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NOTES

UNIVERSITY BIAS RESPONSE TEAMS: BALANCING STUDENT FREEDOM FROM DISCRIMINATION AND FIRST AMENDMENT RIGHTS THROUGH STUDENT OUTREACH

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INTRODUCTION

The field of higher education is working to balance student First Amendment rights with the creation of inclusive learning environments for all students. Incidents involving alleged bias[1] are a consistent presence across college and university campuses in the United States—a recent report found that eighty-four percent of surveyed university equal opportunity professionals reported behavior on their campus violating antidiscrimination policies, eighty-two percent reported encountering a hate crime on campus, and sixty-five percent reported occurrences of hate speech.[2] As colleges and universities grapple with addressing, oftentimes public, incidents that offend individuals or groups of students, institutions receive conflicting messages through media outlets. Some students, faculty, and community members assert that the university must make strong statements in support of free speech, and others argue that the university should take action against students involved in these incidents.[3] Though university leadership may make public statements about incidents, much of the grappling with legal,

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1. The term "bias incidents" has been defined as "acts of prejudice that are not accompanied by violence, the threat of violence, property damage, or other illegal conduct." U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, HATE CRIMES ON CAMPUS: THE PROBLEM AND EFFORTS TO CONFRONT IT 5 (Oct. 2001). For the purpose of this note, a "bias incident" is conduct, speech, or expression that is motivated by prejudice that does not involve a crime.

2. Jeremy Bauer-Wolf, *Hate Incidents on Campus Still Rising*, INSIDE HIGHER ED (Feb. 25, 2019), https://www.insidehighered.com/news/2019/02/25/hate-incidents-still-rise-college-campuses [https://perma.cc/Q3WB-4NN6].

3. *See* Ryan A. Miller et al., *Free Speech Tensions: Responding to Bias on College and University Campuses*, 55 J. STUDENT AFFS. RSCH. & PRAC. 27 (Oct. 2017); Frederick M. Lawrence, *The Contours of Free Expression on Campus: Free Speech, Academic Freedom, and Civility*, 103 LIBERAL EDUC. 14, 16 (Spring 2017).

Constitutional, and ethical factors occurs in private.[4] A university must examine not only legal and Constitutional factors, but the complex interaction between the university's educational mission, student conduct, and the law.[5]

There are few clear answers for how to address bias conduct in higher education. When faced with public bias incidents, universities have sometimes utilized swift action to address the situation but have received criticism in doing so. In 2015, the University of Oklahoma expelled two students for leading peers in song, which included a racial slur and lyrics referencing lynching, as well as the statement that their organization would never admit Black students.[6] Free speech scholars and organizations criticized the decision, stating that it infringed student free speech rights under the First Amendment, while the University President defended the expulsion, arguing that the students created a "hostile" environment.[7]

In the midst of this tension, federal circuit courts have addressed bias incident response on university campuses through the lens of the First Amendment.[8] Specifically, three federal circuit courts have addressed whether campus officials requesting either mandatory or voluntary meetings with students who have allegedly engaged in bias conduct violates student First Amendment rights.[9] These court decisions provide insight for campus professionals to analyze their own practices in the face of bias incidents on their respective campuses.[10]

This note seeks to examine this case law within the context of a university's obligation to balance student free speech rights with creating inclusive learning environments. This note will provide campus officials with a framework within which they are able to uphold free speech rights while also working to further the conversation about bias and inclusion on campus. Specifically, this note will argue that sending meeting invitations to students who allegedly engage in biased conduct does not violate student First Amendment rights because: (1) the meeting is a component of a process and not punishment, (2) meeting with an administrator can provide an opportunity for a student whose actions were made

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4. *See, e.g.*, Clif Smart, *Balancing Rights and Responsibilities When Our Values Are Offended*, MO. STATE PRESIDENTIAL UPDATES (June 2, 2020), https://blogs.missouristate.edu/president/2020/06/02/balancing-rights-and-responsibilities-when-our-values-are-offended/ [https://perma.cc/AT9W-59D9].

5. *Id.*

6. Rachel Janik, *University of Oklahoma Expels 2 Students for Racist Chant*, TIME (Mar. 10, 2015, 12:53 PM), https://time.com/3739178/university-of-oklahoma-racist-chant/ [https://perma.cc/U3VM-5GCM].

7. Eliza Gray, *Civil Libertarians Say Expelling Oklahoma Frat Students May Be Illegal*, TIME (Mar. 10, 2015, 7:17 PM), https://time.com/3739268/sigma-alpha-epsilon-university-of-oklahoma-expel-free-speech/ [https://perma.cc/M82Z-JVCT].

8. *See* Abbott v. Pastides, 900 F.3d 160 (4th Cir. 2018); *see also* Speech First, Inc. v. Schlissel, 939 F.3d 756 (6th Cir. 2019); *see also* Speech First, Inc. v. Killeen, 968 F.3d 628 (7th Cir. 2020).

9. *See Abbott*, 900 F.3d 160; *see also Schlissel*, 939 F.3d 756; *see also Killeen*, 968 F.3d 628.

10. *Id.*

public to provide insight and perspective that otherwise is unknown, and (3) administrators may be able to provide options to students to repair unintentional harm that was caused by their speech in a student-directed manner.

Part I provides an overview of precedent regarding free speech on college and university campuses, Part II outlines university obligations to address discrimination, and Part III discusses the interaction between free speech and bias response on campuses. Part IV overviews three recent circuit court decisions regarding administrator meetings with students accused of engaging in biased conduct. Lastly, Part V analyzes recent case law and argues that administrator outreach does not violate student First Amendment rights.

I. OVERVIEW OF FREE SPEECH ON CAMPUS

Case law regarding student free expression discusses both student First Amendment rights within K-12 education and higher education. The Supreme Court outlined the importance of upholding constitutional freedoms in education generally, stating: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[11] In the landmark case *Tinker v. Des Moines Independent Community School District*, the United States Supreme Court held that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[12] The Court stated that for a school to justify a prohibition of a student's expression of a particular opinion, the school must show that: (1) the speech "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school" or (2) the school can reasonably forecast that the speech would have that effect.[13] This holding continues to be applied to both K-12 and higher education.[14]

Following *Tinker*, the Supreme Court has held that K-12 schools can limit speech if it is lewd and vulgar,[15] if the speech may reasonably be perceived as school-sponsored and the school has legitimate pedagogical concern in limiting the speech,[16] or if speech promotes illegal drug use.[17] These standards are not applied to higher education.

A. Higher Education and the First Amendment

Differences between K-12 education and higher education have been recognized by the courts. Since higher education is not required by the state,

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11. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

12. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

13. *Id.* at 509.

14. *See, e.g.*, Healy v. James, 408 U.S. 169 (1972); Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012); Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997).

15. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

16. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

17. *See* Morse v. Frederick, 551 U.S. 393 (2007).

unlike K-12 education, the state therefore has less of an interest in regulating it.[18] Moreover, students at colleges and universities are primarily adults,[19] and the ability of adult students and faculty to "inquire, to study, and to evaluate" is at the core of higher education.[20] As the Supreme Court stated in *Keyishian v. Board of Regents*: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us . . . ."[21] These differences highlight the importance of context-specific analyses of student First Amendment rights. The court in *College Republicans v. Reed* emphasized the importance of context-specific analyses, stating that environment and setting can impact the Court's analysis of First Amendment challenges.[22]

Regarding higher education, in *Keyishian,* the Supreme Court stated that the classroom is the "marketplace of ideas" [23] and that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"[24] Further, one scholar argued that cases have indicated that due to the educational mission of colleges and universities, there should be special care to allow for competing ideas on campuses.[25]

The Supreme Court asserted that "state colleges and universities are not enclaves immune from the sweep of the First Amendment" and that First Amendment protections should not be upheld with less force on college campuses than in the greater community just because of a need for order on campuses.[26] Therefore, courts have applied the *Tinker* decision to speech on college and university campuses: "absent a 'material and substantial' disruption to the functioning of a school, or some other compelling interest, public schools [including universities] may not restrict students' speech."[27]

1. Hate Speech.—The term "hate speech" is an imprecise catchall term that can include written words, verbal words, symbols, or symbolic acts that are conveyed with the intention of humiliating or wounding people on the basis of race, gender, ethnicity, religion, sexual orientation, or disability.[28] The Supreme

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18. Coll. Republicans at San Francisco State Univ. v. Reed, 523 F. Supp. 2d 1005, 1015 (N.D. Cal. 2007).

19. *Id.*

20. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

21. Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589, 603 (1967).

22. *Coll. Republicans at San Francisco State Univ.*, 523 F. Supp. 2d at 1014.

23. *Keyishian*, 385 U.S. at 603.

24. *Id.* (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

25. Christina Bohannan, *On the 50th Anniversary of Tinker v. Des Moines: Toward a Positive View of Free Speech on College Campuses*, 105 IOWA L. REV. 2233, 2244 (2020).

26. Healy v. James, 408 U.S. 169, 180-82 (1972).

27. Bohannan, *supra* note 25, at 2244.

28. *See Understanding Hate Speech*, UNITED NATIONS, https://www.un.org/en/hate-speech/understanding-hate-speech/what-is-hate-speech [https://perma.cc/H7V6-CJU6] (last visited Oct. 26, 2022); *Hate Speech and Hate Crime,* AM. LIBR. ASS'N, https://www.ala.org/advocacy/intfreedom/hate [https://perma.cc/E3HP-S93A] (last visited Oct. 26, 2022).

Court has also examined speech regarding matters of public concern, stating that these matters are central to the values of the First Amendment and therefore should be especially protected.[29] Controversial speech regarding matters of public concern can be challenging for colleges and universities to manage, as such speech can be hurtful, hateful, and offensive. But the Court has found that even if speech is hateful, if it relates to "broad issues of interest to society at large" or "matters of public import," then it is protected speech.[30]

2. Content-Based Prohibitions.—Some categories of speech, however, are unprotected, including: threats that include "a reasonable belief of intent and the ability to carry out a threat of unwelcome physical contact,"[31] defamation,[32] and genuine threats or harassment directed at a particular person.[33] Though individual instances of speech may overlap between categories of protected and unprotected speech, the speech discussed in this note primarily falls within the former category of speech regarding matters of public importance. Speech that attempts to induce hatred against people based on race, gender, sexual orientation, religion, etc., while recognized as offensive and hateful, is subject to the same analysis as any other speech on campus.[34] The United States Supreme Court has held that in order to prohibit speech based on its content, the prohibiting party must show a compelling governmental interest and that the method used to meet the interest is narrowly drawn.[35] This means that even though members of a campus community may desire for a college or university to address and stop this speech on campus, a school may not be able to do so without violating student First Amendment rights to free speech.[36]

II. OVERVIEW OF FREEDOM FROM DISCRIMINATION

Courts acknowledge that institutions of higher education have a compelling and substantial interest in maintaining an educational environment free from discrimination. For example, the Fourth Circuit stated that George Mason University had a substantial interest "in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education."[37] The court further stated that "it is the University officials' responsibility, even their obligation, to achieve [this goal]."[38] In a separate case, the same court

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29. Snyder v. Phelps, 562 U.S. 443, 451 (2011).

30. *See id*. at 545.

31. Bohannan, *supra* note 25, at 2252.

32. *See id.*; Milkovich v. Lorain J. Co., 497 U.S. 1 (1990).

33. Bohannan, *supra* note 25, at 2252.

34. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); *see also* Bair v. Shippensburg Univ. 280 F. Supp. 2d 357 (M.D. Pa. 2003).

35. *See R.A.V.*, 505 U.S. at 377.

36. *See* Gray, *supra* note 7.

37. IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 393 (4th Cir. 1993).

38. *Id.*

acknowledged that the University of South Carolina had a compelling interest in "protecting students' rights to be free from discrimination based on race, gender, religion, or other attributes."[39] In addition to case law, guidance provided by the federal Department of Education addresses university obligations to investigate, address, and remedy discrimination that occurs on campus.[40]

The United States Department of Education Office for Civil Rights ("OCR")[41] states that colleges and universities have the responsibility under Title VI, Title IX, and Section 504 to respond to discriminatory harassment that "is sufficiently serious to deny or limit a student's ability to participate in or benefit from the recipient's education programs and activities (i.e., creates a hostile environment)."[42] Further, OCR states that when an institution "knows or reasonably should know" of possible harassment, the institution:

> must take immediate and appropriate steps to investigate or otherwise determine what occurred. If an investigation reveals that the harassment created a hostile environment, the educational institution must take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and as appropriate, remedy its effects.[43]

The OCR additionally provides guidance regarding discriminatory harassment involving speech, including name-calling, slurs, taunts, and

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39. Abbott v. Pastides, 263 F. Supp. 3d 565, 578 (D.S.C. 2017).

40. *See* OFF. FOR C.R., U.S. DEP'T OF EDUC., RACE AND NATIONAL ORIGIN DISCRIMINATION, FREQUENTLY ASKED QUESTIONS (Jan. 10, 2020), https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html [https://perma.cc/9Z7W-UQW8]; OFF. FOR C.R., U.S. DEP'T OF EDUC., DISABILITY DISCRIMINATION, FREQUENTLY ASKED QUESTIONS (July 7, 2022), https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/disability.html [https://perma.cc/4S32-FWKH]; OFF. FOR C.R., U.S. DEP'T OF EDUC., SEX DISCRIMINATION, FREQUENTLY ASKED QUESTIONS (AUG. 19, 2021), https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html [https://perma.cc/5ZZC-QR2D].

41. The Office for Civil Rights ("OCR") is an entity within the federal Department of Education that works to "prevent[], identify[], end[], and remedy[] discrimination against America's students." OFF. FOR C.R., U.S. DEP'T OF EDUC., ABOUT OCR (July 13, 2022), https://www2.ed.gov/about/offices/list/ocr/aboutocr.html [https://perma.cc/978V-4DS6] (last visited Nov. 28, 2020). The mission of OCR is "to ensure equal access to education and to promote education excellence through vigorous enforcement of civil rights." *Id.* The department enforces civil rights laws in educational institutions that receive federal funds from the Department of Education, including Title VI of the Civil Rights Act of 1964 (race, color, and national origin discrimination), Title IX of the Education Amendments of 1972 (sex discrimination), Section 504 of the Rehabilitation Act of 1973 (discrimination based on disability), and the Age Discrimination Act of 1975 (age discrimination). *Id.*

42. RACE AND NATIONAL ORIGIN DISCRIMINATION, *supra* note 40; DISABILITY DISCRIMINATION, *supra* note 40. *See* SEX DISCRIMINATION, *supra* note 40.

43. *Id.*

stereotypes.[44] The OCR states that even if discriminatory harassment is in the form of speech, the school still has an obligation to respond if the speech contributes to a "hostile environment."[45] The OCR indicates that schools are able to do so without violating student First Amendment rights.[46] The OCR provides the following example with a suggested university response:

> [I]n a situation where the First Amendment prohibits a public university from restricting the right of students to express persistent and pervasive derogatory opinions about a particular ethnic group, the university can instead meet its obligation by, among other steps, communicating a rejection of stereotypical, derogatory opinions and ensuring that competing views are heard.[47]

The OCR recommends that colleges and universities encourage respectful disagreement about beliefs and "take more targeted responsive action when speech crosses over into direct threats or actionable speech or conduct."[48]

III. HOW FREE SPEECH ON CAMPUS AND BIAS RESPONSE INTERSECT

The purpose of higher education is "to create and disseminate knowledge by fostering a robust exchange of ideas," which can create tension between a university's mission for academic freedom and students who wish to feel comfortable within the university community.[49] This commitment to academic freedom, oftentimes discussed in terms of free speech, can be in direct contrast to a student's right to be free from discrimination on campus.[50] This conflict can be difficult for campus administrators to address:

> [W]hen the proverbial 'tug-of war' begins between preserving First Amendment rights and protecting widely accepted institutional values, such as civility or respect for individual differences, administrators may find themselves in a conundrum, questioning just what the right thing is to do. Legally the answer is easy—protect the First Amendment; yet, in practice, standing up for the First Amendment may create an unintended maelstrom of conflict.[51]

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44. RACE AND NATIONAL ORIGIN DISCRIMINATION, *supra* note 40.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Bohannan, *supra* note 25, at 2262.

50. Arthur L. Coleman & Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, 23 J. COLL. & UNIV. L. 91, 92 (1996-97).

51. Saundra K. Schuster, Lee E. Bird, & Mary Beth Mackin, *First Amendment Issues*, in STUDENT CONDUCT PRACTICE: THE COMPLETE GUIDE FOR STUDENT AFFAIRS PROFESSIONALS 202, 203 (James M. Lancaster & Diane M. Maryold eds., 2008).

Oftentimes, standard university disciplinary processes are not appropriate avenues to address bias incidents involving free speech,[52] though calls for accountability and conflict persist surrounding these incidents. Courts have identified that universities may justify content-based speech prohibitions if the prohibition is both "necessary to serve a compelling governmental interest and narrowly drawn to achieve that end."[53] Content-based prohibitions, however, are not the only method utilized by universities to respond to bias incidents.

A. Overview of Bias Response Teams

Universities often address incidents on campus with a bias response team—that is, a collection of educators whose role is to address bias incidents reported by students, staff, and faculty.[54] Though the specific role of bias response teams differs for each campus, generally, the role of the team is to receive reports regarding prejudice from community members, support reporters, engage the reported students in educational conversations, and monitor campus climate trends.[55]

A 2017 survey found that over one-third of surveyed colleges and universities had a bias reporting system, some of which were administered by a bias response team and others administered by preexisting campus offices.[56] An examination into the makeup of university bias response teams showed that forty-two percent of teams had law enforcement as members, sixty-three percent had student conduct professionals as members, twelve percent had public relations professionals as members, twenty-seven percent had faculty as members, and twenty-one percent had students as members.[57]

Bias response teams have been the subject of much disagreement, with free speech advocates critiquing the model and student affairs administrators arguing that teams are an integral part of student reporting.[58] Largely, critics of bias response teams express concern about teams being the "thought police" and chilling protected speech.[59] Proponents of the teams, however, assert that the

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52. Miller, *supra* note 3, at 29.

53. Abbott v. Pastides, 900 F.3d 160, 167 (4th Cir. 2018). *See* Widmar v. Vincent, 454 U.S. 263, 274 (1981).

54. Lucy A. LePeau et al., *Connecting to Get Things Done: A Conceptual Model of the Process Used to Respond to Bias Incidents*, 9 J. DIVERSITY HIGHER EDUC. 113, 114 (2016).

55. Ryan A. Miller et al., *Bias Response Teams: Fact vs. Fiction*, INSIDE HIGHER ED (June 17, 2019), https://www.insidehighered.com/views/2019/06/17/truth-about-bias-response-teams-more-complex-often-thought-opinion [https://perma.cc/N45A-R9DA].

56. FOUND. FOR INDIVIDUAL RTS. EDUC. (FIRE), BIAS RESPONSE TEAM REPORT 2017, at 4, 7, (2017), available at https://www.thefire.org/presentation/wp-content/uploads/2017/03/01012623/2017-brt-report-corrected.pdf [https://perma.cc/5X29-XSG7].

57. *Id.* at 8.

58. *See* Miller, *supra* note 3, at 27-28.

59. Jake New, *Defending BARTs*, INSIDE HIGHER ED (Sept. 12, 2016), https://www.insidehighered.com/news/2016/09/12/despite-recent-criticism-college-officials-say-bias-response-

teams work to facilitate conversations about bias and provide clear processes for students to report discriminatory conduct.[60]

IV. RECENT CASE LAW

Three recent federal circuit court cases provide split perspectives on whether higher education administrators requesting meetings with students who are alleged to have engaged in bias conduct violates student First Amendment rights. Two of the three cases involve analyses of university actions and procedures related to their internal bias response teams.

A. Abbott v. Pastides

In 2018, the Fourth Circuit held that the University of South Carolina did not chill speech when the University conducted a mandatory pre-investigation meeting into complaints of the plaintiff's alleged bias conduct.[61] In this case, two students groups, the College Libertarians and Young Americans for Liberty, sponsored a university-approved "Free Speech Event" to "highlight perceived threats to free expression on college campuses."[62] The event was scheduled to include visual depictions of symbols and materials that were the center of controversy at other colleges and universities, including a poster with a swastika and a poster with the term "wetback." [63] The Director of Campus Life received multiple complaints from faculty and students regarding the event, to which the Director responded: "This is free speech and . . . if they are being respectful and trying to help learn and create dialogue then I am not sure how to help those who are uncomfortable."[64] After the event concluded, the University's Office of Equal Opportunity Programs received three additional written complaints from students, with one alleging that the sponsoring students made "sexist and racist statements" to the reporting party.[65] Two of the reports were submitted anonymously.[66]

In response to the received reports, campus administrators sent a letter to Abbott, the president of the College Libertarians, instructing him to schedule a meeting with the Office of Equal Opportunity Programs to "fully discuss the charges as alleged."[67] In the letter, the administrator told Abbott that if they were unable to resolve the complaint, that there would be an investigation and recommendation submitted to the Provost and University President.[68]

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teams-fill-important [https://perma.cc/EVC2-HT3B].

60. *Id.*
61. Abbott v. Pastides, 900 F.3d 160, 163 (4th Cir. 2018).
62. *Id.* at 163-64.
63. *Id.* at 165.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 164-65.
68. *Id.* at 165.

Additionally, the letter stated that there was an attached "Notice of Charge."[69] The University later stated that the use of that term was a "clerical error."[70]

Two weeks later, Abbott and the president of the Young Americans for Liberty met with the Assistant Director of the Office of Equal Opportunity Programs.[71] During the meeting, the administrator assured the students that the University had not placed any charges against the students, despite "the letter's reference to a 'Notice of Charge.'"[72] Rather, the administrator stated that it was a standard practice for the administrator to meet with accused students when the University received reports and that the intention of the meeting was to gather "the 'who, what, when, whys, and hows' of the Event."[73] The administrator informed the students that the University had not yet determined whether an investigation would take place.[74] Additionally, the administrator told the students multiple times that the University was in "pre-investigation mode," specifically stating: "we are at the point in our exploration to make sure [we] understand what happened here and to decide if this is something we respond to or not. The decision to respond or not respond has not been made. We're just trying to understand."[75]

A few weeks later, the Assistant Director sent Abbott a letter stating that they had "'found no cause for investigating' the complaints" and that there would be no further action taken regarding the complaints.[76] Abbott, the College Libertarians, and Young American for Liberty then filed a §1983 suit against multiple University officials, claiming that the University violated the plaintiffs' First Amendment rights by chilling their free expression through "'investigating' Abbott in connection with the Free Speech Event."[77]

The Fourth Circuit outlined that, though First Amendment speech rights apply on college campuses, the rights are not absolute.[78] The court agreed with the district court in that "content-based prohibitions on speech will be upheld where they are necessary to serve a compelling governmental interest and narrowly drawn to achieve that end."[79] The Fourth Circuit reasoned that there may have been a temporary "past" chill in speech during the two weeks between the time the plaintiffs received the letter from the University and the in-person meeting.[80] However, the University of South Carolina's process was permitted under a strict scrutiny standard because the school's pre-investigation was

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69. *Id.*
70. *Id.*
71. *Id.* at 166.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* (alteration in original).
76. *Id.*
77. *Id.*
78. *Id.* at 172.
79. *Id.* at 167.
80. *Id.* at 171.

narrowly tailored to meet the school's compelling interest of protecting student rights to freedom from discrimination.[81]

Specifically, the process, as described by the district court, addressed "the rights of all students on campus: those who participated in the event and those who felt discriminated by it."[82] Moreover, the University approved the event, did not sanction the plaintiffs for their conduct, did not try to silence the plaintiffs, and did not try to prevent the plaintiffs' future speech.[83] The court reasoned that a "threatened administrative inquiry will not be treated as an ongoing First Amendment injury sufficient to confer standing unless the administrative process itself imposes some significant burden, independent of any ultimate sanction."[84]

B. Speech First, Inc. v. Schlissel

In 2019, the Sixth Circuit held that the University of Michigan likely violated student First Amendment rights such that the University may be eligible for a preliminary injunction when the University's method for responding to bias reports "acts by way of implicit threat of punishment and intimidation to quell speech."[85] In this case, Speech First, Inc. brought a suit against the University of Michigan to challenge the University's policies related to bullying and harassment.[86] One of the components of the suit addressed the University's process through which it responded to student-reported alleged bias incidents.[87] Once a student submits a report alleging a bias incident to the University's Bias Response Team,[88] a team member contacts the reporting individual to discuss what occurred and to provide resources.[89] Based on the wishes of the reporting individual, the team member may then contact and extend an offer for a voluntary meeting to the reported student.[90] The team member cannot require a meeting and does not have authority to implement sanctions for conduct; however, the

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81. *Id.* at 172-74.

82. *Id.* at 168.

83. *Id.*

84. *Id.* at 179.

85. Speech First, Inc. v. Schlissel, 939 F.3d 756, 765 (6th Cir. 2019). On the issue of whether to grant a preliminary injunction against the University for alleged violations of student First Amendment rights to free speech, the court held that First Speech had "a strong likelihood of success" on the merits. *Id.* at 710. But the court ultimately remanded for the district court to fully address "Speech First's likelihood of success on the merits," which it did not originally do; instead, the district court addressed only enough to determine the questions of mootness and standing. *Id.*

86. *Id.* at 761.

87. *Id.* at 762.

88. The University's Bias Response Team's role is to act as an "informal resource to support students who feel they have experienced bias in the University community, to refer them to other campus resources as appropriate, and to educate the University community with respect to issues related to bias." *Id.*

89. *Id.*

90. *Id.*

member can make referrals to student conduct professionals or police, who maintain the authority to implement such sanctions.[91]

The Sixth Circuit stated that students "face an objective chill based on the functions of the Response Team" and that "the Response Team acts by way of implicit threat of punishment and intimidation to quell speech."[92] The court reasoned that even though team members do not have the authority to implement sanctions, their ability to make referrals to student conduct professionals or the police "is a real consequence that objectively chills speech."[93] Even though an investigation initiated by the team member's referral may not culminate in sanctions or a finding of responsibility, the mere fact that the investigation could potentially lead to an outcome is enough to chill speech.[94] The court further stated that "nothing in the record suggests that the Response Team may refer matters only if the reporting student assents" and that having a process in place that allows referrals without the consent of the reporting students could result in consequences for the reported students they would not face otherwise.[95]

The court also addressed the voluntary nature of the meetings. Specifically, the court stated that the meeting invitations may "carry an implicit threat of consequence" if they were to not attend a meeting because of the team member's ability to refer to student conduct or the police.[96] Additionally, the court stated that the name, Bias Response Team, "intimates that failure to meet could result in far-reaching consequences, including reputational harm or administrative action" because their behavior has been "prejudged to be biased."[97] Therefore, the court held that the referral power of Bias Response Team members and the voluntary meeting invitations objectively chill speech.[98]

The dissenting opinion outlined that the majority disregarded evidence indicating that a Bias Response Team Coordinator did not know of any time when a team member served as a complainant for a case referred to the student conduct office and that the ability to refer alleged bias incidents to the conduct office and police department is not something that is exclusive to Bias Response Team Members—any community member can make a report.[99] Further, the dissenting opinion outlined that Bias Response Team members typically would only refer an incident to the student conduct office or the police department if it is believed that the reported actions were in violation of policy or law, which meant that the team did not pose a threat of concrete harm.[100]

Lastly, the dissent argued that meeting invitations sent by the Team to

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91. *Id.* at 762-63.
92. *Id.* at 765.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 771-72 (White, J., dissenting).
100. *Id.* at 772.

students "rarely [were] extended and [were] even more rarely accepted."[101] Therefore, the dissent reasoned that Speech First did not met its burden for a preliminary injunction because of the lack of threat to the First Amendment:[102] "The evidence in the present matter similarly reflects no threats—direct, subtle, or implied—from the BRT."[103] The court continued by noting: "The evidence does not even reflect an instance where the BRT criticized the speech of an individual who is reported to have engaged in biased conduct."[104] The dissent indicated that even if a team member did criticize reported speech, there would be no First Amendment violations unless there were actual or threatened sanctions.[105] The dissent also stated that the majority agreed with the defense's argument that "a university should be able to address a student when his or her speech may offend or hurt other students without running afoul of the First Amendment."[106] Further, the dissent highlighted a portion of the defense's argument supporting the University addressing a student when their speech offends or hurts other students, which stated:

> That's education. That's what a professor should do. That's what the university should do when someone comes to a body that's created in order to promote respect and understanding on the campus. Respect and understanding are not enemies of the First Amendment. . . . Respect is a condition for effective speech. Understanding is the goal of the speech.[107]

C. Speech First, Inc. v. Killeen

In 2020, the Seventh Circuit held that Speech First did not meet the burden of showing a preliminary injunction was warranted against the University of Illinois at Urbana-Champaign's bias response team when meetings with the team are optional, many students decline meeting invitations with no consequences, and the team has no authority to implement disciplinary measures.[108] In this case, Speech First brought a suit on behalf of four anonymous students against administrators at the University of Illinois alleging that three University policies chill speech and threaten free speech on campus.[109] Specifically, Speech First states that the students wish to express unpopular views on campus, including, but not limited to, "opposition to abortion, support for President Trump, belief in traditional marriage, support for strong immigration policies, support for the 'deradicalization of Islam,' support for First Amendment protection of 'hate

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101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 773.
105. *Id.*
106. *Id.*
107. *Id.*
108. Speech First, Inc. v. Killeen, 968 F.3d 628, 641-43 (7th Cir. 2020).
109. *Id.* at 632.

speech,' opposition to gun control, and support for LGBT rights."[110] Speech First states that three university policies, including the Bias Assessment and Response Team ("BART") and Bias Incident Protocol ("BIP"), "chill their student members' speech, force these students to engage in self-censorship, and deter them from speaking openly about issues of public concern."[111]

The court began by outlining the purpose of BART and the process through which BART responds to received reports of alleged bias incidents.[112] The court stated that BART is "housed within" the Office for Student Conflict Resolution and includes team members from across the university, including, but not limited to, representatives from housing, student affairs, the university police department, and the Office of Diversity, Equity, and Inclusion.[113] Any community member is able to report an alleged bias incident with themself identified or anonymously, which would initiate the team response process.[114] BART will then develop a plan to respond to the reported incident, which can include interventions such as educational conversations, mediation, facilitated dialogue, education, resolution agreements, and referrals to other departments on campus.[115] BART does not have the authority to discipline students and does not refer cases to the University police department.[116] If a student were to violate the Student Code as a component of the report, the student disciplinary process would address the violation, not BART.[117]

If a reporting student includes their name and wants to meet with a team member, a team member will meet with them to discuss what occurred and to offer support.[118] If a student is named to be involved in a reported incident, a team member may invite the student to "participate in a voluntary conversation."[119] The court stated that the majority of reported students who are invited to attend a voluntary meeting decline the invitation or do not respond to the team member's outreach.[120] Importantly, there is no consequence for declining to meet or failing to respond.[121] If a student were to accept the invitation to meet, however, the court explained that a BART member merely "explains to the student that her conduct drew attention and gives the student an opportunity to reflect upon her behavior and its impact on other students."[122]

The court also addressed BIP, a process similar to BART, but solely

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110. *Id.*
111. *Id.*
112. *Id.* at 632-34.
113. *Id.* at 633.
114. *Id.*
115. *Id.*
116. *Id.* at 633-34.
117. *Id.* at 634.
118. *Id.* at 633.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

operating within University housing.[123] The process is similar to that which is enacted through BART—a committee addresses received reports about alleged bias incidents through multiple actions, including invitations to allegedly involved students to participate in a voluntary meeting with a BIP team member.[124] Similar to BART, BIP does not have sanctioning or disciplinary authority.[125]

The court stated that Speech First did not provide evidence to dispute the district court's findings that BART did not have disciplinary authority.[126] The court outlined that because BART does not have disciplinary authority and that solely expressing bias-motivated speech is not a conduct violation, there is no consequence for a student being reported to BART, which results in no credible threat of enforcement.[127] Additionally, though Speech First asserted that no student would find the meeting invitations to be voluntary, the meetings with BART are optional, most students do not accept meeting invitations, and there are no consequences for students who choose to not meet with BART.[128] The court noted *Abbott* as instructive for this matter, stating that because the court in *Abbott* found that a mandatory meeting notice was not sufficient to show standing, that the voluntary meeting invitation in this case would not serve as a credible threat to student rights.[129]

Lastly, the court outlined the district court's finding that BART does not hold disciplinary authority, does not impose sanctions, and does not require behavior modification for reported students.[130] Through Speech First argued that BART's referral power can still chill speech, the court stated that because most students reject attempts from BART members to meet with reported students, "Speech First's speculation that BART's outreach carries an implicit threat of consequences lacks merit."[131] The court stated: "The mere possibility of a referral does not demonstrate standing."[132]

The court distinguished the facts from the Sixth Circuit's *Schlissel* decision, stating that Speech First failed to provide evidence indicating that BART will refer students for not meeting with team members.[133] Moreover, unlike the plaintiffs in *Schlissel*, Speech First did not show that students interpret BART's meeting invitations as an implicit threat.[134]

One judge, dissenting in part as to the question of mootness, but concurring

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123. *Id.* at 634.
124. *Id.* at 634-35.
125. *Id.* at 635.
126. *Id.* at 639.
127. *Id.*
128. *Id.* at 640.
129. *Id.* at 640-41.
130. *Id.* at 641.
131. *Id.* at 642.
132. *Id.* at 643.
133. *Id.*
134. *Id.*

that Speech First lacked standing for the case, stated:

> Reasonably risk-averse students generally avoid a burdensome investigative process. Such investigations could amplify reputational damage suffered by 'offenders' even when the speech investigated is protected . . . . Because reputational damage can impair a student's prospects for academic and professional success, objectively reasonable students may be expected to behave in ways that mitigate their exposure to any allegation that might trigger a bias investigation. 'Process is punishment' is not a platitude; a University-controlled clearinghouse for speech can deter students from speaking out."[135]

Another part of the dissent stated that though these consequences discussed "could conceivably constitute particular and concrete threats of harm chilling protected speech," they are not sufficiently included in Speech First's evidence.[136]

These cases seemingly provide mixed guidance for colleges and universities. Both the *Abbott's* and *Killeen's* holdings suggest the constitutionality of bias response team members reaching out to reported students, while the *Schlissel* holding does not.[137] Therefore, this note seeks to analyze these three cases and develop further discussion to inform university bias response practice moving forward.

V. CONTACTING THE REPORTED STUDENT DOES NOT VIOLATE FIRST AMENDMENT RIGHTS

Scholars recommend non-regulatory approaches to addressing bias speech on college and university campuses because the methods do not prohibit certain types of speech or require involuntary sanctions.[138] Student meetings with university administrators, though serving multiple purposes, oftentimes fall into this category. An administrator inviting an accused student to meet in response to a report of bias speech does not violate the student's First Amendment rights because (1) the meeting is a component of a process and not punishment, (2) meeting with an administrator can provide an opportunity for a student to provide insight and perspective that otherwise is unknown, and (3) administrators may be able to provide the student options to address the reported speech in a manner that is conducive to repairing unintentional harm.

A. Process Is Not Punishment

The act of a university administrator contacting a student for a meeting regarding alleged conduct is not a punishment, but a step of a process. Students meet with university faculty, staff, and officials regarding a wide variety of matters—the act of an administrator purely speaking with a student is not

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135. *Id.* at 652 (Brennan, J., concurring in part and dissenting in part).

136. *Id.* at 652-53.

137. *See supra* Sections IV.A.-C.

138. Miller, *supra* note 3, at 29.

punitive. Student interactions with staff and faculty do not only occur upon receipt of a report of misconduct and can be initiated by either party. Individualized meetings are oftentimes encouraged as an avenue for student learning outside of the classroom, in alignment with the educational mission of higher education.[139]

In *Abbott*, the court found that plaintiffs' First Amendment rights were not violated because a student of "ordinary firmness" would have understood that, as a result of the meeting, they did not have to worry about whether their future speech would lead to punishment—the administrator was clear about which step of the investigatory process the meeting occurred within.[140] This narrowly-drawn approach was not to silence or sanction the plaintiffs but solely to meet with the students to determine whether an investigation needed to proceed.[141] This meeting, though likely uncomfortable for the plaintiffs, was a fact-based inquiry regarding alleged behavior and cannot be seen as not a form of punishment.

1. University Responsibility to Investigate.—The plaintiffs in *Abbott* argued that the University should have taken preliminary steps to weed out complaints without plaintiff involvement; however, the court asserted that the "brief and decidedly non-adversarial meeting with Abbott" was that weeding out process.[142] The court held that this approach was constitutional because it addressed the rights of both the accused and reporting students.[143]

When a university receives a report of an alleged bias incident, it may be obligated to investigate the report under Title VI. Specifically, the Office for Civil Rights in the Department of Education provides guidance that when a school "knows or reasonably should know of possible racial or national origin harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred."[144] Though it is possible that a preliminary review of the report may not require any additional information to make a determination if it falls under a university's obligations, the university may need to speak with those involved to gain a greater understanding of what occurred. In order for colleges and universities to make informed, fact-based, and report-specific decisions, colleges and universities must be able to speak with accused students. The *Abbott* court instructs: "we do not agree that school officials confronted with harassment allegations are required to resolve them in the abstract. Nor does the First Amendment require that they assume no actionable harassment or discrimination without first seeking relevant information."[145]

2. Implicit Power to Punish.—The court in *Schlissel* approached the

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139. Allison Pingree, *Encouraged Student-Faculty Interaction Outside of Class*, IDEA, https://www.ideaedu.org/idea-notes-on-instruction/encouraged-student-faculty-interaction-outside-of-class/ [https://perma.cc/D3ZM-UMBD] (last visited Feb. 4, 2021).

140. Abbott v. Pastides, 900 F.3d 160, 170 (4th Cir. 2018).

141. *Id.* at 168.

142. *Id.* at 172.

143. *Id.* at 173.

144. RACE AND NATIONAL ORIGIN DISCRIMINATION, *supra* note 40.

145. *Abbott*, 900 F.3d at 173.

constitutionality of administrator outreach from a different perspective and focused on administrators holding implicit power to punish students.[146] The court reasoned that "[e]ven if an official lacks actual power to punish, the threat of punishment from a public official who *appears* to have punitive authority can be enough to produce an objective chill."[147] Further, the court stated that the ability of a bias response team to refer students to the police or student conduct, though not a punishment within itself, subjects students to a process that can lead to punishment and therefore lends enough to warrant standing to get a preliminary injunction.[148]

The Second Circuit addressed state actors employing implicit coercion to quell free speech, stating:

> What matters is the distinction between attempts to *convince* and attempts to *coerce*. A public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form.[149]

The *Schlissel* court stated that though a meeting may be labeled as voluntary, "the referral power lurks in the background of the invitation" and if a student were to decline the meeting, there could be an implicit threat of punishment.[150] Despite the holding in *Schlissel*, the *Killeen* court used the *Abbott* decision as instructive regarding whether student outreach is a form of punishment.[151] Citing *Abbott*, the *Killeen* Court stated that it would not treat a potential administrative investigation as enough for a plaintiff to have standing in First Amendment case unless the process imposes a significant burden on the plaintiff.[152] The court indicated that a non-adversarial investigation meeting, in which the plaintiff is provided the opportunity to share their perspective on reports alleging bias conduct, is not an "'extraordinarily intrusive' process that might make self-censorship an objectively reasonable response."[153]

Though courts are split on the constitutionality of administrator meetings with accused students, arguably, it may be necessary for a university to reach out to a student. Though a student may feel as though they will be punished as a result of the meeting, or that the meeting itself is punishment, universities must uphold their obligations under federal guidance to discern what occurred. These

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146. Speech First, Inc. v. Schlissel, 939 F.3d 756, 764 (6th Cir. 2019).

147. *Id.* at 764-65 (emphasis in original).

148. *Id.* at 765.

149. Okwedy v. Molinary, 333 F.3d 339, 344 (2d Cir. 2003) (emphasis added).

150. *Schlissel*, 939 F.3d at 765.

151. Speech First, Inc. v. Killeen, 968 F.3d 628, 640-41 (7th Cir. 2020) (citing Abbott v. Pastides, 900 F.3d 160, 179 (4th Cir. 2018)).

152. *Id.*

153. *Id.*

meetings are a component of a greater response process and are distinct from sanctions.

B. Opportunity to Provide Perspective

Though the Office for Civil Rights guidance regarding a university's responsibility to "take immediate and appropriate steps to investigate or otherwise determine what occurred" does not include specific procedural requirements,[154] a university administrator meeting with an accused student would be a central component of the process. This meeting would allow for the accused student to provide their own perspective on what occurred, ensuring that the administrator is able to make an informed decision on next steps with information from both the reporting party and the student involved. In addition, a student who is accused of engaging in bias conduct may not have an opportunity to share their understanding of what occurred with others due to legal or social ramifications. Especially in the case of public incidents, it is possible that a student has a different understanding of their role in the incident and have not yet had the opportunity to share their perspective with the public. This meeting can serve as a way for the student to speak to any misrepresentations or misunderstandings that they believe are relevant.

In *Abbott*, the administrator who met with the plaintiffs informed them that they were not under investigation but were meeting so the administrator could gain a greater understanding about what occurred.[155] The administrator indicated to the plaintiffs that they would use this information to assist in deciding whether to conduct an investigation or not.[156] Without meeting with the students, the administrator would have had to make a decision regarding whether to proceed with an investigation without first gathering pertinent information from the plaintiffs.

The court also noted potential consequences of interviewing complainants and witnesses without interviewing the plaintiff and stated that decision-making without the plaintiff's perspective could result in reputational damage.[157] Being publicly accused of engaging in bias conduct can have grave consequences for the accused student's reputation, which could interfere with personal and professional endeavors. Therefore, an early opportunity for the accused student to respond to accusations in private balances a university's obligation to discern what occurred and the accused student's rights.

One critique of university bias response procedures is that meetings between administrators and accused students can "more closely resemble a reprimand than an enlightening exchange of views" and that "[s]uch procedures risk becoming tools not only for imposing some form of political or intellectual orthodoxy, but

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154. RACE AND NATIONAL ORIGIN DISCRIMINATION, *supra* note 40.

155. *Abbott*, 900 F.3d at 166.

156. *Id.*

157. *Id.* at 173.

also for policing politeness or civility."[158] Despite concerns that there is a possibility of an administrator "imposing some form of political or intellectual orthodoxy" on students,[159] a student-administrator meeting is an important component of the discernment process.

Courts have established that an opportunity for accused students to speak to what occurred is a component of due process rights that students retain throughout university disciplinary proceedings.[160] Though pre-investigation or informal meetings with students regarding bias conduct do not necessarily occur within a formal disciplinary structure, the *Schlissel* court expressed concerns regarding the power of administrators to refer cases to student disciplinary processes based on the content of the meeting.[161] The *Abbott* court addressed concerns related to meetings violating student rights and stated: "allowing a student accused of a campus infraction an early chance to respond generally is considered a feature of due process, not a bug."[162] Though an administrator may not be required to provide a student a right to be heard as a component of due process because the meetings at issue are not disciplinary meetings, the opportunity for a student to provide perspective has been noted by courts as a central due process right in more stringent disciplinary processes.[163] Therefore, meeting invitations do not violate a student's rights through chilling speech but provide the student an additional opportunity to be heard.

C. Options for Student-Driven Restoration

As discussed earlier, though universities may seek to uphold the First Amendment, doing so can cause conflict on campus.[164] To address this conflict, administrators can utilize student-driven restorative interventions to increase communication between the accused and impacted parties directly, or create community-wide spaces to address topics of conflict. Universities can work to comply with constitutional obligations while simultaneously encouraging student learning: "[A] commitment to legal compliance is not at odds with but rather aligns well with an educationally driven approach to the work of student conflict resolution and student conduct management."[165] Universities are able to work to address bias conduct within the campus community more effectively through

158. FIRE, *supra* note 56, at 9.

159. *Id.*

160. *See* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

161. Speech First, Inc. v. Schlissel, 939 F.3d 756, 765 (6th Cir. 2019).

162. Abbott v. Pastides, 900 F.3d 160, 173 (4th Cir. 2018).

163. *See Dixon*, 294 F.2d 150.

164. *See* Schuster, *supra* note 51, at 203.

165. Simone H. Taylor & Donica T. Varner, *When Student Learning and Law Merge to Create Educational Student Conflict Resolution and Effective Conduct Management Programs*, in REFRAMING CAMPUS CONFLICT: STUDENT CONDUCT PRACTICE THROUGH A SOCIAL JUSTICE LENS 22, 22 (Jennifer M. Schrage & Nancy G. Giacomini eds., 2009).

education than through prohibiting or punishing speech.[166]

An accused student may not know how the alleged conduct has "affected others or even the consequences of their behavior on the larger community."[167] A meeting between the accused student and an administrator can provide a space for the student to begin to learn about the impact of the alleged conduct and discuss opportunities for restoration with the community, if the student would like to do so. "When confronted with these realities, students begin to learn invaluable life lessons about fundamental responsibilities associated with foundational rights."[168] Many students are living and working with people from diverse backgrounds for the first time and are learning from both their faculty members and their fellow students.[169] Having the opportunity to speak directly to people who they have harmed with the intention of restoration can be transformative for all involved parties.

The Foundation for Individual Rights in Education, an organization whose mission is "to defend and sustain the individual rights of student and faculty members at America's colleges and universities,"[170] recommends that university response "would involve prompt, fair, and impartial discipline for instances of physical misconduct, true threats, and harassment, while fostering an environment in which offensive speech would be answered with more speech."[171] Not all involved parties are able to engage in public speech to the same degree, however—"underrepresented minorities who are frequently the targets of hate speech do not have the same ability to speak back and be heard as wealthier, privileged, and more powerful groups."[172] This means that purely providing an open forum to engage in speech may not result in an open exchange of ideas. Further, requiring people who are injured by hate speech to speak back to educate places an additional burden on them.[173] Therefore, providing options for a structured conversation can serve to support all students involved, while encouraging communication among the parties.

In totality, a meeting between an administrator and an accused student can serve to expand lines of communication about the alleged behavior, providing the accused student the opportunity to try to repair individual or community harm. Without an initial meeting with the accused student, the student may not know of the impact of their alleged conduct or opportunities for restoration. "[S]tudents do not have a structured and informed chance to challenge their role and actions in conflict, consider alternative conflict resolution options in the future to resolve or de-escalate their own conflicts, or see a process modeled for them that would

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166. *See* Bohannan, *supra* note 25, at 2263-66.

167. Schuster, *supra* note 51, at 213.

168. *Id.*

169. Bohannan, *supra* note 25, at 2263.

170. *Mission*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (FIRE), https://www.thefire.org/about-us/mission/ [https://perma.cc/N3MG-PSH9] (last visited Feb. 4, 2021).

171. FIRE, *supra* note 56, at 9.

172. Bohannan, *supra* note 25, at 2247.

173. *Id.*

in turn help develop this skill set."[174] Engaging students in a restorative process can do just this—providing both the accused and impacted parties opportunities to engage in dialogue and encourage learning throughout the process.

CONCLUSION

College and university administrators are grappling with how to address bias incidents through a delicate balance of student First Amendment rights and student rights to freedom from discrimination. Circuit court holdings provide mixed guidance to administrators regarding available steps to contact students who allegedly engage in biased conduct. The courts in *Abbott v. Pastides*[175] and *Speech First, Inc. v. Killeen*[176] both found that universities did not violate student First Amendment rights when they sent meeting requests to students after receiving reports of the students' alleged bias conduct. The court in *Speech First v. Schlissel*,[177] however, held that the university's actions likely violated student First Amendment rights because the meeting request was associated with an implicit threat of punishment for non-attendance.

This note argues that campus administrators requesting a meeting with a student who allegedly engaged in bias conduct does not violate the student's First Amendment rights. A meeting between a student and administrator to gather facts is a part of a process, but not a punishment within itself. An information-gathering meeting, such as those discussed in recent case law, is an opportunity for the student to engage in further discussion about their conduct and provide additional perspective within a narrowly tailored process. Campus administrators may be able to engage the student in conversation when unintentional harm occurs as a result of speech and provide the student options to repair the harm or converse with those who were harmed by the speech. In totality, the process of inviting a student to speak with an administrator is one that provides the student additional opportunity to speak and does not violate a student's First Amendment rights.

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174. Nancy G. Giacomini & Jennifer M. Schrage, *Building Community in the Current Campus Climate*, in REFRAMING CAMPUS CONFLICT: STUDENT CONDUCT PRACTICE THROUGH A SOCIAL JUSTICE LENS 7, 17 (Jennifer M. Schrage & Nancy G. Giacomini eds., 2009).

175. Abbott v. Pastides, 900 F.3d 160 (4th Cir. 2018).

176. Speech First, Inc. v. Killeen, 968 F.3d 628 (7th Cir. 2020).

177. Speech First, Inc. v. Schlissel, 939 F.3d 756 (6th Cir. 2019).