

# BART and Free Speech on Campus: Challenges and Opportunities in Addressing Higher Education Bias Incidents

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# Overview of Discussion

- ▶ Legal background
- ▶ Legal forecast
- ▶ Policy and legal considerations unique to the BART space
- ▶ BART at UNC Charlotte
- ▶ BART Report Submission Process
- ▶ Challenges and opportunities in the BART space

# What is BART?

- ▶ BART exists in some form at many universities and may go by different names
- ▶ UNC Charlotte Bias Advisory Resource Team
  - ▶ Provides an avenue for students, faculty, and staff to report alleged bias incidents
  - ▶ Provides support and resources for students, faculty, and staff
- ▶ Generally, BART does not have punitive responsibilities
  - ▶ Outreach from BART is not a punishment
  - ▶ But reported behavior that rises to the level of unlawful harassment may be referred to other offices
- ▶ Every campus BART is a little bit different

# Legal Framework and Considerations in the BART Space

- ▶ The First Amendment, which generally protects “freedom of speech,” sets the tone for our work in this space
- ▶ Generally, governmental restrictions on protected speech are subject to strict scrutiny
  - ▶ Must be narrowly tailored to achieve a compelling government interest
  - ▶ Very high bar
- ▶ Not all speech is protected
  - ▶ True threats, incitement of imminent lawless action, fighting words, obscenity, libel/defamation, disruption, *discrimination/harassment*



# Legal Framework and Considerations in the BART Space (cont.)

- ▶ There are several important cases in this space that have come before federal courts in recent years:
  - ▶ *Abbott v. Pastides* (4<sup>th</sup> Cir. 2018):
  - ▶ *Speech First v. Schlissel* (6<sup>th</sup> Cir. 2019)
  - ▶ *Speech First v. Fenves* (5<sup>th</sup> Cir. 2020)
  - ▶ *Speech First v. Killeen* (7<sup>th</sup> Cir. 2020)
- ▶ The most relevant case, for our purposes, is the *Abbott* case.
  - ▶ This case comes out of our jurisdiction, the Fourth Circuit
  - ▶ More friendly towards BART, compared to Fifth and Sixth Circuit cases

# Key Takeaways from the Case Law

- ▶ When seeking to prevent enforcement of university policies and procedures such as BART procedures, to be successful, litigants must ordinarily prove:
  1. Intent to engage in speech/conduct that is at least arguably protected by the First Amendment *and* that there is a credible threat of enforcement of the policy against them, *or*
  2. That their speech has been “objectively chilled” by the policy
- ▶ Courts disagree on what exactly constitutes a “credible threat of enforcement” and when speech has been “objectively chilled”

# State Law

- ▶ North Carolina Free Speech Bill (2017)
  - HB 527
  - Requires the Board of Governors of the University of North Carolina to:
    - Develop and adopt a policy on free expression
    - Establish the Committee on Free Expression
  - Constituent institutions may only restrict student expression for “expressive activity not protected by the First Amendment”



# What's on the Horizon for BART?

While we cannot say with certainty what is to come in this space, we do know some things that might help us make some predictions:

1. There is currently a circuit split on this issue, and
2. This is a 'hot' (highly litigated) area of higher education law at the moment



# What's on the Horizon for BART? (cont.)

So, what does this mean for the future of BART? A few predictions:

1. We should expect more litigation in this space;
2. Because there is currently a circuit split and this is a highly litigated area of the law at the moment, we might see this issue go before the Supreme Court in the near future;
3. As a result of increased litigation, we may see some changes in how universities, including UNC Charlotte, approach BART

# A Brief Note on Key Policy and Legal Considerations

- ▶ Interactions with BART are supportive and/or educational and not punitive
- ▶ Campus stakeholders maintain First Amendment rights when they come to campus or enroll at the University, and therefore, the University does not have unlimited authority to restrict speech on campus
- ▶ Need for flexibility, as this area of higher education law is dynamic
- ▶ University Free Speech webpage

# BART at UNC Charlotte

# Bias Advisory Resource Team (BART)

The Bias Advisory Resource Team is comprised of university members from the following areas:

- ▶ Office of Student Assistance and Support Services (Chair)
  - ▶ Housing and Residence Life
  - ▶ Office of Student Conduct
  - ▶ Office of Legal Affairs
  - ▶ Office of Identity, Equity and Engagement
  - ▶ International Student and Scholar Office
  - ▶ Office of Diversity and Inclusion
  - ▶ Title IX Office
- ▶ Representatives from other units may be asked to attend meetings or provide input, as needed

# What Happens When a BART Report is Submitted

- ▶ BART reports are routed to the BART Chair
- ▶ The BART Chair will review and assess reports for an appropriate response and to determine the next steps
  - Does the incident pose a potential threat to the campus community?*
  - What campus department(s) should be made aware of the incident for review and response?*
  - Are there any potential violations of the Student Code of Responsibility or Title IX implications?*
- ▶ The BART Chair or team member will reach out to the appropriate office or department where the alleged incident occurred to discuss an appropriate plan of action and follow-up

# Student-to-Student Bias Related Incidents

## Response to Students Who Have Been Negatively Impacted

- ▶ If the student requests a meeting with the BART Chair, the student will be sent a “Care and Concern” meeting request letter.
- ▶ The BART Chair will determine what, if any, support the student may need academically and personally and connect students to the appropriate resources.

# Student-to-Student Bias Related Incidents (cont.)

## Response to Other Identified Students

- ▶ The BART Chair or team member will reach out to the student(s) to request a meeting to further discuss the alleged incident
- ▶ The purpose of the meeting is educational in nature.

# Staff-to-Staff Bias Related Incidents

- ▶ The BART Chair or team member will forward the incident report to Cindy Edwards (Employee Relations Manager) in the Office of Human Resources for review and response
- ▶ The BART Chair or team member will notify the staff member that the report was forwarded to the Office of Human Resources for review and response.

# Faculty-to-Faculty Bias Related Incidents

- ▶ The BART Chair or team member will forward the incident report to Lori McMahon (Associate Provost for Academic Budget and Personnel) in the Office of the Provost for review and response
- ▶ The BART Chair or team member will notify the staff member that the reported was forwarded to the Office of the Provost for review and response.

# Student-to-Faculty Bias Related Incidents

- ▶ The BART Chair or team member will forward the incident report to the Chair of the Academic Department for which the incident occurred for review and response
- ▶ The BART Chair or team member will notify the student that the report was forwarded to the Chair of the Academic Department for which the incident occurred for review and response and follow-up

# Challenges in Navigating Alleged Bias Incidents on Campus

- ▶ Federal Education Rights and Privacy Act: A Need versus a Want
- ▶ Identifying any individual(s) responsible for engaging in bias incidents
- ▶ *Social Media and bias-related incidents*
- ▶ *How best to educate the campus community on the nuance of protected speech while balancing the needs of those who have been harmed by an act of bias.*

# Opportunities in Navigating Alleged Bias Incidents on Campus

- ▶ Providing support and assistance to those harmed by a bias incident
- ▶ Engagement with students alleged to have engaged in bias incidents
- ▶ Meeting students where they are
- ▶ Understanding the student experience and climate

# How to Submit a BART Referral

If you believe you have witnessed or experienced a bias-related incident, a report can be submitted via the university incident report system at [INCIDENTREPORT.UNCC.EDU](https://INCIDENTREPORT.UNCC.EDU) or [BART.UNCC.EDU](https://BART.UNCC.EDU)

- ▶ When reporting an incident, an individual has the option of submitting an “information only” report or submitting a report with a “request for follow-up.” Information only reports are intended to provide BART with information on the student experience
- ▶ “Information Only” reports help BART assess the campus climate. \*Please note that if a report is marked as information only there will be no follow-up or resources offered by BART unless the Chair of BART makes a reasonable determination that the health or safety of an individual or the campus community is at risk
- ▶ The BART team will strive to keep reports confidential. There may be situations, however, when information must be shared or disclosed in order for the University to properly respond. Student information protected by FERPA is only disclosed to other University officials on a need-to-know basis, if they have a legitimate educational interest

Questions?