

Institutional Policy Recommendations Regarding Mandatory Student Fees

Nathan J. Daun-Barnett

Law in Higher Education

July 19, 2005

Introduction

Institutions of higher education have a long history of recognizing and supporting student organizations as a means of extending their educational mission. In fact, because of their roots in the British model of the residential college – where students lived, worked, studied and engaged the issues of the day – the student organization may be seen as an extension of that community of scholars. The institutions role has changed over time as the student body becomes ever more diverse and the boundaries of the college extend beyond the confines of the campus. The American Association of University Professors (AAUP) defines generally, the purpose of the academic institution as:

“Exist[ing] for the transmission of knowledge, the pursuit of truth, the development of students, and the general well-being of society. Free inquiry and free expression are indispensable to the attainment of these goals. As members of the academic community, students should be encouraged to develop the capacity for critical judgment and to engage in a sustained and independent search for truth.”¹

It is clear that student organizations compliment the educational mission by extending the pursuit of truth beyond the boundaries of the classroom. The professor remains the central figure in the academic discourse of the institution, but there is growing recognition that learning occurs in the interchange among and between students. It is equally true that if student organizations are not permitted to exist or promoted as part of the academic experience, students will find alternative modes for engaging one another, perhaps in ways less amenable to the institution. For these several reasons, it is important to consider how and by what means student organizations are recognized and funded for their various activities.

The purpose of this paper is to outline a series of recommendations for the development of a university policy at state supported public institutions, regarding the funding and support of student organizations. These recommendations are informed by standing legal precedent as well as

¹ American Association of University Professors (AAUP). *Student Rights and Freedoms*. In Policy Documents and Reports, (9th Ed., 2001) pgs. 261-267, Johns Hopkins University Press. Found in Law 737 course pack.

recent case law, both of which illuminate appropriate courses of action. In addition, these recommendations include the consideration of current funding practices at other institutions to illustrate how they have begun to operationalize the guidance of the Courts.

The recommendations begin with a brief discussion of the current legal precedents that influence the development of a student organization funding policy. Next will be a discussion of the various types of student groups that fall under the purview of the policy and the several methods of funding that have been suggested or approved by the courts. Within this discussion are recommendations for a final policy that will achieve higher education's educational mission while at the same time ensuring compliance with relevant law.

Student Organization Recognition

The recognition of student organizations is predicated upon the first amendment of the U.S. Constitution, particularly regarding free speech and the freedom to peaceably assemble. The relevant case law arguably begins with the 1972 case of *Healy v. James*.² In this case, the Students for a Democratic Society (SDS) were denied recognition by the president of Central Connecticut State College who claimed the organization was antithetical to the educational mission of the institution and would be a disruptive influence on campus. The Supreme Court ruled in favor of the student organization claiming the president's rationale was insufficient to justify not recognizing the group and said they should receive the same consideration as any other student organization. In essence, any policy that recognizes student organizations may not discriminate based upon the organizations viewpoint. Through *Healy* and others,³ the court has established three guiding principles for the recognition of student organizations: (1) they must be willing to abide by reasonable institutional

² The 1969 Supreme Court case *Brandenburg v. Ohio* may be a precursor as it is cited by the Court in the Healy decision. This case involved the Criminal Syndicalism law in Ohio which was challenged when a Ku Klux Klan member made a speech advocating violence. The court found the law violated his first amendment free speech rights. Found at <http://www.oyez.org/oyez/resource/case/47/>.

³ See also *Gay Students Organization of the University of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974) as cited in Kaplin, W. A. & Lee, B. A. (1997). *A Legal Guide for Student Affairs Professionals: Adapted from The Law of Higher Education, Third Edition*. San Francisco: Jossey-Bass.

policies, (2) the activities of the organization must not interfere with classes or the daily functions of the institution, and (3) the organization must agree not to engage in any illegal activities. These three tenets should serve as a foundation for policies recognizing student organizations. In addition, any policy that stipulates a recognition procedure should be viewpoint neutral, a point that will be explored later in the paper.

Recognition of student organizations should be viewed as a contract binding the student organization to a series of institutional guidelines and responsibilities while affording them access to the privileges of recognition, which typically include an organizational mail box, office space, ability to reserve or rent university space, and the opportunity to seek funding.⁴ Equally, the university is bound to this contract.⁵ If the organization meets the established criteria to become an organization, the institution must grant organizations all the benefits stipulated. It should be emphasized that the decision whether or not to recognize student organizations is completely at the discretion of the institution. There exists no constitutional or statutory obligation to recognize student organizations in a formal way. However, because institutions of higher education have decided that student organizations play a central role in achieving their educational goals, colleges and universities must abide by the guidelines above.

Mandatory Student Fees

The courts have consistently held that while the college is not required to collect mandatory student fees for the establishment and support of student organizations, once they choose to do so,

⁴ See University of Michigan Student Assembly guidelines for student organization funding at <http://www.umich.edu/~msa/organizations/funding.html> or the Office of Student Activities and Services at Kansas State University statement on registering a student organization found at <http://www.ksu.edu/osas/registering.htm>

⁵ The Florida Supreme Court let stand a decision that can hold universities liable based upon implicit contracts established through their printed materials. Makar, S. (Nov. 8, 2002) *Litigious Students and Academic Disputes*. The Chronicle of Higher Education. Found in Law 737 Course pack.

they must again be neutral with regard to viewpoint.⁶ The current guiding legal precedent on the issue of mandatory student fees is the case of *Board of Regents of University of Wisconsin System v. Southworth*.⁷ The Courts, as a general rule, have deferred to the academy with regard to the value of recognizing student organizations, but they have been less clear on whether students may be charged a mandatory fee that compels speech with which they may otherwise disagree. Two types of organizations have been particularly challenging for colleges and universities: political organizations and religious groups. The former is a question of whether a mandatory fee compels political speech and thus is a violation of free speech and the latter balances the concept of content neutrality with the establishment clause of the first amendment. Each of these forms of speech has been tested in the courts and the precedents should give a measure of clarity to any policy.

Take for example, *Good v. Associated Students of the University of Washington*⁸ where the court said students could not be required to join the student association but the mandatory fees could be collected so long as: (1) fees were spent consistent with university regulations and (2) no group promoted a single political, social, economic or religious viewpoint.⁹ The Supreme Court of California decided another mandatory student fee case involving political speech by utilizing U.S. Supreme Court precedent created in a case involving dues paid by union members. *Smith v. Regents of California*¹⁰ applied guidelines established in *Chicago Teacher's Union v. Hudson*¹¹ and gave the university a choice: either ensure that the fees are provided to organizations that are primarily educational

⁶ See *Gay & Lesbian Student Association v. Gohn* 850 F.2d 361 (8th Cir. 1988) and later *Widmar v. Vincent* 454 U.S. 263 (1981) as cited in Kaplin, W. A. & Lee, B. A. (1997). *A Legal Guide for Student Affairs Professionals: Adapted from The Law of Higher Education, Third Edition*. San Francisco: Jossey-Bass.

⁷ Cited as 529 U.S. 217, 120 S.Ct. 1346 and found in Law 737 Course pack.

⁸ Cited as 542 P.2d 762 (Washington, 1975) as cited in Kaplin, W. A. & Lee, B. A. (1997). *A Legal Guide for Student Affairs Professionals: Adapted from The Law of Higher Education, Third Edition*. San Francisco: Jossey-Bass.

⁹ *Ibid.*

¹⁰ 844 P.2d 500 (Cal. 1993) as cited in Kaplin, W. A. & Lee, B. A. (1997). *A Legal Guide for Student Affairs Professionals: Adapted from The Law of Higher Education, Third Edition*. San Francisco: Jossey-Bass.

¹¹ 475 U.S. 292 (1986) as cited in Kaplin, W. A. & Lee, B. A. (1997). *A Legal Guide for Student Affairs Professionals: Adapted from The Law of Higher Education, Third Edition*. San Francisco: Jossey-Bass.

versus political or allow students to opt out of the portion of the fee that would apply to the group(s) in question. The latter was reaffirmed by Justice O'Connor, in her *Rosenberger v. Rector* concurrence.¹²

Religious speech may be an even greater challenge than political speech because of its clash with the establishment clause and the public debate surrounding the separation of church and state. *Widmar v. Vincent* established the early precedent and the more recent decision in *Rosenberger v. Rector and Visitors of the University of Virginia* clarifies the Court's position. In *Widmar*, the University of Missouri – Kansas City passed a regulation prohibiting the use of institutional facilities for purposes of religious expression. The Supreme Court ruled that the university's state interest ensured under the establishment clause was insufficient "to justify content-based discrimination against respondents' religious speech."¹³ The issue presented in *Rosenberger* was whether the University of Virginia could withhold funding for a student newspaper that promoted a religious message. In addition to the question of the establishment clause, the Court was faced with a question of the freedom of the press. The court ruled that the state is forbidden to exercise viewpoint discrimination and that it is not in violation of the establishment clause when the money goes to a third party contractor or when space is given on a religion neutral basis.¹⁴ The lesson for the institution is clear. Colleges and universities are not obligated to provide for all religious traditions or special facilities for those that choose to organize at the university. Rather, they are simply obligated to treat organizations with religious missions as any other student organization. The only regulation institutions may consider is on the active solicitation of members to a faith, typically referred to as proselytizing.

¹² In *Rosenberger v. Rector* (515 U.S. 819, 115 S.Ct. 2510) the court found denying funds to a student paper with a religious message was viewpoint discrimination and Justice O'Connor suggests that an opt-out policy might be necessary when two speech and establishment principles are at odds.

¹³ 454 U.S. 263 (1981) as cited in Kaplin, W. A. & Lee, B. A. (1997). *A Legal Guide for Student Affairs Professionals: Adapted from The Law of Higher Education, Third Edition*. San Francisco: Jossey-Bass.

¹⁴ *Rosenberger v. Rector* (515 U.S. 819, 115 S.Ct. 2510). Found in Law 737 course pack, pg. 368.

The final case providing legal precedence for the establishment of a student organization funding policy is *Board of Regents of the University of Wisconsin v. Southworth*.¹⁵ In this case, a group of students at the University of Wisconsin objected to the mandatory student fees as a violation of their first amendment rights. The court ruled (1) the university may charge mandatory fees so long as the organizations remain viewpoint neutral, (2) the university policy was sufficiently viewpoint neutral to protect the rights of objecting students, (3) the optional refund system (mentioned previously) is not a constitutional requirement, and (4) there is no distinction between campus activities and off campus activities of funded organizations. *Southworth* gives considerable clarity to the student mandatory fee process and serves as the basis for the development of current policy.

University Policy

Students organize for a variety of purposes and in a variety of ways. Entering first year students might seek a social outlet to begin identifying a peer support network like a community service organization or a religious affiliated group, while upper division students may seek opportunities that complement their classroom experience, like student government or an activities board. A variety of student organizations exist on a college campus and each offers something unique to the community. The first question that should be asked is how close a relationship should an institution have with these student groups? The answer to this question may depend upon the contribution made, offset by the potential liability of affiliation. As stated in *Frank v. Ivy Club*, the student organizations have a symbiotic relationship with the institution, because without it, the organizations would not exist.¹⁶

¹⁵ Cited as 529 U.S. 217, 120 S.Ct. 1346 and found in Law 737 Course pack.

¹⁶ 576 A.2d 241 (N.J. 1990) as cited in Kaplin, W. A. & Lee, B. A. (1997) pg. 407. A Legal Guide for Student Affairs Professionals: Adapted from The Law of Higher Education, Third Edition. San Francisco: Jossey-Bass.

It should also be clear from *Good v. Associated Students of the University of Washington*¹⁷ and subsequent cases that organizations with expressly political purposes are subject to close public scrutiny and possible court challenges. For this reason, it would be appropriate to emphasize the educational purposes in any organizational mission submitted and require detailed reports from student organizations regarding the nature of their activities. *Southworth* challenged directly the political ideology of certain speech and the court ruled that the university program was viewpoint neutral. The ruling gives the institution some latitude, but politics are still more likely to attract litigation because it is peripheral to the mission of the institution.

Based upon the legal precedent summarized above, we know that if colleges and universities choose to recognize student organizations, they must do so in a viewpoint neutral way. The same is true for supporting a mandatory student fee to fund organizational activities. In most institutions of higher education, both these decisions have been made and they are simply adapting policy to comply with the most recent interpretations of *Southworth* while maintaining their commitment to enriching the student academic experience. It is important to consider the responsibilities student organizations must meet to gain recognition, because as *Sbarick* indicates, the courts may become more willing to interpret these policies as contracts. At minimum, a student organization should be bound to the same rules and regulations as individual students in the college community. These policies should be clear, thorough, and easily obtainable, should establish the rights and responsibilities of the organization, conditions for membership, privileges of recognition, procedural process for violations of the code, and the process for appeal of any decisions. It should also be clear how much regulatory oversight institutions plan to exercise. Colleges and universities should

¹⁷ Cited as 542 P.2d 762 (Washington, 1975) as cited in Kaplin, W. A. & Lee, B. A. (1997). *A Legal Guide for Student Affairs Professionals: Adapted from The Law of Higher Education, Third Edition*. San Francisco: Jossey-Bass.

not over commit themselves if they do not plan to enforce strictly, because failure to do so may be viewed as a breach of contract.

There are several types of organizations and they contribute differently to the institution. This paper is primarily concerned with organizations that are open to all students and that meet a social, recreational, cultural, or otherwise educational program. According to *Healy* and others, a student organization must be open to all and may not discriminate based upon race, gender, academic ability, or religion. For this reason, fraternities and sororities, academic organizations like honors fraternities and academic interest groups, and athletics that choose to discriminate membership, do not fall under this policy and should be addressed under a separate set of guidelines, which are beyond the scope of this article.

Once an organization meets the requirements for formal recognition, they should become eligible for funding under mandatory student fee allocations. The Supreme Court ruled in *Southworth*, that mandatory student fees may be collected and do not violate the first amendment rights of opposing students. However, the Court was concerned with the manner by which the funds were allocated. The University of Wisconsin had employed several mechanisms that made funds available to students, one of which was objectionable to the Court. The first method made up nearly 80% of the activity budget and was allocated to permanent organizations like the student government, the activities board, student health services and the radio station. These monies are non-negotiable and were not questioned in the *Southworth* case. The second method was to distribute funds based upon a viewpoint neutral application process. This method was contested by the complainants but was found acceptable by the Court. The final method was by means of referendum and the Court found this to be inconsistent with the viewpoint neutrality requirement because the majority could always silence the minority voice by veto power.

A possible recommendation for establishing a funding formula is to utilize the first two distribution methods and establish a discretionary fund that employs an application to fund specific programs, where the only stipulations are: (1) that the program benefit the campus community, (2) the funding granted will be in direct proportion to the number of students anticipated to be benefited, (3) and that applications be considered on a first come, first served basis until the fund is depleted. Students may oversee this fund but would be bound to the stipulations above. Also, limitations should be placed upon the amount that may be granted for any given request or particular student. The purpose of the fund is to benefit the greatest number of students and provide a mechanism that supports giving voice to as many opinions as are reflected on campus. The institutions' goal will not be achieved if a smaller number of students who apply early can utilize the majority of the available funding. An alternative approach might be to make funds available at monthly or semester increments to ensure that funding is available at different times and for different types of events.

It is equally important to place limitations on the use of the money while at the same time avoiding the potential pitfall of viewpoint discrimination. For example, money should not be spent to fund illegal activities, like the purchase of alcohol, or events that discriminate by gender, like an all-male poetry group. The latter could be viewpoint discrimination if they decide to open the event to all and are still denied funds. Also, monies granted should be for specific fees and be documented with sufficient proof of purchase or cost. These should all be covered in the rights and responsibilities of student organizations. Also, it is wise to suggest a two-week lead-time for the granting of funds and a 30-day follow-up to explain how the money was utilized to benefit the campus community. These two policy instruments in combination require students to be more thoughtful about how they use student fees and how their events connect with the greater mission of the institution.

On several occasions, the Supreme Court and others have suggested and complainants like *Southworth* have asserted, consistent with the *Union v. Hudson* precedent (discussed earlier), that an opt-out system should be employed to allow students who object to organizations for political or religious speech, to withhold their portion of the fee. The Court lay to rest this point by stating it is not a Constitutional requirement to provide this alternative and it would be prudent to adhere to this standard. An opt-out system creates an additional administrative burden and may have the effect of discriminating against groups that represent important though minority voices on campus.

In the past, there has been concern about whether funds should extend to organizations and activities that occur outside the campus environment. The Court has said that there should be no distinction between on and off campus activities and that is how colleges and universities should think about student events. It matters less where the activity takes place than it does who benefits from the activity. There are many more opportunities for students to learn and grow outside the confines of the campus and if one of higher education's roles is to prepare students to be responsible and engaged citizens, it is essential to eliminate artificial barriers that exist between the campus and community.

Finally, it is important to reiterate two points with regard to these institutional policy recommendations. First, the policy must remain viewpoint neutral at all cost and it is better to err on the side of recognizing an organization or involving general counsel than to decline recognition of an objectionable organization, unless there is clear indication that their activity is proven to be disruptive and will likely have a similar impact on the campus. It must be clear to all students the requirements for recognition, the applicable policies once recognized and their commensurate privileges, and the process by which recognition can be rescinded and/or grievances can be addressed. Second, *Southworth* shed considerable light on the issue of mandatory student fees, but whenever the issue of free speech is concerned, it is important to remain vigilant. There are likely to

be additional questions regarding student speech on campus and the right of students to assemble. A well-crafted policy will adhere to the guidelines of the Court, be specific enough for a student to understand their rights and responsibilities, and be general enough that the policy is responsive to a changing campus environment.