes to their opinion of elections or candidates.

The resources required to police such restrictions would be considerable and invasive, opening up student organizations and classrooms for investigation and discipline. The restrictions would also be interminable. Consider, to provide just one example, that the current President of the United States filed for Election 2020 candidate status on his first day in office. If the President of the United States is a perpetual candidate, and if no university "funds or resources of any kind" may be expended in an activity that has the possibility of generating "opposition to any candidate," then this policy would appear to perpetually prohibit criticism of the President of the United States on UMS campuses.

Application: Education Policy Consultation

Consider this passage of the draft policy:

"All UMS legislative advocacy without exception will therefore be managed through the Chancellor's office, specifically the Office of Community and Government Relations. System legislative advocacy, including university-specific advocacy, may only be pursued by individuals authorized by UMS for that purpose. For the purposes of this policy, 'UMS (or System) legislative advocacy' includes interaction with the State Legislature, including individual legislators or legislative committees and their staff, the Governor's office and staff, or any other public official or the general public when the purpose of the interaction or communication is to advocate for a specific UMS institutional position or outcome.... This policy does not restrict any UMS faculty, staff, or student from speaking on political matters, including testifying before or speaking with legislators or policy makers, about the subjects of their teaching or research expertise or personal experience, provided they do not represent that they speak for their campus or the System unless specifically authorized to do so."

This passage appears to prohibit education faculty in the system from testifying in person or in writing regarding teacher certification rules before the legislature. This will severely inhibit schools of education from helping to shape teacher education policy, something that has been expected and accepted by the legislature. The Education and Cultural Affairs committee is currently relying on such advice from university faculty on Chapter 115 rules that will impact the ways in which teachers are certified. The point is that none

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of these faculty are claiming to be testifying individually; they are advocating for our students in the UMS system. It appears these faculty would not be able to contribute in the future under this policy.

Application: Campus Justice and Inclusion Initiatives

Public universities are fundamentally rich ground for the expression of conflicting viewpoints. Not only are individuals brought together who may have vastly differing views, but institutions of higher education are also entities that through action support particular values. For example, at the University of Maine at Augusta, there are institutionally supported activities such as the Safe Zone Project that promote inclusion, acceptance, and allyship with the LGBTQ community. Trained university faculty and staff facilitate this program. Under the proposed BOT policy, these activities could be prohibited as the program itself does not remain impartial to all political, social, or religious viewpoints – in fact, the program aims to strengthen a culture that is accepting of individuals of all sexual orientations, identities and genders. Such activity could be considered politically “partisan,” considering that some party platforms in this century have made explicit their opposition to the sort of activities that the University of Maine System has expressly embraced.

While the university must continue to be a place where contrarian viewpoints can be expressed and debated, there is a compelling interest for the university to advance a number of social justice issues. These are matters of public concern and should be protected. The proposed BOT policy, however, will have a chilling effect on individuals called to speak and act on such matters.

Promoting fundamental equality, no matter one’s sexual orientation (or race, birthplace, citizenship, etc.) is an institutional value with political, social, and religious impacts. It is not enough to simply espouse non-discrimination as practice because of civil rights laws. Our institutional culture requires that we promote more than tolerance, and instead equal dignity, worth, and inclusion – those values are not neutral and we will not remain impartial to intolerance, hate or bigotry. To quash promotion of these fundamental ideals and aspirations will injure the institutional culture, and our students, faculty and staff.

Application: Campus Safety Legislation

At times there are legislative proposals that arise which could potentially affect the safety, security and welfare of the entire University population. For instance, L.D. 1370 in the 128th Maine Legislature proposed allowing firearm possession on university/college campuses in Maine. Though this proposed “Act to Enhance Safety on College and University Campuses” was not supported by UMS, an employee with safety and security responsibilities at a UMS institution may want to, expressly acting as an individual, express at a legislative hearing a personal opinion contrary to the University’s official position. Would it be reasonable for an employee with security responsibilities to actually speak from the basis of their experience at their university? We think so. Yet such a

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person's free speech would under the new policy "without exception therefore be managed through the Chancellor's office," representing a significant diminishment of free speech rights.

The lack of definition regarding "interference" or "impairment" may have a significant stifling effect on an individual's personal expression. For this example, would it be reasonable for an employee with security responsibilities to be concerned that should they express a pro-campus carry position their viewpoint could be construed as "interfering" with or "impairing" their ability to do their job? We think so. Should these difficulties overrule the right of an employee to speak their mind? The chilling effects of this policy on free expression in the university environment are worth serious consideration.

Concerns Regarding Institutional Impact

The above sections of our statement identify ways in which the draft policy as currently written could if implemented threaten the rights and freedoms of UMS staff, faculty, and students. But it is also worth considering the ways in which this draft policy could threaten the UMS itself as an institution. In passing a policy that outlines poorly defined, contradictory, and possibly unconstitutional restrictions on the fundamental American rights of speech, assembly and petition, the UMS Board of Trustees opens the door to significant litigation. Lawsuits from within by (notoriously contrarian) academics who are not inclined to surrender their fundamental American rights could drain considerable resources from the already resource-strapped University of Maine System.

Such lawsuits from within might be dwarfed by lawsuits from external political agitators. This policy can be read as an instruction manual for litigators wishing to file suit against public universities, to provoke the firing of staff and faculty, to force revocation of university club status, or to simply intimidate any of these into silence with the express or implicit threat of legal action. As it currently stands, UMS response to complaints about political statements by faculty, staff and students is a relatively simple two sentence construction: "The University of Maine System values free speech. [Insert name of student, staff or faculty] is free to speak for [insert pronoun]self." The new policy would introduce a variety of legal considerations when drafting a response to a complaint:

- Did a faculty member disseminate research or knowledge "responsibly" or irresponsibly?
- Did the knowledge shared by a staff member have the effect of "intervening" in the result of an election?
- Did a faculty member mention an idea about improving the University of Maine System in "general public"?
- Does holding an unpopular opinion "impair" the ability of a staff member to function?
- Did the outcome of a university candidate forum lead to people making decisions

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about which candidates they'd vote for?

- Do the activities of a student organization have the effect of promoting or amplifying the “campaign” messaging of a particular political candidate?

When brought to the courts, these kind of complicated questions can be tied up for months, if not years, in “reasonable person” debates, depositions, and appeals. The chilling effect on the UMS budget could be profound.

Beyond the threat of lawsuits, the passage of this policy has the potential to erode the positive institutional culture that the University of Maine System currently enjoys, in which ideas are free, debate is encouraged, dissemination of knowledge is valued and its restriction is disdained. This pro-expression, pro-innovation, even pro-disruption environment is responsible for the inventiveness that Mainers have come to expect from our universities. Changing this culture to one in which expressions are tightly constrained and ideas are subject to prior office approval has the potential to dampen the kind of innovation that the state and the people of Maine need.

Given the significant number of problems raised by the text of the current draft policy, and given the lack of opportunity for significant discussion regarding the draft, and finally given the lack of any current crisis faced by the University of Maine System due to the policy's absence, we feel it would be prudent to postpone a vote on the draft policy to the meeting of the Board of Trustees in May. Given the potential hazards of this territory, it is far less important to make a decision quickly than it is to make a decision well.

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