

To: Members of the Education Committee
Cc: Senator Halloran
From: Danielle Conrad, Executive Director, ACLU of Nebraska
Re: LB 718
Date: January 30, 2018

For over 50 years in Nebraska, the ACLU has worked in courts, legislatures, and communities to protect the constitutional and individual rights of all people. With a nationwide network of offices and millions of members and supporters, we take up the toughest civil liberties fights. Beyond one person, party, or side — we the people dare to create a more perfect union.



AMERICAN CIVIL LIBERTIES UNION
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The fight for freedom of speech has been a bedrock of the ACLU's mission since the organization was founded in 1920, driven by the need to protect the constitutional rights of conscientious objectors and anti-war protesters. The organization's work quickly spread to combating censorship, securing the right to assembly, and promoting free speech in schools. We believe the First Amendment is the foundation of a vibrant democracy and it is undisputed that the First Amendment provides robust protection for free speech, including protest, counter protest, and other expressive activity.

I am writing today on behalf of the ACLU of Nebraska in the neutral capacity to express our general support for the spirit and intent of the Higher Education Free Speech Act as expressed in AM 1553 to LB 718 but with general reservations about state constitutional prohibitions¹ and with specific points in need of additional clarification presented in the draft.

We deeply appreciate Senator Halloran, Erdman, and Brewer's commitment to presenting legislation to ensure free speech for students, faculty and members of the public while on public property at our University, state colleges, and community college campuses. Free speech on campus is specifically critical to ensure space for the advancement, exploration, and sharing of ideas and we commend legislative leaders for recognizing that and attempting to ensure clarity for all stakeholders about how these issues play out in the campus environment and to breathe life into our beloved First Amendment protections. Additionally, we specifically commend the Senators for the clear and strong commitment to academic freedom and free expression in Sec.3 (1) & (2). For additional

¹ *Board of Regents of Univ. of Neb. v. Exon* 256 N.W.2d 330 (1977). In light of these threshold considerations the ACLU of Nebraska appeared at the University Board of Regent's meeting on January 25, 2018 and presented general support for the Board of Regents Policy RP-6.4.10 "Commitment to Free Expression; Guide for Facilities Use; and Education" with a few important caveats as to definitions, space designations, intentionally for punishable speech, and due process. Testimony available upon request. ACLU of Nebraska has previously communicated concerns about "free speech zones" at the University of Nebraska Lincoln in a letter to Chancellor Perlman in 2015. Letter on file at ACLU of Nebraska and available upon request.



background information on this topic please see the attachment to this testimony and published on the ACLU national website titled *Speech on Campus*.²

We do however want to ensure your consideration of a few sections in AM 1553 to LB 718 that may benefit from amendment or clarification:

First, in light of clear concerns grounded in Nebraska's constitution³ it would be advisable if the committee decides to advance the bill to entertain a committee amendment to make the language in the Higher Education Free Speech Accountability Act permissive or purely aspirational instead of mandatory and thus could replace all uses of "shall" with "may" as appropriate. In the alternative the Legislature could entertain a non-binding legislative resolution stating its intent and position on these topics without running afoul of the constitutional considerations rooted in Nebraska's proud populist history and clear preferences for strong separation of powers and independence among different branches of government and state institutions.

Additional points for your consideration:

-Sec.2 (1) the definition of campus community is too prescriptive for public institutions and should include considerations of members of the public who utilize and have access to certain aspects of campus environs

-Sec.3 (1) the requirement that the campus policies utilize specific language defining their primary function may be too narrow and in conflict with each institution properly promulgated charters and missions⁴.

-Sec. 3 (3) while we appreciate what this section is attempting to do we believe this section may be overly broad and vague. It is critical that state government not impose a gag rule on leaders in Nebraska's community of higher education to speak out on critical issues of the day facing their students, faculty, campuses, and as citizens of their communities, this state, our country, and on the global stage. Recent examples include important statements in response to the Trump Administration's Muslim ban⁵ and the Trump Administration's decision to end the DACA program⁶ which helped to provide support for members of their campus community and to advance civic discourse.

² ACLU website: accessed 1-24-18 <https://www.aclu.org/issues/free-speech>

³ Neb. Const. art. VIII, sec. 10 (1875). See also *Board of Regents of Univ. of Neb. v. Exon* 256 N.W.2d 330 (1977).

⁴ <https://www.unl.edu/about/history/> See also: University of Nebraska mission statements: <https://nebraska.edu/history-mission/mission-statements.html?redirect=true>

Nebraska state colleges mission statements

https://www.nscs.edu/info/2/about_us/3/strategic_plan; Western Nebraska Community College

<https://www.wncc.edu/about-wncc/history-mission>

⁵ <https://news.unl.edu/newsrooms/today/article/university-issues-statement-advisory-following-presidential-order/>

⁶ <https://news.unl.edu/topic-tags/daca/> See also:

http://www.omaha.com/news/education/metro-community-college-board-approves-resolution-supporting-daca-passes-annual/article_8b1a6182-9827-11e7-ae91-bb6ae4ceb2a1.html



-Sec. 3 (4) may be mixing legal tests and standards as it attempts to distill complex First Amendment jurisprudence as to permissible, time, place and manner restrictions that may need additional clarification. Additionally, we do commend the Senators for the strong due process provision included in this very section. Finally, speech cannot be sanctionable without intent and the amendment in this section and throughout does not include an intent provision when describing the type of speech or counterdemonstrations that might trigger consequences or punishment. For example, we respectfully suggest the policy be edited to ensure that activity that intentionally substantially or material obstructs is specified as proscribed or prohibited.

-Sec. 3 (6) While we generally agree with this statement due to the complexities of first amendment jurisprudence it may be advisable to specifically state the standard for access rather than referring to a large body of caselaw difficult to decipher for a reasonable person.

-Sec 3. (7) We give our strongest support and recommendation to this section as the appropriate designation of public areas of campus as traditional public forums. We do believe the recent Regents policy referenced above was in error regarding that critical issue. For example, this classification matters for the standard the public institutions utilize for accessing the space or to determine whether advance permission is necessary. For example, it is these very types of spaces-streets, sidewalks, plazas, and greenspaces- that have been utilized as such during antiwar protests in the 1960-70s⁷, in support of Black Lives Matter⁸, and as a staging area for the local Women's Marches⁹.

-Sec. 3 (9-11). While we appreciate what this section is attempting to do we believe it may need technical correction as certain aspects are clunky and unclear. However, we do wish to reiterate that with appropriate intent provisions for unprotected speech or expressive activity we believe the suggested sanctions may be permissible from a free speech lens especially as the sanctions attempt to parallel other disciplinary actions and we believe does follow best practices.

-Sec. 4 (1) The composition of the committee and granular details as to reporting requirements would be perhaps better suited as the province of the institutions of higher education.

-Sec.4 (2) The designated date for reports is unclear as the Legislature convenes at different dates each session. It would be preferable to select a date certain such as December 1 of each year to harmonize with other legislative reporting requirements.

-Sec 4. (4) These are policy decisions for institutions of higher education that may or may not be advisable from a perspective of legal liability and the timing

⁷ <http://netnebraska.org/article/news/1095577/we-had-do-something-vietnam-protests-unl-and-one-tense-week-1970>

⁸ <https://news.unl.edu/newsrooms/today/article/students-plan-black-lives-matter-rally-for-oct-21/>

⁹ http://journalstar.com/news/local/thousands-show-up-to-support-women-s-march-on-lincoln/article_2e87f297-d977-504f-b240-0f9946a37c68.html



provision would be difficult if not impossible to comply with considering the rhythm of modern litigation.

-Sec. 5 We strongly support this section's strong due process provisions.

-Sec. 6 We are concerned the mandated cooperation identified in this section is broad and vague.

-Sec. 7 (2) This section attempts to enumerate speech that is not protected free expression. While we agree that the list is generally correct, we are uncertain about the specific intent of the phrase "unlawful harassment." For example, we are left to assume that the reference is regarding something like sexual harassment that is not permitted under Title IX. As such, we are concerned that it could be read too broadly as speech that is borne from discriminatory motives that are deplorable and anathema to our values at ACLU of Nebraska but nonetheless legally protected speech. We suggest additional clarification of this section.

-Sec. 7 (2) (h) This section is potentially problematic as it lacks an intent provision and strikes us as both vague and overbroad. We would be happy to work with the Senators and committee to suggest alternative language tailored to whatever policy dilemma or fact pattern this language is meant to resolve. At face value we lack full context for understanding this provision.

Thank you in advance for your time and consideration of this important matter and for your ongoing commitment to public service. Please let us know how we may be of additional assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Danielle Conrad".

Danielle Conrad, J.D.
Executive Director