

## **Notes on UNM Policies that undermine academic free speech and violate the constitutional rights of faculty, staff, and students**

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### **Executive Summary**

- Several current UNM policies violate the Constitutional rights of faculty, staff, and students to freedom of speech and freedom of conscience under the First Amendment ('1A' hereafter). These policies are also inconsistent with the several UNM policies that explicitly protect our free speech rights.
- These policies were often well-intentioned, and accreted gradually over the years, but they appear to have been written and adopted without anyone seriously checking whether they were 1A-compliant.
- These unconstitutional 'speech codes' (policies that limit free speech) violate our rights as citizens at a public university, are contrary to academic values, undermine faculty autonomy, trivialize the education of our students, and make UNM vulnerable to costly litigation.
- If we eliminate these speech codes, UNM could, at a negligible cost, improve its reputation as a bastion of free inquiry and teaching, increase its attractiveness to new faculty, students, and staff, and reassure alumni, donors, politicians, the media, and the citizens of New Mexico that we are a serious and principled university.
- To fix these problems, a few policies need to be repealed entirely. A larger number need substantial revision. Some just need minor tweaks. (Specific policy problems are detailed below.)
- Beyond revising its formal policies, UNM could also improve its culture of free speech and improve understanding of 1A issues among faculty, staff, students, and administrators (e.g. through online training courses, freshman orientation, new faculty orientation, public talks, etc.). Ignorance about free speech rights has led to some embarrassing recent lawsuits against UNM, such as:
  - a) the Kathy Korte case (in which a UNM employee was forced to resign after exercising her rights to political free speech in an online posting): <http://krqe.com/ap/lawsuit-against-unm-over-free-speech-settled/>
  - b) the Monica Pompeo case (in which a student was excluded from a UNM Cinematic Arts course for expressing religious views that upset her professor): <http://www.abqjournal.com/480563/news/lawsuit-tests-speech-limits-at-university.html>
- Caveat: I'm not a constitutional law expert. I've just read some books on these issues and learned from a few experts. Some of my comments and interpretations are probably wrong. This document is intended to provoke discussion, not to be the final word on anything.

### **Priorities for change**

**Policies to eliminate entirely:** These seem hostile to free speech in their whole conception, and would not withstand serious judicial scrutiny or public criticism; they impose an especially high risk of litigation on UNM, and have an especially serious chilling effect on academic discourse.

Faculty handbook:

- C09: Respectful campus

UAP:

- 2240: Respectful campus
- 2100: Sustainability

Policies that require substantial revision: These policies would require careful and substantial rewriting to become 1<sup>st</sup>-Amendment-compliant. Better examples of such policies are available from other universities.

UAP:

- 2720 Equal opportunity, esp. 2.2 Harassment (many severe problems)
- 2730 Sexual harassment (many severe problems)

UNM Residence Life & Student Housing policies

- Bias-Related Incidents

Policies that need minor revisions: These policies are largely constitutional, but could benefit from a few revisions to certain parts.

Faculty Handbook:

- A20: Academic freedom [note that this statement is not part of the Policy on Academic Freedom in Part B of the Faculty Handbook]

UAP:

- 1000/3: Mission of the University of New Mexico
- 2220: Freedom of expression and dissent
- 2230: Police and security services
- 3740: Media response

Regents Policies:

- 2.1 Free expression and advocacy
- 2.5 Sexual harassment

### Introduction by way of glossary:

This section explains some legal terms used by 1A lawyers to describe free speech concepts; later I'll use these terms in comments on specific UNM policies as a shorthand to indicate how they're unconstitutional.

- Protected speech: Speech, writing, online comments, and other forms of communication that are protected by 1A's Free Speech Clause. Many Supreme Court decisions have made it clear that almost all speech at American public universities is protected speech, with only a few narrow and clear exceptions ('fighting words' intended to provoke an immediate, face-to-face, violent reaction, incitements to violent riot, hard-core obscenity, child pornography, criminal threats, discriminatory harassment, and false defamation)
- Compelled speech: Government-mandated expressions of values and ideologies that violate individuals' freedom of speech and freedom of conscience. It is unconstitutional to force citizens – including faculty, staff, and students at public universities – to profess any officially approved beliefs or orthodoxies, including any particular political, philosophical, social, sexual, moral, environmental, or diversity-related values. The landmark case is the Supreme Court *Barnette* decision, 1943: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Several UNM policies impose compelled speech unconstitutionally, either repeatedly throughout a policy (as in University Administrative policies 2110 (Sustainability) and 2240 (Respectful Campus), Faculty Handbook policy C09 (Respectful Campus), and the OEO Hate/Bias incident reporting policy), or incidentally by poorly chosen language in certain passages (as in University Administrative policies 2720/2.2 (Harassment) and 2730 (Sexual Harassment)).

- Viewpoint discrimination: Ideological censorship in its purest form, violating the 1st amendment and 14<sup>th</sup> amendment (due process, equal protection). Universities may not regulate speech on the basis of the point of view it conveys – however politically correct or ideologically abhorrent that viewpoint (Rosenberger v. U. Virginia, 1995; U. Wisconsin v. Southworth 2000). This is common in many of the same UNM policies that prohibit ‘prejudiced’, ‘sexist’, or ‘disrespectful’ values, or that impose compelled speech (see above).
- Prior restraint: Prohibiting speech before it is spoken, e.g. administrators imposing editorial control over student newspapers, requiring prior approval of campus speakers or pamphlets, requiring prior police approval for campus meetings or rallies, etc. (NY Times v. U.S. 1971). Mainly a problem in UAP policy 2230: Police and security services.
- Overbreadth: Often, well-meaning policies are written too broadly so they accidentally but significantly restrict constitutionally protected speech (see Doe v. U. Michigan 1989; DeJohn v. Temple University 2008). For example, most university policies that advocate ‘civility’ or ‘respectful environments’, or that prohibit sexist or racist speech, have been found to be overly broad when legally challenged. An overly broad policy cannot be salvaged by adding a ‘savings clauses’ that gives lip service to free speech (College Republicans at San Francisco State U. v. Reed, 2007). Overbreadth often overlaps with vagueness (see below). A common problem in UNM policies.
- Vagueness: Vagueness in policies and laws is unconstitutional because individuals must have ‘fair warning’ about what exactly is prohibited versus permitted (Grated v. City of Rockford 1972: a law must “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”; also see McCauley v. U. Virgin Islands 2010). Vagueness imposes an unconstitutional chilling effect on free speech (see below). Vagueness often overlaps with overbreadth (see above), and is a very common problem in UNM policies. Vagueness is especially dangerous because it gives university administrators very wide latitude in deciding what speech they consider annoying, offensive, or disruptive (especially in the face of media outcry), and this often leads them to violate our rights to due process.
- Chilling effect: Inhibiting or discouraging free speech through uncertainty and confusion about what is permitted, and fear of viewpoint discrimination (e.g. through selective enforcement and lack of due process). Often caused by overbreadth and/or vagueness, and policies or cultures that imply viewpoint discrimination or that call for compelled speech. Any policy that causes citizens to hesitate to exercise their free speech rights has a chilling effect, and is unconstitutional. This is a very common problem in UNM policies – some of which are explicitly designed to impose a chilling effect on protected speech.
- Savings clause: A clause that pays lip service to 1A (trying to ‘save’ our free speech rights) in a policy that otherwise violates 1A. Commonly found in UNM policies; the usual effect is to create considerable vagueness so that nobody knows what is actually permitted.
- FIRE: The Foundation for Individual Rights in Education, the leading organization that protects free speech rights at American universities: <https://www.thefire.org/> . Awarded UNM a ‘red light’ (their worst rating) for several policies that violate 1A: <https://www.thefire.org/schools/university-of-new-mexico/>

#### **Suggested further reading and viewing on academic free speech vs. speech codes**

- This influential new Atlantic article by Jonathan Haidt and Greg Lukianoff on ‘The coddling of the American mind’ explains how misguided speech codes harm students: <http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american->

[mind/399356/](#). It influenced President Obama's recent comments on the importance of academic free speech and the chilling effect of speech codes:

<https://www.youtube.com/watch?v=mi5da2AhDCY> (6 minute video)

- This American Association of University Professors (AAUP) document reviews the constitutional law supporting academic free speech: <http://www.aaup.org/our-work/protecting-academic-freedom/academic-freedom-and-first-amendment-2007>
- The Guide to Free Speech on Campus by the Foundation for Individual Rights in Education (FIRE) explains the constitutional law problems with most university speech codes: <https://www.thefire.org/fire-guides/fires-guide-to-free-speech-on-campus-3/>
- The FIRE guide to correcting common mistakes in campus speech policies: <https://www.thefire.org/spotlight/correcting-common-mistakes-in-campus-speech-policies/>
- The new U. Chicago policy on freedom of expression strongly protects academic free speech, and could be a model for UNM: [provost.uchicago.edu/FOECommitteeReport.pdf](http://provost.uchicago.edu/FOECommitteeReport.pdf)
- Examples of university speech-related policies that were revised to become 1A-compliant:
  - U. North Carolina: <https://www.thefire.org/university-of-north-carolina-at-chapel-hill-earns-fires-highest-rating-for-free-speech/>
  - College of William and Mary: <https://www.thefire.org/new-video-william-mary-alum-braum-katz-shares-tips-on-getting-your-school-to-green-light/>
  - U. Virginia: <https://www.thefire.org/university-of-virginia-eliminates-all-speech-codes-earning-fires-green-light-rating-2/>
- More generally, here's a recent BBS target article that analyzes the scientific costs of imposing ideological homogeneity on a field of research and teaching (e.g. the secular blank-slate liberalism that dominates social psychology); speech codes are key tactics for excluding the voices of non-liberals (e.g. moderates, conservatives, libertarians, religious people) from academia: <http://heterodoxacademy.org/2015/09/14/bbs-paper-on-lack-of-political-diversity/>

## **Problematic policies are listed below, organized by source**

### **Part 1: Faculty Handbook policies**

Note: Faculty Senate appears to have primary responsibility for revising these policies, either as a whole, or via the Policy Committee.

#### **A20 (Vision, Mission, and Value Statements)**

<http://handbook.unm.edu/section-a/a20.html>

[.....]

**Academic Freedom:** As a center of knowledge, the University adheres to the doctrines of academic freedom and free speech. The University will continue to protect the exploration of ideas and will encourage inquiry and creative activity by students, faculty and staff. At the same time the University opposes statements and activities that reflect bigotry and prejudice and that consequently tend to diminish active participation by all elements of the academic community and to inhibit the free expression of ideas.

[....]

#### **C09 (Respectful Campus)**

**Commented [GFM1]:** This key statement on academic freedom needs revision to remove some unconstitutional language, and could benefit from expansion, clarification, and strengthening. At least, the one clearly unconstitutional sentence should be removed.

**Commented [G2]:** This language could be revised and expanded to defend free speech in much stronger and more detailed ways.

**Commented [G3]:** This sentence is clearly unconstitutional. It's vague (who defines 'bigotry' or 'prejudice'? What does it mean to 'reflect' bigotry and prejudice – who can read someone's true beliefs from their speech, especially if they're using humor, irony, or satire?). Imposes chilling effect: people will hesitate to say anything that might be heard as 'bigoted' or 'prejudiced' by someone. Imposes viewpoint discrimination (even the most bigoted or prejudiced speech is still constitutionally protected speech).

**Commented [G4]:** Flagged by FIRE as a 'red light' policy that clearly violates 1A: <https://www.thefire.org/schools/university-of-new-mexico/>. This whole 'Respectful Campus' policy is flagrantly unconstitutional and violates free speech in almost every possible way. It is a classic example of an unconstitutional 'speech code' of the sort that has been successfully challenged by litigation at dozens of universities. General problems throughout: vague, broad, chilling effect, viewpoint discrimination, compelled speech. I would suggest repealing the entire policy; it can serve no useful function as currently written, it can be selectively enforced by administrators, and it is one of the biggest threats to free speech on campus.

<http://handbook.unm.edu/section-c/c09.html>

### Policy Rationale

The University of New Mexico promotes a working, learning, and social environment where all members of the UNM community, including but not limited to the Board of Regents, administrators, faculty, staff, students, and volunteers work together in a mutually respectful, psychologically-healthy environment. UNM strives to foster an environment that reflects courtesy, civility, and respectful communication because such an environment promotes learning, research, and productivity through relationships. Because a respectful campus environment is a necessary condition for success in teaching and learning, in research and scholarship, in patient care and public service, and in all other aspects of the University's mission and values, the University is committed to providing a respectful campus, free of bullying in all of its forms.

### Policy Statement

This Policy describes the values, cornerstones, and behaviors that delineate a respectful campus and applies to all members of the UNM community, including, but not limited to students, faculty, and staff.

#### 1. Values

A respectful campus exhibits and promotes the following values:

- displaying personal integrity and professionalism;
- practicing fairness and understanding;
- exhibiting respect for individual rights and differences;
- demonstrating harmony in the working and educational environment;
- respecting diversity and difference;
- being accountable for one's actions;
- emphasizing communication and collaborative resolution of problems and conflicts;
- developing and maintaining confidentiality and trust; and
- achieving accountability at all levels.

#### 2. Cornerstones of a Respectful Campus

The commitment to a respectful campus calls for promotion of an environment where the following are upheld:

- All individuals have important contributions to make toward the overall success of the university's mission.
- UNM's mission is best carried out in an atmosphere where individuals at all levels and in all units value each other and treat each other with respect.
- Individuals in positions of authority serve as role models in the promotion of a respectful campus. Promoting courtesy, civility, and respectful communication is consistent with the responsibility of leadership.
- Individuals at all levels are allowed to discuss issues of concern in an open and honest manner, without fear of reprisal or retaliation from individuals above or below them in the university's hierarchy. At the same time, the right to address issues of concern does not grant individuals license to make untrue allegations, unduly inflammatory statements or unduly personal attacks, or to harass others, to violate confidentiality requirements, or engage in other conduct that violates the law or University policy.

Bullying is unacceptable in all working, learning, and service interactions.

[...]

**Commented [GFM5]:** NB According to University Counsel, the Faculty Senate Policy Committee is already working on revising this policy; but as far as I know, it is the only policy being subject to review so far.

**Commented [GFM6]:** Implicitly anti-free-speech. Equates 'mutual respect' with 'psychologically healthy' (but is it 'healthy' for victims of rape, incest, or bullying to show 'respect' to their abusers?). I'd also dispute that university policies should make any assumptions about what is 'psychologically healthy', which is still a matter of intense empirical research. This imposes a chilling effect on any speech that isn't 'respectful'.

**Commented [GFM7]:** Explicitly anti-free speech. Contradicts UNM policy statements elsewhere supporting vigorous open debate and mutual intellectual criticism as the environment that best promotes these goals. Chilling effect on any speech that isn't 'courteous', 'civil', or 'respectful', including constitutionally protected satire.

**Commented [G8]:** Contentious and implicitly anti-free-speech. 'Respect' is a code word for prohibiting any protected speech that isn't considered 'respectful' by those in authority.

**Commented [G9]:** Conflates 'disrespectful' speech (which is almost always constitutionally protected) with 'bullying' (which is already illegal under New Mexico state law).

**Commented [G10]:** Compelled speech, vague, broad, viewpoint discrimination, chilling effect. Dictates what people should believe and say on topics that remain politically controversial. Most of these bullet points are too vague (making ...

**Commented [G11]:** Vague; chilling effect on any speech that doesn't seem sufficient 'fair' or empathic

**Commented [G12]:** Chilling effect. Dictating 'respect for individual differences' would prevent any vigorous debate or criticism of individuals and their ideas, or making any value ...

**Commented [G13]:** Vague, broad, chilling effect against taking any 'inhomogeneous' viewpoint. Sounds more suited to Maoist communism than American academia.

**Commented [G14]:** Vague, broad. Compelled speech: sets up multiculturalism and 'diversity' as normative political values, violating freedom of speech and freedom of conscience for any ...

**Commented [G15]:** Chilling effect: deters any speech that isn't sufficiently collaborative'; implicitly rejects academic values of vigorous debate and devil's advocacy.

**Commented [GFM16]:** Chilling effect. Implies 'accountability' for any speech that anyone in power considers 'disrespectful'

**Commented [G17]:** Meaningless platitude and inconsistent with UNM policies on student expulsion, staff firing, and faculty denial-of-tenure. Chilling effect by deterring criticism of ...

**Commented [G18]:** Meaningless platitude. Chilling effect on 'disrespectful' but protected speech

**Commented [G19]:** Chilling effect: explicitly encourages leaders to impose a chilling effect against protected speech by followers that is 'uncourteous', 'uncivil', or 'disrespectful'; implic ...

**Commented [G20]:** Vague, broad. Chilling effect: this would include a lot of constitutionally protected speech. Potential for selective enforcement: who decides what is 'unduly inflammatory'?

**Commented [G21]:** Massive chilling effect. Implies that any violation of the above bullet points – including in a lot of protect ...

#### 4. Definition of Bullying

Bullying can occur when one individual or a group of individuals exhibits bullying behavior toward one or more individuals. [...]

#### 4.4. Anonymous Bullying

Anonymous bullying can consist of withholding or disguising identity while treating a person in a malicious manner, sending insulting or threatening anonymous messages, placing objectionable objects among a person's belongings, leaving degrading written or pictorial material about a person where others can see. [...]

**Commented [GFM22]:** Bullying is already illegal under New Mexico state law: <http://www.stopbullying.gov/laws/new-mexico.html>. There is no reason to weaken the already clear and strong state laws by including these poorly-thought-out platitudes in UNM policies. Their main effect seems to be to exert a chilling effect on free speech, such that any faculty, staff, or students making any 'disrespectful' but constitutionally protected speech will fear that they'll be subject to disciplinary UNM action and/or state prosecution for bullying.

**Commented [G23]:** Vague, broad. Chilling effect: a lot of protected speech is considered 'degrading' by someone. Needs a reasonable person standard. Selective enforcement problems: Who decides what is 'degrading'?

### Part 2: University Administrative Policies

<https://policy.unm.edu/university-policies/table-of-contents.html>

#### 2240 (Respectful Campus)

<http://policy.unm.edu/university-policies/2000/2240.html>

##### 1. General

....  
This Policy describes the values, cornerstones, and behaviors that delineate a respectful campus and applies to all members of the UNM community, including, but not limited to students, faculty, and staff.

**Commented [GFM24]:** Flagged by FIRE as a 'red light' policy that clearly violates 1A: <https://www.thefire.org/schools/university-of-new-mexico/> This is listed first here because the language in this policy is very similar to that of the Faculty Handbook policy C09 (Respectful Campus) above, and violates 1A in all of the same ways. The only difference from C09 is one sentence noted below

**Commented [GFM25]:** Same language and same problems as C09 above, except for this one additional sentence below

**Commented [GFM26]:** Compelled speech. Public universities cannot dictate values on topics that remain politically controversial. This violates freedom of speech, freedom of conscience, and freedom of religion.

**Commented [G27]:** This policy, like the Respectful Campus policy, is unconstitutional for a public university. General problems throughout: compelled speech, viewpoint discrimination, vague, broad, chilling effects. I would suggest repealing the entire policy. As a set of vague platitudes, it appears to have no real effect on UNM's culture or operations, but it could be selectively enforced by administrators against anyone they find inconvenient or offensive.

#### 2100 Sustainability

<http://policy.unm.edu/university-policies/2000/2100.html>

[...]

##### 5. Curriculum and Research

Education and research are core missions of the University. The curricula in each department were developed over the history of the University as knowledge expanded and external needs evolved, and represent the collective wisdom of generations of educators. As a consequence, changes to the curriculum should not be approached lightly. Nevertheless, we now find ourselves in a situation where sustainability is a moral imperative, not a choice, and special efforts must be made by faculty, administrators, and students alike to ensure that curricula and research evolve rapidly to reflect sustainability issues relevant to each particular area.

**Commented [G28]:** Compelled speech, viewpoint discrimination, vagueness, chilling effect. Forces everyone to adopt the 'sustainability doctrine' as a 'moral imperative' – i.e. as a quasi-religious transcendental value, violating freedom of conscience, freedom of religion, and freedom of speech. A public university can't compel its people to adopt a particular political agenda on a topic that is still subject to vigorous empirical and moral debate. Too vague to know what is really advocated or prohibited, so exerts a strong chilling effect on any discussion of environmental issues – is advocating geoengineering rather than carbon taxes to deal with global warming considered anti-sustainability? Is advocating nuclear power rather than solar considered anti-sustainability? Are we forced to advocate veganism because some vegans think meat-eating is unsustainable? Who decides?

**Commented [G29]:** Compelled speech; same problem. Specifically interferes with faculty and student freedom of speech in syllabus development, lectures, and classroom discussion.

**Commented [G30]:** Compelled speech, chilling effect. Explicitly aims to establish an official campus doctrine that violates the freedoms of speech and conscience for many conservative, religious, libertarian, pro-growth, transhumanist, and/or environmental-skeptical people on campus.

Society is challenged to provide the basic needs of health, water, energy, food, shelter, and transportation now and for future generations. To address these societal challenges, each college and school at UNM will strive to integrate sustainability knowledge and methodologies from the sciences, humanities, and arts into curricula and research in order to provide students with educational opportunities and support pertaining to sustainability. In addition, these programs will prepare students for rapidly growing career opportunities in business, education, government, and the non-profit sector linked to sustainability. The Sustainability Studies Program can assist and support colleges and schools as they develop sustainability curricula.

##### 5.1. Campus Culture

A campus culture of sustainability requires a holistic and systemic approach that can be encouraged via the development of interdisciplinary courses, programs, and projects.

Flexibility in curricula should be increased so that students can increase their knowledge about sustainability issues of interest. Guest lectures on relevant topics by faculty from different disciplines should also be encouraged to promote awareness of far-reaching impacts of a particular discipline. Performance reviews will reward faculty who make an effort to include sustainability in their teaching. Similarly, awareness of sustainability issues should be part of the assessment of student work.

### 5.3. Social Equity

Social equity is an often overlooked but integral component of any approach to sustainability. The impacts of each discipline on social equity should be considered in curriculum development. Different disciplines impact social equity to different extents. Course content should include concepts of social equity as a consequence of its relevance to the subject matter.

### 6.2. Environmental Protection

All campus community members should be aware of the extent to which their actions can negatively or positively impact the environment. In that the University shall strive to establish the lead for environmental protection in New Mexico, it should encourage engagement by faculty, staff, or students in community service projects that positively impact the environment and discourage those that impact the environment negatively.

## 2220 (Freedom of Expression and Dissent)

<http://policy.unm.edu/university-policies/2000/2220.html>

### 1. General

....

Speech activity that unduly interferes with the rights of others or the ability of the University to carry out its mission is not protected by the First Amendment and violates this policy.

....

## 2230 Police and security services

<http://policy.unm.edu/university-policies/2000/2230.html>

### 2.1. Special Events and Rental of Facilities to External Users

A special event is any non-routine, non-academic event that may require security due to the large number of attendees, public role of guests, controversial nature of speakers or subjects, or involvement of dignitaries. Any department, group, or organization hosting a special event or renting a facility to external users must complete a Special Event Notification form and submit it to the UNM Police Department ten (10) business days before any scheduled event or rental. ... This notification must be completed even if the department, group, or organization does not anticipate a need for security. The notification form is available on the UNM Police website and requires:  
[...]

### 3. Security

After an analysis of the event, program, or facility rental based on currently available information the UNM Police Department will determine the number of police officers, security officers, or combination of officers required to reasonably address the safety and security of participants, and the UNM Police Department will contract for such

**Commented [G31]:** Compelled speech, viewpoint discrimination, and chilling effect problems. Implies that faculty who do not adopt this ideological agenda should be punished by adverse performance reviews that could affect promotion, tenure, and salary decisions.

**Commented [G32]:** Compelled speech, viewpoint neutrality, and chilling effects in their most flagrant form applied to students. Implies that students who do not adopt this ideological agenda will be punished by lower grades.

**Commented [G33]:** Compelled speech, viewpoint discrimination, and chilling effect problems. Forces UNM people to adopt a particular liberal model of how to solve environmental problems that most conservatives and libertarians would not support. A public university cannot dictate through policy how faculty and students should think about the complex and still empirically controversial relationships between environmental issues and social issues.

**Commented [G34]:** Compelled speech, viewpoint neutrality, and chilling effect problems. Explicitly tells faculty that they must frame environmental issues in terms of social inequality, when the empirical and ideological relations between the two are still very much under debate.

**Commented [G35]:** Compelled speech, viewpoint discrimination, chilling effect, and vagueness problems. Vagueness is especially tricky here: How could a freshman possibly assess what kind of community service has a net positive impact on the environment (globally, in the long-term, given unanticipated consequences and complex tradeoffs), when the expert environmental economists struggle to quantify such issues?

**Commented [G36]:** Most of this policy is OK. It could be strengthened to support free speech more resolutely, and has one problem noted below.

**Commented [G37]:** Vague, chilling effect. The Supreme Court has already specified what speech is not protected by 1A (e.g. inciting riots, child pornography); it's not for a public university to impose additional restrictions unless they are very specific (e.g. the 'time, place, and manner' restrictions in section 4.1 of this policy are fine.) Any general warning to not 'unduly interfere with the rights of others' is hopelessly vague and imposes a chilling effect on all speech.

**Commented [G38]:** Prior restraint, chilling effect. The requirement to notify police before public speeches or events is unconstitutional, and violates freedom of speech and freedom of assembly.



services. In extraordinary circumstances if the security risk to the University is too high, the Chief of Police is authorized to cancel the event, program, or facility rental.

The event, program, or facility rental sponsor is responsible for security costs based on the number of police and/or security officers required and the length of event, program, or rental. The UNM Police Department will provide a cost estimate, but actual fees will be determined after the event, program, or rental based on actual circumstances.

## **2720 (Equal Opportunity, Non-Discrimination, and Affirmative Action)**

<http://policy.unm.edu/university-policies/2000/2720.html>

### **1. General**

The University of New Mexico is committed to creating and maintaining a community in which students and employees can learn and work together in an atmosphere that enhances productivity and draws on the diversity of its members, and is free from all forms of disrespectful conduct, intimidation, exploitation, and harassment....

### **2.2. Harassment**

The University prohibits harassing behavior on its campuses and by any person while engaged in University business, whether on or off campus. Harassment is a form of discrimination. It is defined as unwelcome verbal or physical behavior, which is directed at persons because of their race, color, religion, national origin, ancestry, physical or mental disability, pregnancy, age, sex, sexual preference, gender identity, spousal affiliation, veteran status, genetic information, or other characteristic protected by applicable law, when these behaviors are sufficiently severe or pervasive to have the effect of unreasonably interfering with their educational experience, working conditions, or student housing by creating an intimidating, hostile, or offensive environment.

In some cases, a single incident may be so severe as to create a hostile environment. Such incidents may include injury to persons, or property, or conduct threatening injury to persons or property. In other instances, the behavior at issue is harassing, but not sufficiently severe, persistent, or pervasive as to constitute a hostile work or learning environment. In such cases, the University generally takes action to stop the offending behavior in an effort to promote a respectful environment and avoid the possibility that a hostile environment will develop.

Listed below are examples of behavior that can constitute such harassment. The list is not all-inclusive; in addition, each situation must be considered in light of the specific facts and circumstances to determine if harassment has occurred.

- Unwelcome jokes or comments about a protected characteristic (e.g., racial or ethnic jokes)
- Disparaging remarks to a person about a protected characteristic (e.g., negative or offensive remarks or jokes about a person's religion or religious garments)
- Displaying negative or offensive posters or pictures about a protected characteristic
- Electronic communications, such as e-mail, text messaging, and Internet use, that violate this policy

In cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved. Free speech rights apply in the classroom and in all other educational programs and activities. This policy is intended to protect students and employees from discrimination, not to regulate the content of speech.

[....]

### **4. Reporting Procedures**

**Commented [G39]:** Prior restraint, chilling effect. Multiple court rulings agree that public universities cannot charge groups for security at potentially controversial events. This imposes a huge chilling effect on any group that's considering inviting a controversial speaker.

**Commented [G40]:** Vague, chilling effect. Most 'disrespectful' speech is protected speech under 1A. This imposes a huge chilling effect on campus communication. Who decides what is 'disrespectful'? How can a student know in advance what the admin will consider 'disrespectful'?

**Commented [G41]:** Contentious, irrelevant, violates viewpoint neutrality. 'Harassment' is bad because it's harassment, regardless of whether it's discriminatory. Even white male cis-gendered senior professors can be harassed, despite not being in a protected category.

**Commented [G42]:** Vague, insofar as it's impossible for a reasonable person to know in advance what's permitted or what is not – it's contingent on the unpredictable responses of another; needs a reasonable person standard.

**Commented [GFM43]:** Vague; implies that administrators can read people's minds concerning their values and the intentions behind their speech or actions; prohibits most humor and satire, which is protected speech

**Commented [G44]:** Chilling effect. Inconsistent with the language above the harassment must be 'pervasive' (i.e repeated).

**Commented [G45]:** Chilling effect, prior restraint. Implies that any 'disrespectful' conduct, including protected speech, may be cause for a disciplinary inquiry. To 'avoid the possibility that a hostile environment will develop' requires prior restraint of potentially 'hostile' speech, even when it's protected.

**Commented [G46]:** Vague. Needs a reasonable person standard or else this can be enforced selectively whenever the administration is annoyed by any one's conduct. Invites violations of due process.

**Commented [G47]:** Clearly unconstitutional, chilling effect. Directly violates multiple Supreme Court decisions that most humor, including racial humor, is protected speech. This clause would prohibit 90% of stand-up comedy.

**Commented [G48]:** Ditto. Humor about religion is clearly protected speech.

**Commented [G49]:** Ditto, and way too vague. Who decides what is 'negative' or 'offensive'?

**Commented [G50]:** Ditto. Protected speech is still protected when it's electronic.

**Commented [G51]:** Ineffective savings clause, vague. It doesn't resolve the fundamental problem that much of the speech considered 'harassment' by this policy is actually constitutionally protected speech. Creates huge vagueness and uncertainty about what's actually permitted.



[...]

The University encourages persons who believe that they have experienced or witnessed discrimination or harassment as prohibited by this policy to come forward promptly with their inquiries, reports, or complaints and to seek assistance within the University

[...]

#### 4.1 Reporting Responsibility

[...]

Further, if supervisors fail to take action when they know, or reasonably should have known, that a student or subordinate employee is being subjected to discrimination, supervisors could be held in violation of this policy. The University encourages reporting of all known or suspected discriminatory conduct.

[...]

#### 7. Providing False Information

Because of the nature of discrimination, harassment, or retaliation complaints, allegations often cannot be substantiated by direct evidence other than the complaining individual's own statement. Lack of corroborating evidence should not discourage individuals from seeking relief under this policy. No adverse action will be taken against an individual who makes a good faith allegation of discrimination, harassment, or retaliation under this policy, even if an investigation fails to substantiate the allegation.

### 2730 Sexual Harassment

#### 1. General

The University is committed to creating and maintaining a community in which students and employees can learn and work together in an atmosphere that enhances productivity and draws on the diversity of its members and is free from all forms of disrespectful conduct, harassment, exploitation, or intimidation, including sexual harassment and sex-based discrimination.

#### 2. Definition

Sexual harassment, a form of sex discrimination, is defined as unwelcome conduct of a sexual nature.

Conduct of a sexual nature becomes a violation of this policy when:

- such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, hostile, or offensive working or academic environment (hostile environment).

...

#### 2.1. Other Violations

The University also disapproves of conduct of a sexual nature which does not rise to the level of the above definition of sexual harassment but which has a detrimental, although limited, impact on the work or academic environment. The University strongly encourages all persons witnessing or experiencing such conduct to report it (see Section 3) so that the University can take appropriate action. Such conduct may include isolated sexual remarks, sexist comments, gestures, or inappropriate physical behavior of a sexual nature. This could warrant remedial action in order to prevent such behavior from becoming unlawful harassment.

**Commented [G52]:** Chilling effect. Explicitly encourages 3<sup>rd</sup> hand reporting of protected speech whenever anyone might have been offended by anything.

**Commented [G53]:** Chilling effect. Requires reporting of any protected speech that could be considered 'discriminatory' by anyone, without any reasonable person standard.

**Commented [G54]:** Chilling effect. Requires hair-trigger presumption of guilt in reporting protected speech.

**Commented [G55]:** Chilling effect. Encourages false accusations of 'harassment' or 'discrimination' by anyone who's upset by anyone else. Implies a presumption of guilt that violates due process. Fails to deter malicious or trivial accusations.

**Commented [G56]:** Flagged by FIRE as a 'yellow light' policy that violates 1A in some important ways: <https://www.thefire.org/schools/university-of-new-mexico/> Many major problems. Though well-intentioned, this violates 1A rights in many ways. This is the horribly written policy that won the October 2014 'speech code of the month' from the Foundation for Individual Rights in Education: <http://www.thefire.org/speech-code-month-university-new-mexico/>

**Commented [G57]:** Vague, chilling effect. Much protected speech is 'disrespectful'.

**Commented [G58]:** Contentious and irrelevant. Sexual harassment need not involve any 'discrimination'; it can just be annoying intrusive, repeating mating effort. Sexual harassment can happen to cis-gendered straight males although they're not in a protected category with respect to discrimination issues.

**Commented [G59]:** Vague, chilling effect. It's impossible for a reasonable person to know what's 'unwelcome' a priori. 'Conduct of a sexual nature' includes most protected speech that relates in any way to sex. Deters UNM people from expressing any views about any sexual topics. Allows nearly infinite latitude for selective enforcement by administration.

**Commented [G60]:** Vague, chilling effect. Much of protected speech is 'offensive' to someone. No reasonable person standard. Selectively enforceable at administration's discretion.

**Commented [G61]:** Huge chilling effect: it's impossible to know ahead of time what conduct or speech is permitted. Gives admin infinite latitude in deciding what to punish.

**Commented [G62]:** Chilling effect. Encourages reporting of anything that isn't clearly sexual harassment, but that somebody might consider vaguely 'offensive'.

**Commented [G63]:** Vague, chilling effect. Would make it impossible to teach Human Sexuality courses. Would make it impossible for couples to flirt with each other.

**Commented [G64]:** Prior restraint, violates viewpoint neutrality, chilling effect, vague. Outlaws any protected speech that someone might consider 'sexist' according to their own ideology. For example, any discussion of evolved human sex differences would be considered 'sexist' by many gender feminists, so it would be impossible to teach evolutionary psychology or evolutionary anthropology at UNM.

**Commented [G65]:** Vague; seems to outlaw dancing or twerking. Who decides what is 'inappropriate'? No reasonable person standard; invites selective enforcement.

## 2.2. Examples of Sexual Harassment

Listed below are examples of behavior that can constitute sexual harassment. The list is not all-inclusive; in addition, each situation must be considered in light of the specific facts and circumstances to determine if harassment has occurred.

- Suggestive or obscene letters, notes, invitations
- Electronic communications, such as e-mail, text messaging, and Internet use, that are sexual in nature
- Unwelcome sexual jokes or comments (including favorable comments about someone's gender, body, or appearance)
- Impeding or blocking movements, touching, or any physical interference or stalking
- Sexually oriented gestures; or displaying sexually suggestive or derogatory objects, pictures, cartoons, or posters

.... When the University determines that a hostile environment exists, it takes action to stop the harassment and ensure it does not happen again.... In other cases, the conduct at issue is offensive, but not sufficiently severe, persistent, or pervasive as to constitute a hostile work or learning environment. In such cases, the University generally takes action to stop the offending behavior in an effort to promote a respectful environment and avoid the possibility that a hostile environment will develop.

In cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved. Free speech rights apply in the classroom and in all other education programs and activities. This policy is intended to protect students and employees from discrimination, not to regulate the content of speech.

[...]

## 2.3. Interim Measures

The University may also implement interim measures or interventions, as appropriate to the allegations and if the allegations warrant, to protect the community and students involved, pending the culmination of any review, investigation, or appeal process.

.....

[....]

## 6. Providing False Information

Because of the nature of discrimination, harassment, or retaliation complaints, allegations often cannot be substantiated by direct evidence other than the complaining individual's own statement. Lack of corroborating evidence should not discourage individuals from seeking relief under this policy. No adverse action will be taken against an individual who makes a good faith allegation of discrimination, harassment, or retaliation under this policy, even if an investigation fails to substantiate the allegation.

## 3740 Media Response

<http://policy.unm.edu/university-policies/3000/3740.html>

....

1.2. Employees should remember that the public may judge their profession and the University by what is said to media representatives. Employees should at all times be accurate, exercise appropriate restraint, show respect for the opinion of others, and make every effort to indicate that they are not an institutional spokesperson, unless otherwise instructed by the administration.

**Commented [G66]:** Vague, chilling effect: It's impossible to know in advance what is permitted

**Commented [G67]:** Vague, overbroad. What is 'suggestive' depends on the mind of the observer. Would eliminate most of my scientific emails with sex researcher collaborators, submissions to sex journals, and conference announcements.

**Commented [G68]:** Vague, overbroad, chilling effect. Would prohibit 70% of the Powerpoint slides I used when teaching Human Sexuality. Would prohibit me when emailing my Human Sexuality syllabus to students or posting readings on UNM Learn system. Protected speech is still protected when it's electronic.

**Commented [G69]:** Vague. 'Unwelcome' means it's impossible to know in advance what is permitted until the person reacts. No reasonable person standard. 1A protections on humor and satire are especially strong – including sexual humor.

**Commented [G70]:** Vague, overbroad; who defines what a 'sexually oriented gesture' is? Most sexually oriented gestures are protected speech.

**Commented [G71]:** Vague, chilling effect. Most of these communications constitute protected speech under 1A. Interpreted broadly, this clause would make it impossible to teach or discuss anything about human sexuality.

**Commented [G72]:** Huge chilling effect; vague, overbroad. Explicitly says that even if speech doesn't violate this policy as written, the administration still has unlimited latitude to do anything it wants to stop the speech. Violates due process and makes it impossible to know a priori what is permitted versus what will be deemed 'offending behavior'.

**Commented [G73]:** A savings clause that's totally disingenuous, when the rest of this policy violates 1A in so many ways. 'Issues of speech or expression' are always 'involved' if there any speech or expression is happening, and much of this policy is about speech and expression, not about physical contact between people.

**Commented [G74]:** Chilling effect. Violates due process. UNM folks will fear that any protected speech related in any way to sexuality may still be subject to 'interim measures' (i.e. censorship) before any formal investigation even starts. Gives administration way too much power to censor inconvenient speech whenever it wants.

**Commented [G75]:** Chilling effect. Encourages false accusations of 'sexual harassment' (including any sexually-oriented speech of almost any sort) by anyone who's upset by anyone else. Implies a presumption of guilt that violates due process. Fails to deter malicious or trivial accusations.

**Commented [G76]:** Vague, overbroad, chilling effect. Protected speech does not have to show 'appropriate restraint' or 'respect for the opinion of others'. Satire, for example, is strongly protect by 1A, and it is the opposite of 'respect' and 'restraint'.

### Part 3: Regents' Policies

<https://policy.unm.edu/regents-policies/table-of-contents.html>

#### 2.1 Free Expression and Advocacy

<http://policy.unm.edu/regents-policies/section-2/2-1.html>

Freedom of academic inquiry and freedom of expression are indispensable elements of a university. The freedom to express dissent by lawful means, including peaceable assembly and the right of petition, is as important on a university campus as elsewhere in our society. The Regents have protected and defended and will continue to protect and defend the academic freedom of all members of the University community. The exercise of the freedom to dissent, however, must be balanced with the rights of others, respect for others, the educational process, and other legitimate University activities and interests....

**Commented [G77]:** This is UNM's major policy supporting academic free speech. It's OK, but includes some unconstitutional restrictions, and it could be strengthened a lot.

**Commented [G78]:** Unclear. Confuses constitutionally protected speech with 'freedom to express dissent', which is a much narrower concept

**Commented [G79]:** Unclear; ditto.

**Commented [G80]:** Vague. Balanced against what other rights? Constitutional exceptions to free speech (e.g. child pornography) are already clearly demarcated.

**Commented [G81]:** Vague, and would outlaw much protected speech, which is often 'disrespectful'.

**Commented [G82]:** Implies that free speech is inherently opposed to the educational process, rather than being fundamental of it.

**Commented [G83]:** Vague, overbroad, chilling effect. Much of protected speech could be construed by someone as 'disrespectful'.

#### 2.5 (Sexual Harassment)

<http://policy.unm.edu/regents-policies/section-2/2-5.html>

The University is committed to creating and maintaining a community in which students, faculty, and administrative and academic staff can learn and work together in an atmosphere that enhances productivity and draws on the diversity of its members -- an atmosphere free from all forms of disrespectful conduct, harassment, exploitation or intimidation, including sexual. Sexual harassment subverts the mission of the University and threatens the careers of students, faculty and staff. It is a violation of federal law and will not be tolerated. The University makes special efforts to eliminate both overt and subtle forms of sexual harassment. In fulfilling its dual roles of educating and providing public service, the University can and must demonstrate leadership in educating all members of its community to what is appropriate behavior between the genders.

**Commented [G84]:** Compelled speech, vague, overbroad. A public university cannot compel belief in a particular set of ideological values about gender relations, when debate over such values is one of the most active areas of disagreement in current American politics. Violates freedom of speech, conscience, religion, and association.

### Part 4: UNM Residence Life & Student Housing policies

(p. 17 in [http://issuu.com/unmhousing/docs/residence\\_hall\\_handbook\\_2015](http://issuu.com/unmhousing/docs/residence_hall_handbook_2015))

#### Bias-Related Incidents

Bias is a preformed negative opinion or attitude toward a group or persons based on their race, gender, gender identity, religion, disability, sexual orientation, ethnicity, or national origin. Bias-related incidents include, but are not limited to, non-threatening name calling and using degrading language or slurs directed toward a person because of his or her actual or perceived membership in a particular group.

**Commented [G85]:** Flagged by FIRE as a 'yellow light' policy that violates 1A in some important ways: <https://www.thefire.org/schools/university-of-new-mexico/>

**Commented [G86]:** Vague, overbroad, chilling effect. Would cover much protected speech. If the intent is to prevent harassment, this should be clearly defined as harassment, consistent with NM state harassment laws.

### Part 5: OEO Hate/Bias Incident Reporting Process Document

[from Office of Equity and Inclusion]

<http://diverse.unm.edu/presentations-reports/reports/hatebias-reporting.html>

<http://diverse.unm.edu/wp-content/uploads/2009/09/Hate-Bias-Incidents-Doc-9-15-09.pdf>

**Commented [G87]:** Vague, overbroad, viewpoint discrimination, chilling effect. This entire policy is one big unconstitutional chilling effect against protected speech. It shows zero understanding of 1A rights, and sets up an ideological tribunal to monitor protected speech and to impose compelled speech on faculty, staff, and students.

[...]

the Office for Equity and Inclusion supports the following statement of community:

The University of New Mexico believes that everyone has worth and dignity. Our rich community of students, faculty, staff, constituents, and stakeholders represent numerous cultures, ethnicities, religions, nations, abilities, and perspectives. We recognize that our diversity is a unique advantage that plays a significant role in sustaining a learning environment of inclusive

excellence. Our environment empowers our community to learn with and from one another, and to generate knowledge that enables the world's people to value difference. Respectful relationships built on trust, collaboration, and thoughtful dialogue and deliberation are essential to UNM's commitment to equity and success. We will respond to any violation of our sense of community displayed in acts of hatred and bias.

[...]

Of equal importance to the University's embrace of diversity is the University's commitment to academic freedom and free speech. The University recognizes that respect for these rights requires it uphold a speaker's freedom to express views that oppose our statement of community and that members of the campus community find offensive. However, protecting the rights of speakers to express such opinions does not mean that the University must remain silent in the face of speech that is hateful or biased. Quite the contrary; the University retains and will exercise its right to speak out in response to hate or bias acts that violate our sense of community by engaging in educational dialogues, conflict mediation, and campus programming. Successfully resolving the dynamic tension between free speech and the values that underlie our sense of community is an ever present challenge.

[...]

"Within the University, we recognize that some hate/bias incidents are noncriminal activities committed against a person or property motivated, in whole or in part, by the offender's bias against a race, color, ethnicity, national origin, sex, gender identity or expression, sexual orientation, disability, age, or religion. Derogatory language or writing directed against someone because of their identity, if not accompanied by threat of harm or delivered in a threatening manner, would be protected speech and not a hate crime. Such incidents, however, may constitute a hate/bias incident and can be reported using these procedures.

[...]

"All UNM community members are encouraged to report hate/bias incidents to the Office for Equity and Inclusion. This information can help the Office monitor and address issues of hate and bias on campus as well as help the University to be proactive in creating a safe and respectful campus climate to prevent future incidents. Hate crime and hate/bias incident reporting will be maintained as confidential to the extent permitted by law"

[...]

"The University of New Mexico's primary concern is for the emotional and physical well-being of those affected by a hate or bias incident."

[...]

"The data [about 'hate/bias incidents'] will be used to monitor campus climate and to develop and implement proactive steps toward a more inclusive and safe campus environment"

**Commented [G88]:** Vague, broad, chilling effect. Who defines 'hatred and bias'? This would apply to much of protected speech.

**Commented [G89]:** Chilling effect, viewpoint discrimination, compelled speech. Who decides what 'violates our sense of community'? Who decides what 'campus programming' (i.e. compelled speech and ideological indoctrination) should be imposed in response?

**Commented [G90]:** Ineffective savings clause. This is not 'an ever present challenge' for UNM policy. It is a challenge already decided by the Constitution and the Supreme Court.

**Commented [G91]:** Chilling effect, viewpoint discrimination, vague. Explicitly says that even constitutionally protected speech will still be monitored, recorded, and used to guide viewpoint-discriminatory policies. Impossible for a reasonable person to anticipate what will be considered a 'hate/bias incident'.

**Commented [G92]:** Clearly designed to have a big chilling effect on protected speech.

**Commented [G93]:** Implies that a 'right not to be offended' trumps 1A rights, and that free speech is not UNM's priority.

**Commented [G94]:** Chilling effect by design, with compelled speech as a backup. Clearly intended to deter people with unpopular views from expressing such views, and to 'correct' any such views by 'campus programming' (i.e. indoctrination and compelled speech.)