Explanation regarding Student Activity Fee (SAF) Review and Recommendations

On October 23, 2017, the Board of Trustees passed a resolution asking for a review of current Bylaws and other relevant policies and documents concerning Student Activity Fees. The Board requested that this review consider legal compliance issues as well as policy considerations and best practices, noting that the relevant policies and bylaws had not been updated for many years.

Attached are changes to the Bylaws and Fiscal Accountability Handbook recommended by the Offices of General Counsel and Student Affairs. We believe these recommendations are responsive to the Board’s initial charge as well as student concerns that they continue to be the primary force in determining the uses of their student activity fees.

Two major changes are recommended in the attached redlined documents, 1) the discontinuance of referenda to allocate funding for student organizations, clubs, associations, chapters, intramural teams and media/publications and the requirement that the recognition and funding of such “speech activities” instead be done by viewpoint neutral criteria and processes, and 2) the disallowance of contributions or payments of SAFs to external organizations outside of the University’s required purchasing and procurement processes. Additionally, language is recommended for inclusion in the Fiscal Accountability Handbook concerning viewpoint neutral recognition and allocation criteria and processes, to be implemented by the Chancellor.

Assuming that the Board accepts the attached recommendations and amends Bylaws XV and XVI, additional conforming changes will need to be made to existing University, College and student government policies, constitutions and guidelines regarding SAFs to fully implement the transition from referenda to viewpoint neutrality for recognition of and allocation of funding to covered student speech activities. These changes may need to occur in phases consistent with upcoming academic and student election cycles.

Reasons Why Changes Are Being Recommended:

The impetus for the recommended changes is to bring CUNY into compliance with law both with regard to 1st Amendment protections that apply to the funding of student speech activities in public universities as well as fiduciary obligations for the appropriate use and control of public funds. The proposed changes to Articles XV and XVI of the Bylaws are designed to remedy legal concerns about the lack of viewpoint neutrality in CUNY’s recognition and funding allocation procedures in relation to student speech activities. The changes require viewpoint neutrality in the recognition and funding of student intramural teams, media/publications, organizations, associations, clubs or chapters. Referenda seeking to allocate funding to any student speech activity listed above are disallowed and in the place of referenda is created an annual viewpoint neutral funding process for such speech activities.
Referenda and Viewpoint Neutrality—

It is settled law in the United States that public universities may collect mandatory student activity fees to foster student speech activities as part of their educational mission. In so doing, they must protect the free speech rights of student organizations, treating minority views with the same respect as majority views, and may not allocate funding based upon the speaker’s viewpoint. The requirement of viewpoint neutrality to protect free speech rights was established in 2000 in Board of Regents of the University of Wisconsin v. Southworth, 529 U.S. 217 (2000) and has been applied more recently to universities in the 2nd Circuit, notably in Amidon v. Student Association of the State University of New York at Albany, (2nd Cir. 2007). Viewpoint neutrality means the use of objective, neutral criteria in recognition and funding decisions for student speech activities.

Referenda that allocate funds for student speech activities based upon popular vote—even if advisory in nature—are inherently viewpoint discriminatory because the vote represents an aggregation of the student body’s agreement with or valuation of the message a student group wishes to convey. CUNY students have expressed opposition to changes in the university’s longstanding referenda process, citing the “democratic” nature of the current system. Although a popular majority vote on an issue certainly can represent a “democratic” method of decision, it does not protect the rights of the minority in the 1st Amendment context to speak or refrain from speaking. Moreover, the Board has expressed its concern in the past that only a very small percentage of CUNY students vote on referenda in student elections, thereby casting doubt that these votes on student activity fees represent the views of a majority of students that pay SAFs. Balancing and respecting the rights of both minority and majority views with regard to student speech activities is necessary.

The proposed changes to Article XV and XVI of the Bylaws are designed to remedy legal concerns about the lack of viewpoint neutrality in CUNY’s recognition and funding allocation procedures in relation to student organizations. The changes require viewpoint neutrality in the recognition and funding of student intramural teams, publications, organizations, associations, clubs or chapters. Referenda seeking to allocate funding to any student activity listed above are disallowed and in the place of referenda is created an annual viewpoint neutral funding process.

The University has entered into a settlement agreement in relation to litigation against Queens College in which the Queens College Students for Life challenged both the Queens College’s recognition and funding processes and Board Bylaw16.12 as viewpoint discriminatory. Under this settlement agreement, the Board is required to consider amendments to the Bylaws consistent with existing law by its May 7, 2018 Board meeting. Accordingly, an action item recommending the attached changes will be prepared for the next Student Affairs and Special Programs Committee meeting on April 16, 2018 and the full Board for the May 7, 2018.

The recommendations for changes to referenda powers allow students to vote on whether to increase or decrease their student activity fees in general and to continue to “earmark” funding for non-speech activities (e.g., student government, student programs and services such as shuttle buses, child care centers, student centers, tutoring and writing centers, etc.) There are some task force members who continue to strongly prefer the original draft language disallowing all earmarking by referenda. While we agree that such a system would be more coherent, less cumbersome and allow for greater responsiveness to current student needs and changing circumstances, student commenters have been adamant about retaining control over such non-speech related funds via referenda. Because we have determined that the earmarking of funding for non-speech related programs and services presents low legal risk in terms of violation of 1st Amendment protections, we have therefore left the current Bylaws provisions in place to maximize student control of SAFs.
Finally, the recommended language allows another avenue for referring a funding referendum to the ballot besides the current 10 percent petition process. This additional avenue is a referral by a 2/3 majority vote of the college student government association. Again, there are varying views on the SAF Taskforce about the recommended change but we have included it because we believe it allows the student body an additional avenue to direct funding to programs and services they desire by petitioning their elected representatives for a ballot measure. All referenda referred to the ballot continue to need to be approved by majority vote of the college student body.

Contributions/Payments of Public Funds to External Organizations—

The other significant change to Bylaw XVI is the disallowance of contributions or payments to external organizations outside university procurement, purchasing and contracting requirements. Currently, nine CUNY colleges annually send a total of approximately 1.3 million dollars directly to an external organization, NYPIRG, without a contract delineating the services to be provided. While NYPIRG’s value to participating students is not in dispute by most, it is settled law that student activity fees are public funds that must be safeguarded per state laws and university policies and cannot be allocated in a viewpoint discriminatory manner. *See Smith v. City University of New York*, 92 N.Y. 2d 707 (1999). CUNY fiscal policies generally disallow contributions/payments of public funds to external non-profit and political organizations. Moreover, the activities that NYPIRG engages CUNY students in are clearly speech activities that cannot be funded in a viewpoint discriminatory manner via referenda. Accordingly, the attached Bylaws changes disallow this funding practice as it is presently structured.

Next Steps in Process:

An action item recommending the attached changes will be prepared for the next Student Affairs and Special Programs Committee meeting on April 16, 2018 and the full Board for the May 7, 2018. Because the Board requires a first and second reading prior to amending its Bylaws unless there is unanimous consent, it is likely that Board will not take final action on these recommendations until its June 25, 2018 meeting. Accordingly, there will be two Student Affairs and Special Programs committee meetings (April 16 and June 4, 2018), two public hearings (April 30 and June 18, 2018), and one Board meetings (May 7, 2018) prior to the Board taking action on the recommended changes on June 25, 2018. This special communication is being sent to student list serves to ensure that information about the proposed changes is widely communicated and additional input is received.

History of Process and Input:

- The Board passed a resolution on October 23, 2017, calling for a review and recommendations concerning the SAF infrastructure with both a legal compliance and policy/best practices lens.
- In its resolution, the Board created a Task Force to serve as the mechanism for engagement with students and campus constituents. Chairman Thompson ultimately appointed 13 task force members, 6 USS/SGA student representatives, 1 USF faculty representative, 2 presidents and 4 campus student affairs officers.
- The SASP committee has discussed the SAF review and associated issues 4 times in open public session since October—October 2, 2017, November 13, 2017, January 17, 2018 and February 26, 2018.
- The internal working group was led by General Counsel and Vice Chancellor for Legal Affairs Loretta Martinez and Vice Chancellor for Student Affairs Chris Rosa, consisting of staff from legal, finance and student affairs as well as two USS student representatives, a UFS faculty representative and a president
and has met eight times since October—October 31, 2017, December 5, 2017, January 10, 17, 24 and 31, 2018, and March 9 and 28, 2018.

- The SAF Task Force, co-chaired by York College President Marcia Keizs and USS Chair John Aderounmu, has met 8 times since October—December 11, 2017, January 8, 16, 26, 2018, February 9 and 23, March 16 and April 4, 2018.

- On February 13, 2018, the working group via the OGC distributed to Task Force members a two-column side by side comparison of proposed language changes to Trustee Bylaws XV and XVI and the Fiscal Accountability Handbook for use with their constituencies. This language was discussed, changed and refined at several meetings of the working group and Task Force prior to its inclusion in the side by side comparison document.

- Draft language was submitted for discussion at the February 26, 2018 SASP committee meeting.

- Approximately 80 students and other interested persons attended the SASP committee meeting on February 26, 2018. Student led Town Halls took place at several colleges afterwards. USS has discussed and introduced resolutions regarding the proposed changes at meetings in March 2018, and University Faculty Senate (UFS) has considered the issues at its regular meeting in March.

- A public hearing was held in Brooklyn on March 12, 2018, where nearly 70 speakers addressed several topics, including the ongoing review of the SAF infrastructure. The comments primarily addressed students’ ability to have input into recommended changes and desire to continue to determine how SAFs are spent.

- The recommended changes to the Bylaws and Fiscal Accountability Handbook attached to this explanation represent significant changes from the initial draft language presented at the February 26 SASP committee meeting based upon the SAF Task Force’s input and the input received at public hearings, constituent meetings and town halls.

**For more information and to provide input, please visit the SAF Review website at [www.cuny.edu/studentactivityfee](http://www.cuny.edu/studentactivityfee).**

Very Truly Yours,

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General Counsel and Vice Chancellor for Legal Affairs

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