

**LETTER OPINION
2004-L-75**

December 22, 2004

The Honorable Eliot Glassheim
State Representative
619 N 3rd St
Grand Forks, ND 58203-3203

Dear Representative Glassheim:

Thank you for your letter asking whether the University of North Dakota campus buildings and grounds may be used for political purposes and whether the University may prohibit political or commercial speech or activities during student orientation. It is my opinion that the University of North Dakota buildings and grounds may, to the extent they are traditionally or by designation made available for public use, be used as a public forum for free speech pursuant to the First Amendment of the United States Constitution, subject to reasonable content-neutral time, place, and manner regulations. It is my further opinion that a temporary prohibition of short duration against all solicitations of students during student orientation at the University of North Dakota is a permissible content neutral restriction on the time, place and manner of expression that is narrowly tailored to serve a significant government interest, and may be lawfully applied so long as ample alternative channels of communication are open.

BACKGROUND

The University of North Dakota sponsors a “welcome weekend” for new and returning students. This year, welcome weekend lasted from Friday, August 20 through Monday, August 23, 2004.¹ On August 22, 2004, two individuals set up a table to solicit persons on behalf of a political party at a location on campus known as Walsh Quad opposite from the

¹ See memorandum from Robert Boyd, Vice President for Student and Outreach Services, and Robert Gallager, Vice President for Finance and Operations, to all Student Organizations, August 16, 2004 (Boyd and Gallager memo).

entrance to Hancock Hall.² At that time, freshmen students were undergoing orientation, students were moving into their housing facilities, and a student steak barbeque was in progress at the Quad.³ The University has a written procedure for groups or individuals wishing to hold an on-campus event, which requires the group or individuals to coordinate the event by contacting the University Office of Central Scheduling, filling out a special events form, and allowing the Central Scheduling Office to provide copies of the form to affected divisions and departments at the University.⁴ The University had not received any request from the political organization to hold this on-campus event.⁵ Upon complaint from University officials, the police responded and escorted the individuals off University property.⁶ The officer involved stated that the solicitors were moved to a public sidewalk located adjacent to the Quad, that they were not forced to leave the general vicinity, and that one of the two individuals continued to solicit students from the sidewalk area.⁷

ANALYSIS

Your question implicates both N.D.C.C. §16.1-10-02, which prohibits the use of state property for political purposes, and the First Amendment's right to free speech.

Use of State Property for a Political Purpose

Government buildings and grounds are often used as a site for political activities.⁸ North Dakota law, however, prohibits the use of state property for political purposes. N.D.C.C. § 16.1-10-02. The Legislature's purpose in prohibiting the use of state property for political purposes is to prevent "a misuse of public funds or a financial misuse of public property for political purposes." Saefke v. Vande Walle, 279 N.W.2d 415, 417 (N.D. 1979). The North Dakota Supreme Court has interpreted N.D.C.C. § 16.1-10-02 narrowly so that it does not prohibit trivial uses of state property, which must be determined on a case-by-case basis. Id. Such a trivial use includes merely being present on the grounds or in a building for a political purpose, and has been held to permit a political candidate to use a building or

² See Uniform Incident Report, Case No. 200430947, Officer Lt. Tracy L. Meidinger, August 22, 2004 (Police Report).

³ Letter from UND General Counsel Julie Ann Evans to A.A.G. Edward Erickson, October 27, 2004 (Evans Letter).

⁴ UND Code of Student Life § 5-1(F).

⁵ Evans Letter.

⁶ See Police Report.

⁷ See Evans Letter.

⁸ See for example N.D.A.G. 96-12 (State Capitol); Tinker v. Des Moines Ind. Comm. School Dist., 393 U.S. 503 (1969) (public school); Grayned v. City of Rockford, 408 U.S. 104 (1972) (public school grounds and surrounding areas); U.S. v. Grace, 461 U.S. 171 (1983) (U.S. Supreme Court Building and grounds).

meeting room open to the general public in order to express the candidate's views or to solicit signatures on petitions. N.D.A.G. 96-12.⁹ It is my opinion, based on the facts presented, that the described activities do not violate N.D.C.C. § 16.1-10-02.

Free Speech

Public educational institutions, including those of higher learning, are not enclaves immune from the sweep of the First Amendment rights.¹⁰ Healy v. James, 408 U.S. 169, 180 (1972). Having said that, however, I note that

First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case. And, where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.' Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'

Id. (citations omitted).

As noted, school officials at state operated educational institutions may, consistent with the constitutional safeguards, prescribe and control conduct in the schools. Healy, 408 U.S. at

⁹ See also the exception contained in N.D.C.C. § 16.1-10-02(2)(b): "However, nothing in this section may be construed to prohibit any candidate, political party, committee, or organization from using any public building for such political meetings as may be required by law, or to prohibit such candidate, party, committee, or organization from hiring the use of any public building for any political purpose if such lease or hiring is otherwise permitted by law."

¹⁰ The Constitution of North Dakota also protects the public's right to freedom of speech and freedom to assemble and to petition. N.D. Const. art. I, § 4. Any rights under these provisions would likely be analyzed similarly to the analysis of rights under the United States Constitution and need not be separately addressed in this opinion. Under certain circumstances the "North Dakota Constitution may provide more protection to its citizens than the Federal Constitution." City of Bismarck v. Fetting, 601 N.W.2d 247, 250 (N.D. 1999). Where appropriate, an analysis of differing language between the North Dakota Constitution and the Federal Constitution may be useful. State v. Nordquist, 309 N.W.2d 109, 113 (N.D. 1981).

180. See also City of Jamestown v. Beneda, 477 N.W.2d 830, 836 (N.D. 1991); (governments, consistent with the First Amendment to the United States Constitution, may place limitations on the exercise of free speech on government property based upon the nature of the property or the disruption that might be caused by the speaker's activities); Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 799-800 (1985). The campus of a public university is, for its students, considered to have many of the characteristics of a public forum. Widmar v. Vincent, 454 U.S. 263, 268, n.5 (1981).¹¹ The United States Supreme Court has recognized that First Amendment rights on a public university campus must be analyzed in light of the special characteristics of the school environment, considering the university's educational mission. Widmar, at 268. n.5. A public university therefore is authorized to impose reasonable regulations compatible with that mission concerning the use of its campus and facilities. Id. For purposes of this opinion, I will assume that the Walsh Quad is a traditional public forum.¹²

The University permits its facilities to be used for numerous purposes, including protests and demonstrations. Code of Student Life § 5-1(E). Those wishing to hold an on-campus event are required to coordinate the event with the Central Scheduling Office. Id. at § 5-1(F). The Central Scheduling Office is required to approve requests unless there are reasonable grounds to believe that the facility is inadequate or inappropriate for the planned activity; the sponsoring organization is under disciplinary penalty prohibiting use of University facilities; the proposed use would include an activity

¹¹ A public university or college campus may become a designated public forum if the state opens it for use by the public as a place for expressive activity. Putnam v. Keller, 332 F.3d 541, 549 (8th Cir. 2003) quoting Perry Educ. Assoc. v. Perry Local Education Assoc., 460 U.S. 37, 45. UND permits use of its campus by student organizations, UND related groups and some non-UND organizations if sponsored by a campus organization. See Code of Student Life § 5-1(B). Any designation of the UND campus or facilities as a public forum is limited to the designated uses under the Code of Student Life.

¹² The Supreme Court analyzes free speech issues based on the forum or setting of the speech. There are three types of forums. Traditional forums are places which have generally been the site of public gatherings or expressive activities and include public streets, parks or public grounds. N.D.A.G. 96-12. Designated public forums are places which are not traditional public forums but have been opened to expressive activity by the government. Id. The third category is public property which is not by tradition or designation a forum for public discussion including, for example, private offices within public buildings. Id. The government's authority to regulate speech in traditional or designated forums is sharply curtailed, while the government has greater leeway to restrict activities, including expressive activities, in non-public forums. Id. A large institution may contain spaces which fall into each of these categories, and any legal analysis must be made on a case-by-case basis. Id.

which would violate University or State Board of Higher Education policy or federal, state, or municipal law; the proposed use would be an immediate and actual danger to the peace and security that available law enforcement would not be able to control or that would disrupt or disturb regular academic and institutional programs; or that the proposed use would be an unauthorized or unacknowledged joint sponsorship with a non-University related group. Id. at § 5-2(F). If the request is not approved, a written statement of the reasons for refusal will be given to the requester. Id. at § 5-2(G). Further, there is an appeal process for anyone aggrieved by a decision not to allow the requested activity. Id. at § 5-3.¹³

The University chose to hold its own event - the welcome weekend event described by University's vice president for Student and Outreach Services and University's vice president for Finance and Operations. Boyd and Gallagher memo. The welcome weekend, from Friday, August 20 to Monday, August 23:

is a campus-wide effort to create an environment that is welcoming for incoming and returning students. . . . [T]his effort is crucial to easing the transition to college life for new students. By eliminating recruitment and solicitation from the first week of school, we allow new students to become familiar with their surrounding and comfortable with college life. After a student's initial adjustment they can then make decisions about how to become involved in the UND community.

Boyd and Gallagher memo. Further, recruitment and solicitation of students was specifically invited to occur the next week at the "involvement expo" to be held on Wednesday, August 25. Id.

A similar restriction was addressed in a case concerning the North Dakota State Fair. In Bolinske v. N.D. State Fair Assoc., 522 N.W.2d 426 (N.D. 1994), the North Dakota Supreme Court determined that the North Dakota State Fair may restrict the gathering of signatures for an initiative petition to a booth rented for that purpose. The Supreme Court analyzed the relevant principles from the United States Supreme Court on a similar topic.¹⁴ The criteria to establish a valid time, place, or manner restriction on

¹³ The UND Code of Student Life also contains a specific restriction stating that only a recognized UND organization may sponsor activities on UND property on behalf of the specific candidate for political office. Code of Student Life § 5-5(A). This requirement in the Code of Student Life was not cited as a reason by the police when they responded to the incident. See Uniform Incident Report. Therefore, I am not considering a possible violation of this provision in this opinion. However, the validity of this restriction may depend upon specific locations to which it is applied.

¹⁴ Heffron v. Int'l. Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

speech are: (1) that the restriction may not be based upon either the content or subject matter of speech (considerations include whether the method of allocating space is a straight forward first-come, first-served system which is not open to arbitrary application which would have the potential to become a means of suppressing a particular point of view); (2) that the restriction must serve a significant governmental interest such as the need to maintain the orderly movement of a crowd; and (3) that it must be sufficiently clear that alternative forums for express protected speech exist despite the restriction's effect. Id. at 432-33.

University's policies demonstrated by the Code of Student Life and the Boyd and Gallagher memo have ample support in First Amendment jurisprudence. In this instance, the University was reasonably expecting a large number of new and returning students and their families moving belongings into the dorms, and that parking, sidewalk space, and access to University buildings would be scarce. Both the ban against solicitation during welcome weekend stated by the Boyd and Gallagher memo and the regulations contained in the Code of Student Life are content-neutral. That is, the content of a person's speech is not relevant to the restriction, and the Code of Student Life contains straightforward, content neutral restrictions and a process for appeal to guard against arbitrary decisions.

These crowded circumstances are similar to those found by the Bolinske court to exist at the State Fair:

solicitation, whether for donations or signatures, can have a disruptive effect on the flow of traffic, because it requires action by those who would respond. . . . The process of soliciting signatures requires discussion on the merits of the measure proposed with each person approached to sign. The process invites a response, which may entail a reading of the measure, additional discussion, and eventual signing of the petition. Thus, the petition circulation process may result in substantial disruption of . . . patrons, especially if numerous petitioners choose to use the [event] as a place for soliciting signatures.

Id. at 434. Further, the University may impose reasonable regulations in light of the special characteristics of the school environment and its educational mission under Widmer. The welcome weekend ban on solicitation was limited to three days to allow students to move in and become comfortable with their new home at college. Courts have upheld restrictions on political activities in public university residence halls to protect student privacy and to prevent security issues. Moreover, universities have an "understandable interest in promoting quiet study conditions for residents." Brush v. Pa. State Univ., 414 A.2d 48, 53 (Pa. 1980). See also Am. Future Sys., Inc. v. Pa. State Univ., 618 F.2d 252 (3d Cir. 1980) (prevention of commercial solicitation of students in

dormitories). The ban on solicitation during welcome weekend serves significant governmental interests by helping to control crowds and traffic and by helping students adjust to college life.

The University's policies do not prevent other individuals or organizations from contacting or soliciting University students. Not only was the ban of short duration, but a special event was to be held subsequently for the purpose of soliciting students. Also, in the specific situation described in your letter, the people soliciting students were not stopped from soliciting students, but were only moved out of the way to an adjacent public sidewalk. Therefore, there were sufficient alternative forums available to solicit students, both at an on campus "involvement expo" and immediately adjacent to campus on a public sidewalk.

Consideration must also be given to the fact that welcome weekend is the University's own event. A governmental entity may impose regulations to control what is essentially its own speech. Fleming v. Jefferson County Sch. Dist. 12-1, 298 F.3d 918 (10th Cir. 2002). Courts have also noted that persons or organizations desiring to hold an event for their own purposes, even in a traditional forum such as a public park, have the right to exclude persons who would seek to send the public a different message without violating that person's right of free speech. Sistrunk v. City of Strongsville, 99 F.3d 194 (6th Cir. 1996). In Sistrunk, a political organization had applied for and obtained a permit to hold a political rally to support a presidential candidate in a public park, and the organization prohibited those attending the political rally from wearing badges or insignia favoring a different candidate. Id. at 196. The plaintiff had intended to attend the event while wearing a campaign button for the opposing candidate, and argued that the city violated her free speech rights by permitting the political organization to exclude members of the public from the rally based on the contents of her campaign button. Id. at 197-98. The court held that the city could not require persons who are engaging in their own right of free speech, in particular the political rally, to include speech with which they disagree without violating the free speech rights of those organizing the event. Id. at 198-200. It is reasonable to conclude that the University may hold its own event and may also purposefully exclude those who would use the University event to send a different and potentially conflicting message.

Therefore, it is my opinion that the University of North Dakota buildings and grounds may be used as a public forum for free speech pursuant to the First Amendment of the United States Constitution, subject to reasonable content-neutral time, place, and manner regulations, to the extent they are traditionally or by designation made available for public use. It is my further opinion that a temporary prohibition of short duration against all solicitations of students during student orientation at the University of North Dakota is a permissible content neutral restriction on the time, place and manner of expression that is

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narrowly tailored to serve a significant government interest, and may be lawfully applied so long as ample alternative channels of communication are open.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).