

NKU FACULTY SENATE RESOLUTION ON GAG ORDER

Approved by a vote of the Faculty Senate on February 27, 2017

Be it resolved that the Faculty Senate of Northern Kentucky University respectfully disagrees with the University's efforts to obtain a gag order to prohibit our student Jane Doe from talking with reporters about the university's response to her campus sexual assault and recommends that the University, in the future, not seek to prohibit students from talking with the media about matters having to do with the University and its policies.

BACKGROUND:

(Included for explanatory purposes, not voted on by Faculty Senate).

On August 26, 2016, NKU asked a federal district court to enter a “gag order” against one of our students. During her first semester at NKU in Fall 2013, this student—known pseudonymously as “Jane Doe”—was sexually assaulted by another NKU student. She reported the incident to the university, which investigated her claim. Following a hearing that was conducted pursuant to established university policies, a three-person panel consisting of one faculty member, one staff member, and one student determined by a preponderance of the evidence that the male student had performed “nonconsensual sexual intercourse” on Jane Doe. At the panel’s recommendation, the male student was suspended for one semester and ordered to stay away from Jane Doe. Jane Doe alleges that the male student did not subsequently stay away from Jane Doe, though the University denies this allegation.

Eventually, Jane Doe sued the university under Title IX of the Civil Rights Act of 1964, as amended. Jane Doe’s lawsuit is currently pending in United States District Court. Before and since filing this lawsuit, both on-campus and off, Jane Doe and her attorney have talked about this lawsuit and the underlying events that led to it, and seemingly have sought to generate news coverage of the case. The case has been covered by the *Cincinnati Enquirer*, the *Northern Kentucky Tribune*, and *The Northerner*.

On August 26, 2016, in response to Jane Doe’s lawsuit, NKU asked the federal district court presiding over the case “to grant a gag order prohibiting [Jane Doe] from any further communication with the press regarding the merits or allegations of this case. . . .” “The University told the court that without such a gag order, news coverage of Jane Doe’s statements would make it difficult to seat an unbiased jury in the case. The University also told the Court that it would be unfair to allow the plaintiff to talk about the case with reporters while the University believes that its own obligation to protect student privacy precludes it from doing so. On October 18, 2016, U.S. District Judge William O. Bertelsman denied the University’s request for a gag order against Jane Doe and her attorney, and also denied the University’s related motion to “seal” (i.e. keep secret) transcripts of depositions in the case. Judge Bertelsman’s decision was published in a written Order on October 24, 2016.

The Faculty Senate takes no view on the legal issues in the case or on the underlying facts, except to the extent those facts are summarized above. However, the Faculty Senate is gravely concerned that the University's decision to seek a gag order against one of our students cannot be reconciled with some of the basic values of our university community.

Freedom of Speech

As amended by the Board of Regents in May 2016 following a long and inclusive vetting process, the [NKU Values & Ethical Responsibilities Statement](#) identifies the promotion of freedom of speech as one of our core ethical values. It provides:

University community members are expected to . . . [p]romote academic freedom, including the freedom to discuss relevant matters in the classroom, with fellow NKU community members, and with the public. . . . The freedom of speech of community members includes the freedom to express their views on matters having to do with their institution and its policies. This freedom should be accorded – and rights to it protected – because grounds for thinking an institutional policy desirable or undesirable must be heard and assessed if the community is to have confidence that its policies are appropriate.

In filing its request for this gag order, the university has sought to prevent Jane Doe from expressing her views on matters having to do with NKU and its policies. *The Faculty Senate has grave concern that this action contravenes our ethical obligation to promote the individual freedom of NKU community members to discuss such relevant matters, both with fellow NKU community members and with the public.*

Relatedly, the NKU [Code of Student Rights and Responsibilities](#) also recognizes NKU's obligation to ensure that our students enjoy the freedom of speech, both on and off campus. As approved by the NKU Board of Regents on November 21, 2012, the Code's Preamble provides:

The Code of Student Rights and Responsibilities is designed to ensure that Northern Kentucky University students shall enjoy intellectual freedom, fair and legal treatment, *the freedom of speech both on and off campus*, freedom of press, the right of peaceable assembly, the right to petition for redress of grievances, the right to a fair hearing of charges made against one, and the right to responsible participation in the university community. Rights imply responsibilities; therefore members of the University community must show both initiative and restraint. The Code is designed neither to be exhaustive nor to encompass all possible relationships between students and the institution. This document is endorsed by the Student Government Association, Faculty Senate, Staff Congress and University Administration, and approved by the Northern Kentucky University Board of Regents. The Code is not rigid or unchangeable. As the relationship between students and the University continues to grow, it may be necessary to modify the Code.

The Faculty Senate believes that the university's decision to seek a judicial gag order is intended improperly to interfere with the right of an NKU student, Jane Doe, to enjoy "the freedom of speech both on and off campus."

Transparency and Accountability

NKU's Mission Statement identifies transparency and accountability as key components of "institutional excellence," which is another of our community's core values. Like the [NKU Values & Ethical Responsibilities Statement](#), *the University's Mission Statement is the product of a long and inclusive vetting process that involved every campus constituency*. The Mission Statement is included within the university publication entitled "[Fuel The Flame](#)," **which further elaborates on the University's aspirations and values. One of NKU's goals and values is "Institutional Excellence."** In [Fuel The Flame](#), "Institutional Excellence" is defined as follows:

Institutional excellence lays the foundation for student success. Our ability to achieve our vision rests with faculty who are passionate about **student-centered learning** and staff and administrators who are dedicated to providing outstanding service and leadership. In order to sustain and nurture this valuable resource, we will take aggressive steps to secure our financial future, improve effectiveness across all dimensions of our work, and **hold ourselves accountable to the public and others who invest in our future**.

The Faculty Senate questions whether the university's effort to suppress public discussion of our response to a campus sexual assault properly holds ourselves accountable to the public and others who invest in our future. Moreover, the Faculty Senate also questions whether the effort to silence Jane Doe reflects the passion for student-centered learning that is extolled in our Mission Statement.

Faculty Senate Gag Order Resolution: Q&A

Q: What is going on?

A: In Fall 2013, a female first-year student known pseudonymously as Jane Doe reported having been sexually assaulted by a fellow NKU student. Following an investigation and a hearing conducted pursuant to established university policies, a three-person panel consisting of one faculty member, one staff member, and one student determined by a preponderance of the evidence that the male student had performed “nonconsensual sexual intercourse” on Jane Doe. Dissatisfied with NKU’s subsequent follow-up to this finding, in January 2016 Jane Doe sued the university.

Jane Doe’s lawsuit, which remains pending, has been covered in the local press. On August 26, 2016, NKU asked the court “to grant a gag order prohibiting [Jane Doe] from any further communication with the press regarding the merits or allegations of this case. . . .” On October 18, 2016, U.S. District Judge William O. Bertelsman denied the University’s request for a gag order. The PCC believes that the University’s decision to seek a gag order against Jane Doe cannot be reconciled with some of the basic values of our university community.

Q: Does the Faculty Senate have jurisdiction to take up this issue?

A: Yes, the Faculty Senate Constitution authorizes us “to discuss all matters relating to the well being of the University” and to “evaluate university . . . practices and recommend such improvements as seem warranted.” In his remarks to PCC on Oct 20, 2016, President Mearns acknowledged the Senate’s right to comment on this matter, either through a formal resolution or through candid conversations.

Q: Why should the Senate care about this issue?

A: The Statement on Collegial Governance at NKU (set forth in Appendix C of the NKU Faculty Handbook) provides that “[a]ll colleagues in the system, regardless of their respective roles as faculty or administrators, have an obligation to honor and support the decisions reached through the collegial process.” The Faculty Senate thus has a responsibility to honor and support decisions that have been reached through the collegial process, and to insist that administrators do so, as well. On Oct 20, 2016, President Mearns told the PCC that he respects the role of the faculty in upholding the values and guiding principles of the university.

Q: What “decisions made through the collegial process” are we talking about?

A: In the PCC’s view, the University’s decision to seek a gag order against a student contravenes provisions of: (1) The [NKU Values & Ethical Responsibilities Statement](#), (2) the NKU [Code of Student Rights and Responsibilities](#), and (3) the University’s Mission Statement set forth in the publication entitled “[Fuel The Flame](#).” **All three of these documents memorialize decisions that were reached by the faculty and the administration through the collegial process.**

Q: Do those documents really say that the university should not seek a gag order against a student?

A: The above-mentioned documents identify NKU’s ethical and institutional values as follows:

- **Freedom of Speech:** The [NKU Values & Ethical Responsibilities Statement](#) states that university community members must promote the freedom to express one’s views on matters having to do with our institution and its policies, both with fellow NKU community members and with the public. The NKU [Code of Student Rights and Responsibilities](#) likewise recognizes NKU’s obligation to ensure that our students enjoy the freedom of speech, both on and off campus.
- **Transparency and Accountability:** NKU’s Mission Statement identifies transparency and accountability as key components of “institutional excellence,” which is another of our community’s core values. The [Fuel The Flame](#) document promises that in order to achieve institutional excellence, “we will take aggressive steps to . . . **hold ourselves accountable to the public and others who invest in our future.**”

After due deliberation, the PCC concluded that the university’s decision to seek a gag order was inconsistent with the statements of principle set forth in these documents.

Q: Isn’t a gag order needed to preserve the integrity of the judicial process in this case?

A: United States District Judge William Bertelsman ruled that a gag order is not needed to preserve the integrity of the judicial process in this case. Instead, Judge Bertelsman noted that “[t]he Court draws its jurors from twenty counties having a collective population of over 300,000. If a panel of forty jurors is called, in the Court’s experience, fewer than ten would have encountered any publicity concerning this case.”

Q: Isn't a gag order needed to protect the university against an adverse money judgment in the case?

A: NKU's insurance policy will cover the cost of any adverse money judgment in this case. But even if it wouldn't: in ruling that a gag order is not needed to preserve the integrity of the judicial process in this case, Judge Bertelsman found that the court was capable of ensuring that the outcome of the case would not be affected by media coverage.

Q: Isn't a gag order needed to protect the federal privacy rights of other students?

A: Judge Bertelsman ruled that a gag order is not needed to protect the federal privacy rights of other students. In fact, a university official also invoked the need to protect the federal privacy rights of our students when he refused to answer questions posed to him in a deposition. Judge Bertelsman ruled that that the claim of need was exaggerated and the refusal to answer was improper. He therefore ordered the university to pay the student's lawyer for time spent dealing with this claim.

Q: Does this mean that the names of NKU students (including innocent bystanders) will be published in the press in connection with reports of a campus sexual assault?

A: While denying the gag order, Judge Bertelsman reaffirmed that NKU's records that might be pertinent to the litigation "may be redacted to remove student's name and other identifying information." He also directed the parties to reach an agreement that will govern (and generally prohibit) disclosure of such information. Meanwhile, although this litigation has received some media attention, no NKU students involved in the underlying incident or its investigation have been identified in any of the press coverage—even though no gag order has ever been imposed.

Q: Isn't a gag order needed to protect the reputation of the university?

A: Holding ourselves accountable and transparent to the public is one of our core values. The university should protect its reputation by responding to public criticism, not by seeking to censor or suppress it.

Q: The Faculty Senate does not know the facts of this case. How can we comment on it?

A: Judge Bertelsman does know the facts of the case relevant to the university's request for a gag order. He found that those facts do not justify a gag order. In light of NKU's stated ethical values, it is difficult to imagine any set of facts that could fall short of meeting the legal standard for a gag order, but nonetheless justify suppressing a student's right to speak publicly about the university's response to her campus sexual assault under our own standards.

Q: The Faculty Senate is not a body of lawyers. How can we second-guess legal judgments that have been made by the university's lawyers?

A: The proposed Faculty Senate Resolution takes no view on any legal issues in the case. It simply expresses Senate's concern that the University's decision to seek a gag order against one of our students cannot be reconciled with some of the basic values of our university community. The Faculty Senate is fully competent to interpret the NKU policy documents that set forth our own community's basic values.

Q: But what if our ethical values conflict with the university's legal responsibilities?

A: Judge Bertelsman has ruled that NKU did not have any legal responsibility to seek a gag order against Jane Doe, or any legal right to obtain one.

Q: Is Jane Doe still a student at NKU?

A: Yes.

Q: Judge Bertelsman has already denied NKU's request for a gag order. He has also ordered NKU to pay some of the plaintiff's legal bills. Media coverage of NKU's request for a gag order has been uniformly negative. NKU has achieved no benefit from seeking a gag order. The University has probably learned its lesson. What does Faculty Senate hope to gain by adopting this resolution?

A: The Faculty Senate is the official representative body of the General Faculty of Northern Kentucky University. By issuing this resolution, the Faculty Senate hopes:

- to formally express the sense of the faculty that the university committed a serious wrong by seeking to prevent a student from speaking publicly about the university's response to her campus sexual assault;
- to fulfill the faculty's responsibility to promote and interpret the values set forth in the NKU Values & Ethical Responsibilities Statement and other campus policy documents promulgated through shared governance processes;
- to fulfill the special role of the faculty in protecting and promoting freedom of speech (and academic freedom) on campus, which includes an obligation to speak out against censorship;
- to defend students' rights;
- to avoid communicating through silence that the faculty condones the University's efforts to censor a student;
- to reduce the chances that the university will seek to censor the speech of students or faculty members in the future.

DOCUMENTS APPENDIX

The full text of the [NKU Values & Ethical Responsibilities Statement](http://policy.nku.edu/content/dam/policy/docs/a-through-z-policy-finder/ValuesandEthicalResponsibilities.pdf) is online at:
<<http://policy.nku.edu/content/dam/policy/docs/a-through-z-policy-finder/ValuesandEthicalResponsibilities.pdf>>.

The full text of the NKU [Code of Student Rights and Responsibilities](http://scra.nku.edu/Infostudents/Infostudents.html) is online at:
<<http://scra.nku.edu/Infostudents/Infostudents.html>>.

The full text of the “[Fuel the Flame](http://fueltheflame.nku.edu/goals.html)” document is online at:
<<http://fueltheflame.nku.edu/goals.html>>.

The full-text of NKU’s “**Motion To Enter Gag Order,**” which was filed in United States District Court on Aug 26, 2016 is online at:
<<http://www.nkytribune.com/wp-content/uploads/2016/08/08-26-16-Doc.-53-Motion-to-Enter-Gag-Order-and-to-Seal.pdf>>.

The full-text of Judge Bertelsman’s Order **denying** NKU’s “**Motion To Enter Gag Order,**” which was published on Oct 24, 2016 is online at:
< <https://www.scribd.com/document/328764045/Enq-NKU-2016-10-24-Memorandum-Opinion-and-Order>>.

The plaintiff’s original complaint that initiated the underlying Title IX lawsuit—and NKU’s response—both are available online at:

<<http://www.nkytribune.com/wp-content/uploads/2016/02/Doe-NKU-Complaint.pdf>>.

<<http://www.nkytribune.com/wp-content/uploads/2016/02/NKU-Doe-Response.pdf>>.

Judge Bertelsman’s Order to NKU to turn over documents about sexual assaults (dated Oct 27, 2016):

< <http://www.nkytribune.com/wp-content/uploads/2016/10/10-27-16-Doc.-112-Order.pdf>>.

Judge Bertelsman’s Order dismissing some of Jane Doe’s claims (dated Nov 3, 2016) is available online at:

<http://www.nkytribune.com/wp-content/uploads/2016/11/D.E.-115-Order-Granting-Motion-for-Partial-Dismissal-00754828xA9D25.pdf>

The following news articles report on NKU's request for a gag order, which was filed in United States District Court on Aug 26, 2016:

The Northerner:

<http://www.thenortherner.com/news/2016/08/26/nku-seeks-gag-order-sexual-assault-lawsuit/>>.

<http://www.thenortherner.com/feature-on-homepage/2016/10/19/judge-denies-gag-order-sexual-assault-lawsuit/>>.

The Cincinnati/Kentucky Enquirer:

<http://www.cincinnati.com/story/news/your-watchdog/2016/08/26/nku-asks-gag-order-sex-assault-lawsuit/89425004/>>.

<http://www.cincinnati.com/story/news/your-watchdog/2016/10/24/nku-gag-order-sexual-assault-lawsuit-denied-lawyers-sanctioned/92694368/>>

Northern Kentucky Tribune:

<http://www.nkytribune.com/2016/08/northern-kentucky-university-files-motion-for-gag-order-in-doe-rape-case-cites-possible-juror-bias/>>.

<http://www.nkytribune.com/2016/10/judge-sanctions-nku-awards-fees-for-issues-related-to-bothoffs-deposition-in-jane-doe-case/>>.

<http://www.nkytribune.com/2016/10/judges-order-in-doe-vs-nku-court-tells-university-to-turn-over-all-documents-about-sexual-assaults-on-campus/>>.

<http://www.nkytribune.com/2016/11/bertlesman-rules-for-dismissal-of-jane-does-suit-relative-to-current-nku-officials-as-individuals/>>.