



To: Anne Lawton, Professor of Law, Michigan State University, College of Law
From: Ryan Ansloan, Program Officer, Policy Reform, Foundation for Individual Rights in Education (FIRE)
Date: February 1, 2021
Re: “Code of Professional Standards and Behaviors for Faculty and Academic Staff” at Michigan State University

Introduction

This memorandum will provide the Foundation for Individual Rights in Education’s (FIRE’s) recommendations for how Michigan State University’s proposed “Code of Professional Standards and Behaviors for Faculty and Academic Staff” (the Code) should be revised to protect faculty members’ rights to free speech and expression under the First Amendment.

FIRE is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America’s college campuses.

As a public institution, Michigan State is fully bound by the First Amendment and must uphold its faculty members’ free speech rights. Additionally, in 2015, Michigan State adopted the “Chicago Statement,” the free speech policy statement produced by the Committee on Freedom of Expression at the University of Chicago. Adoption of this Statement represents an understanding of how the principles of free speech are essential to the core purpose of a university. The proposed Code of Professional Standards and Behaviors for Faculty and Academic Staff is problematic, as it contains provisions that seek to prohibit certain expressions, under the cowl of civility, that are not only protected under the First Amendment but also at the heart of what the Chicago Statement was drafted to safeguard.

Analysis

It is FIRE’s understanding that Michigan State’s Faculty Senate is in the process of considering adoption of the Code. Despite the university’s obligation, as a public university, to uphold faculty members’ free speech rights, the Code contains a variety of clauses proscribing expression protected by the First Amendment.

A central flaw in the Code is that it contains clauses that suggest there will be punishment for potential infractions. The first relevant clause is excerpted below:

The faculty handbook identifies existing mechanisms for resolution in those instances in which a MSU community member believes they have been subject to behaviors or interactions contrary to the Code.

A second clause similarly contemplates recourse against those who engage in “problematic behavior,” and is excerpted below:

An individual may contact any of the campus administrative offices here for advice, consultation, and support on matters involving problematic behavior:

[. . .]

- The Faculty Grievance and Dispute Resolution Office

The Code includes a statement at the beginning of Section III that it is intended to “be aspirational and constructive rather than punitive.” However, the above clauses’ references to the faculty handbook’s “existing mechanisms for resolution” and to individuals’ use of the faculty grievance procedures indicate the availability of recourse beyond mere palliative care. These references open up the possibility of investigation and disciplinary action being taken against a faculty member accused of breaching one of the Code’s mandates.

Because the Code is not merely aspirational in nature, it is essential that it not direct faculty as to how they may or may not express themselves beyond prohibiting speech that is unprotected by the First Amendment. While it is not the only concerning aspect of Section III of the Code from FIRE’s perspective, the fourth part of this section of the Code of Professional Standards and Behavior is perhaps the most problematic. This part identifies expression for which faculty could be disciplined. The relevant portion is excerpted below (emphasis in original):

- 4) Recognize that respect must be central to our interactions. This means:
 - a. We model constructive behaviors in all our communications with one another, whether in person, via electronic communications or elsewhere.
 - b. We avoid personal attacks, derogatory statements, and subtle behaviors targeting identities.
 - c. We use the names and pronouns that others ask us to use for them.
 - d. We reject bullying behaviors designed to intimidate or silence.
 - e. We respect our colleagues’ time and priorities.

When we place respect at the center of our interactions with one another, we are mindful of the values, beliefs, identities, and experiences of those around us. We commit to modes of expression and dialogue that promote positive environments. We do not belittle or attack each other.

This excerpt is concerning for a number of reasons. First, the policy uses language that is inherently vague and subjective—such as “respect,” “constructive behaviors,” and “subtle behaviors targeting identities”—thus making it difficult to apply in an even-handed,

consistent manner. This is a problem that pervades the Code and it is one reason why, if this Code is to be adopted at all, it must be a purely aspirational, voluntary statement or resolution.

The simplest method to achieve this would consist of (1) removing the first two excerpted clauses above, which vaguely reference potential modes of recourse, or revising them to make clear that they are referring exclusively to non-punitive options, (2) adding an additional sentence to the Preamble and/or Introduction emphasizing the aspirational quality of the Code, and (3) clarifying in the Resources section that the purpose of those resources is to provide support to targets of alleged incidents of incivility, rather than to independently investigate or punish those who have been accused. It would also be wise to reference the university's obligations under the First Amendment, signaling to faculty that speech protected under those standards would not be subject to disciplinary action.

A second concern is that some of the terms that are used in this policy clearly proscribe expression that is protected under the First Amendment. For example, one clause states, "We reject bullying behaviors designed to intimidate or silence." However, while alleged "bullying" that rises to the level of harassment or true threats as defined by the Supreme Court would legitimately be punishable, the broad term "bullying" could also be applied to include speech protected by the First Amendment.

Similarly, "personal attacks, derogatory statements, and subtle behaviors targeting identities" could be part of a larger pattern of repeated conduct that could rise to the level of harassment, but most of the time, on their own, they constitute protected speech. Individuals reading this policy, however, are likely to assume that a single instance of this behavior is sufficient to result in discipline and they may self-censor accordingly. Such a chilling effect on speech is impermissible, and the Code should be revised to avoid this result.

A policy drafted so broadly leaves faculty members uncertain of what they are permitted to say and at the mercy of an administrator's subjective notion of civility and respect. This is an unacceptable result at an institution fully bound by the First Amendment.

Conclusion

The Code being considered by Michigan State's Faculty Senate restricts fundamental free speech rights and prohibits categories of speech that are clearly protected under the First Amendment. The proposed policy must be revised to remove prohibitions on speech that do not track the few narrowly-defined categories of speech that are unprotected by the First Amendment, and to make clearer that the Code is an aspirational statement.