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## **M E M O R A N D U M**

To: Directors of Public Safety  
From: Frederick P. Schaffer  
Re: The Campus and The First Amendment Right to Free Speech

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The Supreme Court of the United States has long held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."\* Constitutional rights and, specifically, the First Amendment, apply to students as well as to employees and others properly on campus.

This memorandum sets forth the background and basic principles of the First Amendment and discusses some of the ways or circumstances in which First Amendment rights may be implicated by activities on CUNY campuses, undertaken either by students, the colleges, or outsiders.

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\*Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969); Healy v. James, 408 U.S. 169 (1972).

### **I. The First Amendment And Why It Applies To CUNY**

The First Amendment to the United States Constitution provides as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

As a creation, or arm, of New York State, CUNY must abide by the First Amendment.\*\* This means that CUNY may not curtail the First Amendment rights of its students or employees, unless it does so within certain narrow limits that the courts have established and approved.

The words of the First Amendment itself establish six rights: (1) the right to be free from governmental establishment of religion (the "Establishment Clause"), (2) the right to be free from governmental interference with the practice of religion (the "Free Exercise Clause"), (3) the right to free speech, (4) the right to freedom of the press, (5) the right to assemble peacefully (which includes the right to associate freely with whomever one chooses), and (6) the right to petition the government for redress of grievances. College employees and students retain all of these rights on campus (subject to some permissible limitations). More than one of these rights may be involved in any given situation that may arise on campus. For example, the rights of free speech, peaceful assembly, and petitioning the government might all be implicated in potential regulations concerning student demonstrations.

As noted above, in interpreting the First Amendment, the courts have allowed these rights to be curtailed or narrowed (but not eliminated) in limited circumstances. In the case of college campuses, the Supreme Court has recognized some difference between a college campus and other public forums, such as parks, public streets, or municipal theaters. The Court has held:

A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.\*\*\*

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\*\*Although the First Amendment refers to the Congress of the United States, it applies to States as well, through the application of the Fourteenth Amendment to the Constitution.

\*\*\*Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981).

Thus, although CUNY must actively respect First Amendment principles on its campuses, the application of the First Amendment may be affected, in narrow and limited ways, by the unique interests of the academic community. Any restrictions must be evaluated by balancing the individual's or group's First Amendment rights against legitimate educational purposes and interests of CUNY. Therefore, determining whether a rule or restriction is constitutionally permissible will require attention to the particulars of the situation, the application of good, reasonable judgment, and recognition of the importance our society, through our courts, places on First Amendment rights, keeping them as flexible and broad as possible while maintaining conditions that foster the underlying purposes of the institution and protect the rights of others on campus at the same time.

## **II. Bedrock Principle: Viewpoint Neutrality**

In applying the right to free speech one bedrock principle applies: an effort to control or limit speech on the basis of its content or message is presumed to be unconstitutional. In other words, for CUNY to deny a speaker an opportunity to give a speech on campus solely because the content of

the speech is offensive or disagreeable to some, and is therefore likely to cause a disruption, would almost always be unconstitutional.

Restrictions on speech on the basis of its content are permissible in only two very narrow circumstances: (1) "fighting words" and (2) speech that causes a "clear and present danger."

"Fighting words" refers to speech that by its very utterance inflicts injury or tends to incite an immediate breach of the peace. The concept was established in a case in 1942 involving political and other epithets and slurs.\*\*\*\* Since then, it has been construed ever more narrowly, so that racial, ethnic, political and other type of slurs are not considered to be fighting words and are therefore protected by the First Amendment.\*\*\*\*\* Thus, there seems to be little continuing validity to the "fighting words" doctrine.

Speech that poses a clear and present danger is speech that (a) advocates a violation of law and (b) is likely to incite and produce imminent unlawful conduct.\*\*\*\*\* Both elements must be present to justify a restriction on speech. It is not sufficient that the speech creates a general concern for disturbance or disruption unless there is advocacy of unlawful conduct under circumstances in which immediate unlawful conduct is probable.

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\*\*\*\*Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

\*\*\*\*\*E.g., Gooding v. Wilson, 405 U.S. 518 (1972) (doctrine of "fighting words" not applicable when a black man, upon being arrested, said "white son of a bitch, I'll kill you").

\*\*\*\*\*Brandenburg v. Ohio, 395 U.S. 444 (1969).

### **III. Reasonable Time, Place, And Manner Restrictions On Speech**

CUNY may regulate speech on campus by imposing content-neutral "reasonable time, place, and manner" regulations provided they are narrowly drafted "to serve a significant government interest and leave open ample alternative channels of communication."\*\*\*\*\* This means that CUNY can impose reasonable restrictions on where, when, and how the speech will occur, so long as (1) the restrictions are necessary to fulfill a significant legitimate institutional purpose and (2) other avenues remain available for communicating the same message to the same audience.\*\*\*\*\* For example, CUNY could prohibit the use of a bullhorn in making a speech if the use of a bullhorn would be so noisy as to interfere with classes scheduled for the same time. Similarly, a well publicized rule prohibiting posting notices on classroom doors, but designating other areas for notices, would be appropriate. And a rule restricting the hours during which a speaker may give a public speech on campus would be constitutional provided the rule was reasonably necessary to prevent disruption of such activities as teaching or course registration.

### **IV. Conclusion**

Open discussion of issues and ideas, even unpopular, controversial, or offensive ideas, is an integral part of life on CUNY campuses and should be encouraged. At the same time, colleges must ensure that classes and other daily activities are not disrupted and provide for the safety of members of the college community and visitors. Typically, the best methods of balancing these often competing concerns are to develop and adhere to written college policies and to employ reasonable, carefully

tailored time, place, and manner restrictions that simultaneously permit speech and ensure safety. Most colleges have such policies, and you should, of course, be familiar with yours. My office is available to assist you with any questions you may have concerning the implementation of those policies, or for any other related questions, in cooperation with the Office of University Public Safety and its Director, William Barry.

\*\*\*\*\*Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948 (1983).

\*\*\*\*\*This principle applies to all expression whether in the form of oral speech or in another form, such as leafleting.