

IN RE DEFINITION OF COMMUNITY MEMBER

Opinion of the Emory University Senate Standing Committee for Open Expression

No. CFOE-16-3

November 21, 2016

Executive Summary

The Emory University Standing Committee for Open Expression exists to promote and protect the rights to open expression, dissent and protest among Emory Community members. As part of our responsibility to provide advice and counsel regarding the interpretation of Emory's Open Expression Policy, this Committee clarifies the definition of "Community members" under the Policy.

The Policy grants rights and responsibilities to "Community members," sharply distinguishing between Community members and mere interlopers. Within the Community, the Policy distinguishes among various kinds of limited and unlimited Community members. Students, faculty, staff, contract workers, and trustees are Community members at all times. Alumni, invited guests, and business patrons are considered Community members in specific contexts. However, all Community members have the same substantive rights and responsibilities under the Policy.

The invited guest category is limited to those who are invited by the University and are active participants in an event, and is further limited to the approximate space and time of the event.

The business patron and guest category is limited to those who are receiving the services of Emory-related businesses, roughly where and when they are receiving those services. For members of both of these categories, the University may rescind their authorization to be on campus in case of willful and serious violations of University policies, and it is not required to adopt as conciliatory an enforcement posture as it usually does for "internal" categories of Community members such as students, faculty, and staff.

When an event is open to the general public, the general public has the same protest rights as other Community members outside the event.

I. INTRODUCTION

Emory University’s Open Expression Policy¹ (“Policy”) “reaffirms Emory’s unwavering commitment to a community that inspires and supports courageous inquiry through open expression, dissent, and protest.” Under the Policy, the University “affirms the rights of members of the Community to assemble and demonstrate peaceably.”² The Policy “is paramount to other policies of the University that may conflict, except those grounded expressly in local, state, or national law.”³

The Committee for Open Expression serves as “a working group of [Emory University] community members—faculty, staff, and students—who seek to *promote* and *protect* the rights and responsibilities of community members related to issues and controversies involving speech, debate, open expression, protest, and other related matters.”⁴

The Committee’s responsibility is to “provide advice and counsel to Community members interpreting the Policy and the rights and responsibilities of individuals and groups under it.”⁵ One way that it does so is by “[i]nvestigating alleged infringements of the right of members of the Community concerning speech, debate, open expression, Protest, Dissent, and other related matters.”⁶ To that end, Emory Community members who believe their open expression rights have been infringed are encouraged to contact the Committee for Open Expression at openexpression@emory.edu.⁷ But the Committee may also proceed more generally, even in the absence of a complaint by a Community member, by “provid[ing] education . . . to the Community” about these issues and in any other way that is “necessary to effectuate [the] Policy.”⁸

In this opinion, we clarify who is considered a member of the “Emory University Community” for purposes of the Policy.

II. WHAT IS “COMMUNITY” AND WHY DOES IT MATTER?

As we have explained in past opinions, Emory University is a private institution and is therefore not bound by the First Amendment of the U.S. Constitution.⁹ However, “the Policy incorporates at least the same substantive standards that the First Amendment

¹ The Policy is available at <http://policies.emory.edu/8.14>. We have discussed the Policy in greater depth in our recent opinions, *In re Emory Students for Justice in Palestine*, No. CFOE–16–1 (Feb. 10, 2016) [hereinafter *In re ESJP*], http://senate.emory.edu/documents/past_documents/cfoe-palestine-16.02.10-revised2.pdf, and *In re Donald Trump Chalkings and Related Matters*, No. CFOE–16–2 (Apr. 26, 2016) [hereinafter *In re Trump*], http://senate.emory.edu/documents/past_documents/Open%20Expression%20Trump.pdf.

² Policy 8.14.1.

³ Policy 8.14.2.

⁴ Policy 8.14.3. The members of the Committee are listed at the end of this opinion.

⁵ Policy 8.14.3.2.

⁶ See, e.g., *In re ESJP*.

⁷ Policy 8.14.4 describes generally the procedure for filing complaints to the Committee.

⁸ Policy 8.14.3.2.

⁹ See *In re ESJP*, Part I.B, at 2.

imposes on public universities, so that the Emory Community has at least the same rights as the communities of the University of Georgia or Georgia State University.”¹⁰ Indeed, “[i]n some ways, the Policy provides broader support for open expression than the First Amendment compels at public universities.”¹¹

However, the rights guaranteed by the Policy are generally limited to a group of people denoted the “Emory University Community.” The Policy strictly distinguishes between Community members, who have rights under the Policy, and other people, who generally do not. The Policy defines the term in the following way:

Emory University Community (“Community”): the following individuals are considered members of the Community for purposes of this Policy:

- I. Students, defined as any person pursuing studies at the University including (1) a person not currently enrolled who was enrolled in the preceding fall, spring, or summer, or (2) a person who, while not currently enrolled, was previously enrolled in Emory University and may reasonably seek re-enrollment at a future date, (3) a person who has applied to and been accepted for admission to Emory University and has accepted an offer of admission or may reasonably be expected to enroll, or (4) a person enrolled in the Emory University Pre-College Program on a credit or non-credit basis.
- II. Persons who are employed by Emory University or Emory Healthcare as faculty or staff; persons who are employed by contracted entities to provide a service to Emory University and whose work location is on any of Emory’s multiple campus locations.
- III. Trustees of the University and members of Boards of various entities of the University.
- IV. Alumni of the University when returning to campus or to official University events.
- V. Invited guests of the University such as guest speakers, panelists, artists, performers, participants, etc. for events, both on and off campus.
- VI. Patrons, guests, and those receiving the services of Emory Healthcare or other businesses, such as Continuing Education, of Emory University.¹²

¹⁰ In re Trump, Part II.A, at 3 (footnote omitted); see also In re ESJP, Part I.B, at 2–3; Policy 8.14.5 (“Emory University respects the Constitutional rights of free speech and assembly. As such, the only responsibilities outlined in this section that limit the free exercise thereof have been done in a way to ensure maximum open expression and narrowly tailoring exceptions to specific safety or community concerns.”).

¹¹ In re ESJP, Part I.C, at 3–4.

¹² Policy 8.14.2.

The Policy makes clear in several places that the Community is the set of people who have rights under the Policy. Every Community member is treated identically under the Policy. This Committee is tasked with promoting and protecting “the rights and responsibilities of *community members*” related to open expression issues, and investigating infringements of “*University community*” members’ open expression rights.¹³ With some exceptions, “[r]eservations [for Events and Meetings] shall not be denied to any *member of the Community* based on content of the Meeting, Event, or Dissent.”¹⁴ And “the foundations of this Policy are grounded in the principles of the entire campus being open and available to *members* to build community through Protest and Dissent.”¹⁵

The Community is also the set of people who have *responsibilities* under the Policy. “Each *member of the Community* is expected to know and follow this Policy.”¹⁶ The Committee is authorized to “submit recommendations to the University Senate, the President, the [Dean of Campus Life], or any other appropriate person or governing body for review” when it finds violations of the Policy “by any *member of the Community*, including those acting in the name of the University.”¹⁷ An entire section of the Policy deals with “Community Responsibilities”;¹⁸ it is “*Community members*” who violate the Policy by “infringing on the rights of other *Community members*,”¹⁹ by “substantially impeding a *Community member’s* right to open expression,”²⁰ and the like.²¹

Indeed, this is one of the ways in which the Policy goes beyond the First Amendment: While the First Amendment, at public universities, would constrain only “state actors,” i.e., administrators, faculty, staff, and other agents of the university (and thus agents of the state), Emory’s Policy also binds students, invited guests, and others who, under the First Amendment, would be considered merely private persons.²²

¹³ Policy 8.14.3 & .3.2 (emphasis added); see also Policy 8.14.4; id. 8.14.5.4(a) & (c); id. 8.14.7. We do not consider it significant whether “community” is capitalized in the Policy.

¹⁴ Policy 8.14.5.3 (emphasis added).

¹⁵ Policy 8.14.5.6 (emphasis added).

¹⁶ Policy 8.14.5.1 (emphasis added).

¹⁷ Policy 8.14.4.4 (emphasis added); see also Policy 8.14.7.1(f) (“The Committee for Open Expression should be consulted whenever possible before making a determination that *members of the Community* are indeed violating the principles of this Policy.” (emphasis added)); id. 8.14.7.2(b) (same).

¹⁸ Policy 8.14.5.

¹⁹ Policy 8.14.5.4(a) (emphasis added).

²⁰ Policy 8.14.5.4(c) (emphasis added).

²¹ See, e.g., Policy 8.14.5.4(b) (disrupting Meetings or Events); id. 8.14.5.5 (violating other policies and thus failing to act “within the spirit of Open Expression at Emory”); id. 8.14.5.6(d) (space no available for Protest or Dissent includes locations where Protest or Dissent would create “undue health and safety risk to members of the Community”); id. 8.14.5.8 (“a member of the Community who defaces the open expression of others will be held in violation of this policy”).

²² See *In re ESJP*, Part I.C, at 3.

Third, the term “Community” is incorporated into the definition of the terms “Meetings” and “Events” (these are both “gatherings of *members of the Community* in a location specifically reserved for that purpose”²³) which appear in various places in the Policy.²⁴

Fourth, the Committee or any of its subcommittees “may invite other *Community members* to provide consultative services to the Committee for their areas of expertise.”²⁵

III. THE STATUS OF LIMITED COMMUNITY MEMBERS

A. *The Distinction Between Unlimited and Limited Community Members*

The definition distinguishes between some who are always Community members by virtue of their status, and others who are Community members only at certain times or places or for certain purposes.

For instance, the Community includes “any person pursuing studies at the University.” This cannot mean *while they are studying* or *while they are attending classes*: Some students live on campus, others routinely spend time on campus for social events or other purposes, and the definition even includes three categories of students who are not currently enrolled.²⁶ Thus, students within the definition have rights and responsibilities under the Policy anytime and anywhere, simply by virtue of being students. Similarly, faculty, staff, and trustees are included in the definition without any limitation.

On the other hand, alumni are included only “when returning to campus or to official University events.” Thus, while students have rights and responsibilities under the Policy (just as they do, for instance, under the Undergraduate Code of Conduct²⁷) both on and off campus, alumni are not covered by the Policy in their daily off-campus lives outside of official University events.

Thus, there are what one might call “unlimited” and “limited” Community members. This distinction is useful for understanding the contours of two categories of limited Community members: subsections V (“Invited guests of the University such as guest speakers, panelists, artists, performers, participants, etc. for events, both on and off campus”) and VI (“Patrons, guests, and those receiving the services of Emory Healthcare or other businesses, such as Continuing Education, of Emory University”).

²³ Policy 8.14.2 (emphasis added). The difference between “Meetings” and “Events” is that “Events are generally considered to be public” while “Meetings are generally considered to be private,” *id.*, though the word “generally” indicates that the distinction is not absolute.

²⁴ See Policy 8.14.4; *id.* 8.14.5.1; *id.* 8.14.5.2; *id.* 8.14.5.3; *id.* 8.14.5.4(b); *id.* 8.14.5.5(b) & (d); *id.* 8.14.5.6 & .6(c); *id.* 8.14.5.7; *id.* 8.14.7.1; *id.* 8.14.7.3.

²⁵ Policy 8.14.3.4(c) (emphasis added).

²⁶ Policy 8.14.2 (subsections I(1), (2), and (3) of the definition of “Community”).

²⁷ See Policy 8.1 (“Applicability” section); see also *id.* (“Definitions” section, subsection (18), defining “university-sponsored activity” to include off-campus activities).

B. The Invited Guest Category

The Community includes “[i]nvited guests of the University such as guest speakers, panelists, artists, performers, participants, etc. for events.”²⁸ Three features limit this category and distinguish invited guests from mere interlopers: the “[i]nvited guests of the University” phrasing, the “such as guest speakers . . .” list, and the “for events” phrasing.

First, the phrase “[i]nvited guests of the University” implies that the University has extended an invitation. (The invitation may also come from a sub-University entity, such as a student organization or university department.) For invited guests to claim the protection of this category of the Community member definition, they must be prepared to state who invited them if asked.²⁹ The inviter is not responsible for the guest’s violations of University policies merely by virtue of having invited the guest—everyone is responsible for their own violations. However, the inviter may rescind the invitation at any time; and in case the guest willfully³⁰ and seriously violates University policies, the University may likewise rescind the guest’s invitation.

Second, the “such as guest speakers, panelists, artists, performers, participants, etc.” list indicates that this invited guest category is limited to those who *participate* in an event, not those whom someone might invite to observe or protest.³¹ The first four listed categories are all types of participants who take an active role in presenting the intended content of the event, and the fifth category (“participants”) thus serves as a catch-all to indicate both that other sorts of active intended participants are covered and that non-participants are not covered.

Third, the “for events” phrasing indicates that people who are invited guests do not continue to be members of the Community outside of the context of the event for which they are invited. They are members of the Community within the scope of their invitation, that is, for the duration and in the location of the event, with some reasonable leeway both in time (shortly before and after the event) and place (in the vicinity of the event).

The precise leeway is context-specific, and there is no single formula that will always be applicable. But we note that it is not unusual for speakers, panelists, and the like to come to the event in which they are participating perhaps an hour or two before the event, and to continue talking to guests for a similar time after the event. During this time, they might reasonably wander between their parking location and the event location, with perhaps a

²⁸ Policy 8.14.2 (subsection V of the definition of “Community”).

²⁹ Policy 8.14.7.2.b (“When the [Dean of Campus Life] declares that an individual or a group has violated the Guidelines, [the Dean] may request to examine their University or other identification. The hosts of invited guests may also be asked to provide their University identification.”).

³⁰ That is, with knowledge that their behavior was prohibited.

³¹ Some who come to observe or protest may fall within the business patron category discussed below; they simply do not fall within the invited guest category.

detour to a nearby campus café. These sorts of reasonable activities would not exceed their invitation, though this example should not be taken to be exclusive.

At the other extreme, if someone were invited to participate in a 7 p.m. event on campus, arriving at noon to organize a rally would presumptively exceed their invitation, though the University (or sub-University entity) could certainly extend a separate invitation to that person for this additional activity.

C. The Business Patron Category

1. The Limited Subcategory of “Guests” Within the Business Patron Category

A similar analysis applies to the last category of Community members: “[p]atrons, guests, and those receiving the services of Emory Healthcare or other businesses, such as Continuing Education, of Emory University.” Here, too, the Policy carefully distinguishes between those who are covered and mere interlopers.

The term “guests” is limited by the structure of the sentence. The first term, “[p]atrons,” is not sensible unless it is read with the following prepositional phrase: “[p]atrons . . . of Emory Healthcare or other businesses.” Similarly, the third term, “those receiving the services,” is not sensible unless it is read together with the same phrase “of Emory Healthcare or other businesses.” It thus makes sense to also read the middle term, “guests,” as similarly limited: “guests . . . of Emory Healthcare or other businesses.”

As with the invited guests category, this category narrowly limits the “guests” category to the context of Emory business services. The use of the present participle “receiving” indicates that they are Community members *while and where they are receiving*, and *to the extent they are receiving*, these services.

Thus, Emory Healthcare patients may come to a clinic for a doctor’s appointment, but they are not “[p]atrons . . . receiving the services of Emory Healthcare” outside of the scope of their appointment—for instance, on a separate day, even though they have a continuing doctor-patient relationship with an Emory doctor. Similarly, anyone may walk into Highland Bakery in the Business School—a café that is open to the public—and order and eat food. It makes sense that café customers have limited protection under the Policy: Otherwise, if there were two identical tables in the café, one where students are having a political discussion and another where outside customers are having an identical discussion, University authorities would have to respect the rights of the students at the first table but could expel the customers at the second table with impunity. But these customers would no longer fall within the “receiving the services of Emory Healthcare or other businesses” category if they wandered around campus for a long time afterward.

As with invited guests, there is a leeway in time and space around the specific service, which includes activities like going to and from parking. People are advised to show up half an hour before their scheduled doctor’s appointment, and people might often show

up an hour before the starting time of the concert that they are attending at the Schwartz Center or Carlos Museum. As with invited guests, the extent of this leeway is highly context-specific.

And as with invited guests, the business patron, guest, or service recipient is properly present on campus only pursuant to some authorization by the business (which might be individualized, like a medical appointment, or generalized, like an invitation to the public at large to buy food); and in case the patron willfully and seriously violates University policies, the University may rescind this authorization.

2. Protest at Events Open to the Public

One issue involves those who come to an event or service that is open to the public, but who do not intend to actually attend the event or use the service. For instance, a speaker, performer, or museum exhibit might be controversial and thus elicit protest within the world at large. Anyone from outside the University may come to a museum, concert, or talk that presents itself as being open to the public. But may they show up and merely protest outside?

Our opinion is that they may, to the same extent as unlimited Community members such as students. As for students, there is no requirement that a protest by a guest from the general public be related to the subject matter of the event. If the event is open to the public (i.e., if the general public is invited to the event), the area immediately outside the event is also open to the public. A general invitation to the public to attend an event implies an invitation to the public to be in the area immediately outside the event around the time of the event (at the very least, before and after the event).

Even if the event charges admission—so that a non-paying member of the public is not permitted to actually attend the event—the invitation to the general public to buy tickets implies an invitation to the general public to physically (and without paying) be in and near the area where tickets are sold. Thus, for instance, a political event on campus may attract protesters outside the event, and these protesters fall within the definition of Community members even if the event itself charges admission. This position stems from the Policy’s general pro-protest-and-dissent orientation: If the organizers of an event generally invite the public to attend, they should not be able to insulate themselves from dissent by charging admission, thus in effect requiring that protesters from the general public pay them an admission fee in order to protest.

D. The University’s Enforcement Posture

In practice, University authorities often use their discretion to take a soft approach to enforcement of University policies in the context of open expression.³² But the extent to

³² See, e.g., Policy 8.14.7.2 (“The Committee and the [Dean of Campus Life] shall work with Protestors or Dissenters to identify ways to continue the Dissent with modifications to avoid future violations. The spirit of this policy is to protect the right of Protestors to do so while ensuring the narrow exceptions in this policy

which this is appropriate or necessary depends on the context—in particular, what sort of Community member is involved.

It is true that the substantive provisions of the Policy apply identically to all Community members. But when faced with a violation of University policies by the “internal” categories of Community members like students, faculty, staff, trustees, and contract workers, the University has many options—for instance, the Conduct Code. Indeed, the Policy explicitly contemplates what sanctions may ultimately be applied against members of these categories.³³ Therefore, in these cases, there is less need to use strong sanctions from the start. However, the University has fewer realistic options for dealing with policy violations by alumni or by outsiders like invited guests and business patrons.

The University may therefore permissibly decline to be as charitable with willful and serious policy violations by invited guests and business patrons as it would be if the same violations were committed by students or employees.

IV. CONCLUSION

The Policy grants rights and responsibilities to “Community members,” sharply distinguishing between Community members and mere interlopers. Within the Community, the Policy distinguishes among various kinds of limited and unlimited Community members. Students, faculty, staff, contract workers, and trustees are Community members at all times. Alumni, invited guests, and business patrons are considered Community members in specific contexts. However, all Community members have the same substantive rights and responsibilities under the Policy.

The invited guest category is limited to those who are invited by the University and are active participants in an event, and is further limited to the approximate space and time of the event.

The business patron category is limited to those who are receiving the services of Emory-related businesses, roughly where and when they are receiving those services. For

are no longer being violated.”); id. 8.14.7.3 (“Termination of an event or any arrests must be the option of last resort. The Chair of the Committee for Open Expression, or his/her/hir designee, must be consulted and must have advised of all alternatives to support continuation of the Protest or Dissent before there is any termination or arrest.”).

³³ See Policy 8.14.7.4.a (“Cases involving undergraduate students are referred to the Office of Student Conduct who investigates the Event and decides what disciplinary proceedings, if any, to pursue.”); id. 8.14.7.4.b (“Cases involving graduate or professional students are referred to the established disciplinary body of the school in which the student is enrolled.”); id. 8.14.7.4.c (“Cases involving faculty are referred to the appropriate Dean or to the Provost.”); id. 8.14.7.4.d (“Cases involving University, including Healthcare, staff or administrators are referred to that individual’s supervisor or any other person with supervisory responsibility over that individual.”); id. 8.14.7.4.e (“Cases involving trustees and associate trustees of the University and members of the Boards of Overseers or other bodies advisory to the University are referred to the Executive Committee of the Trustees.”); id. 8.14.7.4.f (“Cases involving contracted workers shall be discussed by the Committee for Open Expression in collaboration with the University administrator managing that relationship.”).

members of both of these categories, the University may rescind their authorization to be on campus in case of willful and serious violations of University policies, and it is not required to adopt as conciliatory an enforcement posture as it usually does for “internal” categories of Community members such as students, faculty, and staff.

When an event is open to the general public, the general public has the same protest rights as other Community members outside the event.

Composition of the Committee for Open Expression:

Ross Abbott, Constitutional Council (ex officio, non-voting)
Nidia Bañuelos, faculty, Libraries & Information Technology
Christy Bradley, Campus Life
Dawn Francis-Chewning, staff, Libraries & Information Technology
Katherine Howard, graduate student, Laney Graduate School
Veronique King, staff, School of Medicine
Scott Kugle, faculty, Emory College
Maria Lameiras, staff, Communications & Public Affairs
Erica Lee, faculty, School of Medicine
Zachary Needell, graduate student, School of Law
Nathaniel Sawyer, student, Emory College
Tarrek Shaban, student, Emory College
Kyla Smith, student, Oxford College
Alexander “Sasha” Volokh, faculty, School of Law (chair)