


Confidential Memo

TO: Board of Trustees, North Central Michigan Community College

FROM: Varnum LLP 

RE: Investigation of June 22, 2023, Luncheon Lecture Incident Response

DATE: November 20, 2023

I. Background and Procedural History.

On Thursday, June 22, 2023, as a part of its annual Luncheon Lecture Series, the College hosted a luncheon concerning the planned Great Lakes Tunnel Project, at which Paul Meneghini, a representative of Enbridge Energy, was the presenter (the "Event"). An incident occurred at the beginning of the presentation in which a group of individuals ("the Group") entered the room in which the lecture was occurring and disrupted the event with shouting and attempts to display a banner. Several individuals, including attendees of the presentation and College personnel, responded to the situation and attempted to remove the Group from the presentation room. These efforts were resisted by the Group. While this sequence of events was occurring, the Petoskey Police were called. Within a number of minutes, the individuals in the Group had been removed from the room and had left the premises. Police officers located the individuals shortly thereafter, and "no trespass" orders were communicated to them. The Board President was notified of the incident's occurrence.

In the days that followed, video footage of the incident surfaced on local and social media. The footage captured the actions of several people during portions of the incident, including the College's President David Finley, certain other College personnel, and other unidentified individuals. The Board reviewed and requested additional information regarding the incident. On June 30, 2023, the College's Association of Faculty and Professional Staff sent a letter to the College's Board of Trustees (the "Board") requesting that President Finley be placed on administrative leave and that an independent investigation be conducted. The Board held a meeting on July 14, 2023, at which further public discussion of the incident occurred.

At the conclusion of that meeting, the Board voted that, in addition to the Board's own existing efforts to coordinate with the Petoskey Police and College personnel to ascertain the facts, it would authorize an independent investigation of the College's response to the incident. The Board thereafter undertook efforts to identify a qualified investigator. In August 2023, Varnum LLP was engaged to serve as the investigator. Richard Hewlett, Stephanie Settingington, and Jessica Visser comprised the investigation team, with Stephanie Settingington and Jessica Visser serving as primary investigators. The investigation process was initiated August 24, 2023.

II. Issues for Investigation.

Investigation issues include: (a) whether President Finley or any College personnel violated College policies; and (b) whether a violation of First Amendment rights occurred in the College's handling of the incident. The Board also asked for any recommendations to be considered for the handling of future events.

III. Investigation Process.

The investigative team determined the investigation process and scope. The investigation involved review of relevant documents and policies, as well as interviews of witnesses to the incident. Review of preliminary documentation occurred first, followed by witness interviews and additional document review and analysis.

As to interviews, the investigation team solicited interviews from all registered attendees who were present at the event ("Audience members"), all College personnel who attended and/or witnessed elements of the incident, and all members of the Group. All College personnel witnesses completed initial interviews in person. Subsequent and non-employee witnesses were offered in-person, virtual, or telephone format at the witness's preference to maximize participation. With respect to non-employee (Audience member and Group member) interviews, witness names are de-identified for privacy. In addition to initial interviews on the dates indicated below, follow-up interviews and inquiries were conducted with several witnesses as needed based on the evidence collected in the investigation. Overall, 37 interviews were conducted. These consisted of interviews of 10 College employees, 24 registered attendees, and 3 of the 5 Group members.

A. Key documents reviewed:

1. Videos from luncheon lecture
 - a. Video (Kalamazoo Remembers FB site)
 - b. Video by audience attendee Audience Member H
 - c. Video by audience attendee Audience Member M
 - d. Video by Group Member 2
 - e. Video by Group Member 5
2. Documentation of luncheon lecture postings/advertisements
3. Roster of registered attendees for Event June 22, 2023
4. Waitlist for Event June 22, 2023
5. Incident reports
 - a. James Cousino
 - b. Stephen Strom
 - c. Shantelle Duffiney
 - d. Donna Cannon

6. Room diagram drawn by Mr. Strom
7. Notes provided by Dr. Finley
8. Campus map
9. Library Conference Center map
10. E-mails provided by Dr. Finley regarding Event security preparations
11. Unpublished July 10, 2023, editorial provided by Dr. Finley
12. June 22, 2023, post-Event text message to NCMC Board President provided by Dr. Finley
13. Notes of incident provided by Ms. Duffiney
14. Room diagram drawn by Audience Member G
15. Signage for June 22, 2023, Event
16. Library building security camera footage for June 22, 2023
17. Documents produced via Petoskey Police FOIA request
 - a. Police reports
 - b. 911 call recording
 - c. Bodycam and dashcam footage
18. Records regarding NCMC safety trainings
19. December 2021 Security Risk Assessment Report
20. Pre-Event correspondence from public and witnesses regarding Event provided by NCMC
21. Post-Event correspondence provided by NCMC
22. E-mail and advertisements for August 2023 F.L.O.W. lecture
23. Physical tour of NCMC Library Conference Center and campus areas
24. NCMC Policies and Procedures
 - a. Faculty handbook

b. Board of Trustees policies

25. July 14, 2023, NCMC Board meeting video excerpts
26. Articles and public records regarding Kalamazoo incident
27. 20 Event-related photo images shared by Group Member 2
28. 1 Event-related photo image shared by Group Member 3
29. E-mail confirmation of waitlist placement shared by Group Member 1
30. NCMC Lecture Series website confirmation details example

B. Witnesses interviewed:

September 21, 2023:

1. Melissa Mansfield, NCMC Executive Assistant to the President
2. Stephen Strom, NCMC Vice President of Academic Affairs
3. Matt Raab, NCMC Network Administrator
4. Dr. David Finley, NCMC President
5. Scott Lumley, NCMC IT Systems Engineer
6. Donna Cannon, NCMC Administrative Manager of Corporate and Community Education
7. Jim Cousino, NCMC Dean of Career and Technological Education.
8. Shantelle Duffiney, NCMC Assistant to Director for Food and Conferences
9. Charlie MacInnis, Volunteer - Leader of NCMC Luncheon Lecture Series

September 22, 2023:

10. Christy Lyons, NCMC Dean of Corporate and Community Education
11. Audience Member A
12. Audience Member B

13. Audience Member C
14. Audience Member D
15. Audience Member E
16. Audience Member F
17. Audience Member G
18. Audience Member H
19. Audience Member I
20. Audience Member J
21. Audience Member K

September 26, 2023:

22. Audience Member L
23. Audience Member M
24. Audience Member N
25. Audience Member O

September 27, 2023:

26. Audience Member P
27. Audience Member Q
28. Audience Member R
29. Audience Member S
30. Audience Member T
31. Audience Member U
32. Audience Member V

October 4, 2023:

33. Audience Member W

October 10, 2023:

34. Audience Member X

October 29, 2023:

35. Group Member 1

36. Group Member 2

37. Group Member 3

IV. Summary of Relevant Policy Provisions.

A. Employee Handbook

1. Section 411. Weapons, Threats and Violence.

The College maintains an employee handbook which includes policies, procedures, and conduct expectations for employees. Policy 411 states:

411. Weapons, Threats and Violence. Employees **shall refrain from violent behavior and conduct that threatens, intimidates or coerces another employee, student, guest, vendor or business associate.** There shall be zero tolerance for the possession or use by college employees of weapons, explosives, firearms, or items intended to threaten or be used as a weapon while on College property (leased or owned), classrooms, dormitories, within College vehicles, or while conducting College business regardless of whether the employee is licensed to carry the weapon. College Board Policy 405, which also applies to employees, defines types of weapons, explosives and firearms that are prohibited. Employees will refrain from fighting, "horseplay" or other conduct that may be dangerous to others. The College resources may not be used to threaten, stalk, bully or harass anyone at the workplace or outside of the workplace. **Physical assault or abuse, vandalism, arson, sabotage, willful destruction of company property, or any other act which is destructive, threatening or violent, is not tolerated.** In addition, bizarre or offensive comments regarding violent events and/or violent and destructive behaviors are not tolerated. Employees who witness or who feel subjected to any of the threatening behaviors listed above must contact Human Resources. **The College will promptly and thoroughly investigate all reports of threats or acts of violence** and of suspicious individuals or activities. The College will not discipline employees for raising such concerns and will not retaliate against employees making good-faith reports; however, false claims will not be tolerated.

(Emphasis added).

2. Section 201. Use of Handbook.

Section 201 sets forth the scope of the Handbook's applicability. It states, in relevant part, "This Employee Handbook applies to all North Central Michigan College employees including temporary and part time employees working in all College positions." "Unless specifically stated otherwise herein, **the work rules outlined in the Employee Handbook shall apply to workers of the College including regular, seasonal, temporary, students, and volunteers.**"

(Emphasis added).

B. Policy Manual (B) Section 406 - Freedom of Assembly

The College maintains publicly available online policies applicable to the "overall campus" and residence halls. Policy 406 states:

FREEDOM OF ASSEMBLY - 406

North Central Michigan College is a public institution of higher education whose authority is derived from the Michigan Constitution of 1963 and whose property and resources are primarily dedicated to academic, administrative and related functions. **As an institution that highly regards the freedom of speech, freedom of expression and right to peaceably assemble, North Central Michigan College affords groups and individuals an invitation to exercise such freedoms on its grounds. The purpose of this policy is to facilitate expressive activities while ensuring that such activities do not interfere with College operations and the learning environment.**

For anyone lawfully present on the College's campus, the outdoor common and indoor common areas are designated as venues for free expression, including spontaneous expression, speeches, demonstrations and the distribution of information. Anyone who wishes to engage in commercial solicitation is required to reserve time and space for such activities following the terms of the College's Solicitation Policy.¹

For purposes of this policy, the term "expressive activity" includes such activities as:

- Meetings and other group activities;
- Speeches, performances, demonstrations, parades, marches, rallies, vigils and other events;

¹ We also note that **Policy Manual (B) Section 400 - Campus Security Policies and Procedures, 3. Public Areas** states that "Certain College locations are considered public locations which are open to orderly unsupervised access by faculty, staff, students, and visitors" and "the library-conference center" is a location included in this Section; however, the Section further states that "Certain public locations such as the library-conference center" are "subject to specific conduct policies which are hereinafter set forth." Section 406 FREEDOM OF ASSEMBLY is one such policy and further clarifies use is permitted in outdoor and indoor "common" areas "not otherwise reserved for use."

- Distributions of informational materials, such as circulars, newspapers, leaflets and pamphlets;
- Any other expression, including spontaneous expression, **protected by the First Amendment to the U.S. Constitution.**

While North Central Michigan College maintains its authority to regulate the time, place, and manner of expressive activities, it shall not consider or regulate the content of speech or viewpoint of speakers in the application of this policy. When expressive activities occur, North Central Michigan College will work to ensure that such activities transpire **without interference by the College, provided the learning environment is not disrupted and campus safety is not compromised by the activities.** If persons react negatively to expressive activities occurring on the campus of North Central Michigan College, the College will take necessary steps to ensure campus safety while allowing the expressive activity to continue, unless the College's operations are materially and substantially disrupted.

For purposes of this policy, the terms "outdoor common" and "indoor common" refer to such areas as:

- **Lawns, sidewalks, benches and other outdoor areas that are not otherwise reserved for use;**
- **Student lounges and other indoor areas designated for social interactions that are not otherwise reserved for use.**

Expressive activities, as defined by this policy, are allowed on North Central Michigan College's campus during the periods that College facilities are open to the general public.

No expressive activity at North Central Michigan College shall be permitted to:

- **Violate or infringe upon the rights of others;**
- Falsely defame an individual;
- Constitute a genuine threat or harassment;
- Invade privacy or confidentiality interests;
- Block access to campus buildings;
- Impede ingress or egress to the College or any College property, pedestrian pathway, parking lot, building, facility or event;
- Obstruct vehicular or pedestrian traffic;
- Include the use of audio amplification devices, unless specifically authorized by the College;
- Include the use of fire or pyrotechnics, unless specifically authorized by the College;
- Affix materials to College buildings, equipment, fences, trees or property, unless specifically authorized by the College.

North Central Michigan College does not assume any obligation or responsibility for the content of expressive activities or materials distributed. People engaging in

expressive activities assume responsibility for damages to College property, for the cleanup of materials immediately following the conclusion of expressive activities, and for remaining in compliance with applicable local, state and federal laws.

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(Emphasis added).

V. Findings.

The investigation first involved factual findings as to the conduct at issue. Such factual findings were reviewed against potentially applicable policies and codes to evaluate whether a violation of any handbook policy or applicable code was substantiated.

A. Factual Findings

The evidence gathered in the investigation supports the following factual findings by a preponderance of the evidence. While all factual findings were supported by a preponderance of the documentary and witness evidence, citations to specific portions of the evidentiary record are noted for key findings.

1. Background and Activities Leading up to Date of Event

The College regularly hosts a summer luncheon lecture series featuring several topics. Events are advertised to the public, and admission is limited to ticketed, registered guests. The College may require advanced registration only or may also sell tickets at the door. If advanced registration will be required, the College advertises accordingly. The luncheon events are held in the NCMC Library Conference Center. The College maintains, and establishes from time to time, reasonable rules for the format and conduct of such meetings. Charlie MacInnis, a retired former employee, leads the planning and delivery of the luncheon series events on a volunteer basis.

The College hosted its luncheon lecture series in 2023. Four events were initially planned for the months of June through August. The College published its schedule of lecture series events in advance. One installment in the series was to be the Event, a presentation regarding Line 5, which would be led by a representative from Enbridge Energy. The Event was to be held on June 22, 2023.

After the College published its schedule for the 2023 series, the College received several e-mail communications and contacts from members of the public who opposed the College's decision to host the Event. (Strom Interview; Lyons Interview; Mansfield Interview; Finley Interview; Mansfield E-mails). The College's leadership considered these communications and determined how best to respond. (*Id.*). The College's leadership cabinet determined that, as an educational institution desiring to promote the full and free exchange of ideas, the appropriate course was not to cancel the Line 5 presentation, but rather to have a plan to allow for any protected activity around the Event, and to offer an opportunity for the opposing viewpoint to be presented as a luncheon lecture series event as well. (Mansfield Interview; Strom Interview; Finley Interview; MacInnis Interview; June 12, 2023, E-Mails).

The College thus began efforts to organize a fifth installment for the series to occur. (Mansfield June 12, 2023, E-Mails). The fifth installment was "Enbridge Line 5: Legal and Indigenous Perspectives." That session was scheduled for and occurred August 17, 2023. (Advertisements; Lyons Interview; Duffiney Interview).

In terms of planning for the June 22, 2023 Event, the College notified the Petoskey Police of the upcoming Event and controversy surrounding it. (June 12, 2023 Cousino, Finley and Mansfield E-mails; Finley Interview; Mansfield Interview). The College requested that police be present on campus for the Event. (*Id.*; Strom Interview). The College wished for police to be present but wished for such presence "not to be obvious or overstated" in a way that might create any air of intimidation. (Strom Interview; Cousino Interview).

At the suggestion of the Petosky Public Safety Director, the College decided to designate in advance a particular area of the campus to which any protestors or demonstrators could be directed to conduct such activities. (June 22, 2022 Mansfield 10:14 a.m. E-mail; Finley Interview, Strom Interview, Mansfield Interview). The College selected the concrete circle in the Harris Gardens area as this location. (*Id.*). The reason for this selection was that the Harris Gardens area is prominent and central to the campus. (Finley Interview; Mansfield Interview; Campus Map). The area is visible from the Library Conference Center and all campus buildings. (*Id.*). The College's leadership anticipated that any demonstrators would be identifiable, would be conducting any activity in accordance with the College's general existing policies, and that the College could then refer them to the designated Harris Gardens area. (Strom Interview; Finley Interview).

The College also decided not to sell tickets at the door, to close registration two days before the Event, to post notices in the Library lobby prohibiting the display of banners inside the Event, and to ask attendees to submit questions in writing for the Event. (Event Advertisement; Lyons Interview; MacInnis Interview). Advertisements for the Event included notice of the advance registration requirement. (Event Advertisement).

Registration for the Event closed Monday, June 20, 2023. (Cannon Interview). On Wednesday evening, the night before the Event, Group Member 1 attempted to register for the Event but was notified registration was closed. (Group Member 1 Interview; Waitlist Documentation). The website offered Group Member 1 the opportunity to join a waitlist, which Group Member 1 did for himself and one guest.² (Group Member 1 Interview). Group Member 1 stated the confirmation he received advised him to still show up for the event despite being waitlisted. (Group Member 1 Interview). Website documentation did not support such an affirmative communication being made but did reveal arguable grounds for confusion about a waitlisted person's registration status. (Group Member 1 E-mail Confirmation; Website Example Documentation).³

² Records indicate one other party joined the waitlist that evening as well indicating two additional guests. The name of that individual does not correspond with the names of any of the Group members. Group Member 1 stated that another Group member joined the waitlist that evening and indicated two guests.

³ Review of the website documentation indicates that when a person is waitlisted, they are provided a confirmation of their status. The confirmation, however, has a link to "registration details." Clicking on that link presents a page that includes a "Registration" number, as well as the time and place of the event. This could arguably be confusing as to one's registration status.

2. The Date of the Event.

On the day of the Event, lunch was to be served at 11:30, and the presentation was to start at noon. (Lyons Interview). A large registration desk is located directly in front of the main entry doors to the Library Conference Center. (Library Conference Center Map). The door leading to the lecture room is located to the left of the desk. The entrance doors to the library itself are located off to the right of the lobby. (*Id.*)

a. Activities of College Personnel Prior to Event.

On the morning of the Event, Administrative Manager of Corporate and Community Education Donna Cannon was present in advance. (Cannon Interview). Ms. Cannon set out signs and information about future programs, posted the notice prohibiting banners on the wall between the entrance doors to the presentation room, and displayed a placard with this same notice at the registration desk. (Cannon Interview; Duffiney Interview). Ms. Cannon was then seated at the registration desk to greet and check in guests as they arrived.

Dean of Corporate and Community Education Christy Lyons arrived around 11:15. She observed the setup of the room. When the speaker arrived, she spoke with him. (Lyons Interview).

Charlie MacInnis arrived about 30 minutes before the Event. He met with Ms. Lyons and Ms. Cannon to go through the general plan for the Event. (MacInnis Interview).

Assistant to the Director of Food and Conferences Shantelle Duffiney was present before the event as well. She set up the lunch and beverage stations, and conference room. (Duffiney Interview).

Various other College leadership personnel, including Vice President of Academic Affairs Stephen Strom, Dean of Career and Technological Education Jim Cousino, and President Finley, were at the Library Conference Center at various times throughout the morning to monitor for any potential protest activity and help direct people should that become necessary. No indications of any protesting, or of any potential disruption, occurred prior to the event. (Strom Interview; Cousino Interview; Finley Interview; Library Conference Center Lobby Security Footage).

Petoskey Police were on campus and in the parking lot prior to the event. Mr. Cousino spoke with an officer shortly before the start time of the Event to confirm whether any signs of protest had occurred. None had been noted. (Cousino Interview).

Other personnel such as Network Administrator Matt Raab, IT Systems Engineer Scott Lumley, and Administrative Assistant to the President Melissa Mansfield were in the Library Conference Center area in conjunction with their duties. They, as well as Mr. Strom and Mr. Cousino, were out in the lobby when the Event began, having lunch that was left over from the Event. (Raab Interview; Lumley Interview; Mansfield Interview).

President Finley was also scheduled to be an attendee at the Event. Consistent with his normal practice, he spoke with guests and remained in the lobby area until approximately 11:55 until all guests had gotten their lunches. He then got his own lunch and took a seat in the conference

room. He was seated near the front of the room, as he often may be asked to say a few words of welcome at the beginning of such events. (Finley Interview).

b. The Group's Activities Prior to the Event.

The Group consists of individuals from the Detroit and Kalamazoo areas of the state. (Group Member 1 Interview). The Group traveled to the College for the Event because they felt it was "important to attend to speak on behalf of the protection of water and the illegal operation of Line 5." (*Id.*). The Group intended to "attend this public event and practice [their] First Amendment Rights." (Group Member 1 Interview). On the morning of the Event, they spent time in the library, the entrance to which is in the same common lobby as the Conference Center room where the Event was to be hosted. (*Id.*; Library Conference Center Map).

The Group members state they did not approach the Event registration desk upon their arrival or at any time prior to the beginning of the Event to inquire about their waitlist status or to attempt to check in. (Group Member 1 Interview; Group Member 2 Interview; Group Member 3 Interview). They state they did not observe any kind of check-in process or line. (*Id.*). Contrary to these representations, review of security footage reveals that a line formed at the registration desk prior to the Event, and that Group Member 5 and Group Member 1 both approached the desk and spoke to Ms. Cannon at 11:35 a.m. while that was occurring. Group Member 4 and Group Member 2 took a seat on a lobby couch momentarily at that time. Group Member 5 then took a seat on a different couch in another part of the lobby area. (Security Footage Library Conference Center Lobby). Group Member 5, Group Member 4, and Group Member 2 then walked into the library moments later. Footage shows that Group Member 5 approached and spoke to Ms. Cannon on at least two occasions thereafter prior to the Group entering the Event lecture room. (Library Conference Center Lobby Security Footage).

c. The Event and Incident.

By approximately noon, guests had gotten lunch and were seated. (Library Conference Center Lobby Security Footage; Finley Interview). The presentation began.

Within a few moments, Group Member 5 emerged from the library, followed by the other four Group members. (Library Conference Center Security Footage). Group Member 5 went to the registration desk and made conversation with Ms. Cannon, asking her about future programming. (*Id.*; Cannon Interview). The remaining four Group members walked by the registration desk and into the lecture room. (Library Conference Center Security Footage). Three of the five Group members were wearing masks. At least one Group Member was wearing a backpack. (*Id.*).

When the Group members entered the room, members of the audience were surprised by a loud "ruckus" caused by the Group members who were "yelling" and "rushing" into the room. (Interviews of Mansfield, Duffiney, Audience Member A, Audience Member B, Audience Member E, Audience Member K, Audience Member N, Audience Member O, Audience Member P, Audience Member T, Audience Member U, Audience Member V, Audience Member X, Finley, MacInnis, Lyons).⁴ Some of the Group members were observed to have "metal poles" and to be

⁴ Community member and employees who were not involved in the physical scuffle that ensued described the Group members' entry in terms such as: "they burst into the room" (Audience Member A Interview; Audience Member B Interview; Audience Member L Interview); "they charged into the room" (Duffiney Interview); "they were rushing in" (Mansfield Interview);

"trying to pull things out of their pockets" and backpacks. (Interviews of Finley, MacInnis, Audience Member P, Duffiney, Lyons). Some attendees recognized that the Group members were attempting to unfurl and display a "banner" or "sign" of some sort. (Interviews of Audience Member G, Audience Member M, Audience Member N, Audience Member O, Audience Member R, Audience Member S, Audience Member X, MacInnis, Finley).

Audience members' emotional response to the incident varied. Some witnesses, who also indicated they had fully expected protest activity would occur at the Event, stated they recognized the Group's activity immediately as a "demonstration" or "civil action" and observed it to be non-violent (Interviews of Audience Member G, Audience Member M, Audience Member H). Other audience member witnesses reported experiencing confusion and fear about the Group's actions, indicating they felt "frightened," "trapped" in the room, unsure of what the Group members were about to do, and/or that the Group's actions were "threatening." (Interviews of Audience Member N, Audience Member O, Audience Member P, Audience Member Q.)

In the seconds that this sequence was occurring, several people who were in the presentation room approached to attempt to address the situation. First, President Finley and Mr. MacInnis, who were near the front of the room, stood up. (Interviews of Duffiney, Lyons, Audience Member C, Audience Member D, Audience Member T). They stood with their arms raised and MacInnis stated in a loud voice, "You can't be here. You have to get out," or "You've got to leave." (Interviews of Audience Member C, Audience Member D, Audience Member F, Audience Member T, Audience Member U, Audience Member V).⁵

At the earliest point the video footage captured any of the event, President Finley was standing in front of Group Member 1, facing him while Group Member 1 was speaking in an elevated tone to the room. (FB Remembers Video). President Finley's arms were down and then momentarily raised to his sides as if ushering Group Member 1 at that point. (*Id.*). There is no evidence of physical contact between Dr. Finley and Group Member 1. (*Id.*). Group Member 1 continued speaking and made no acknowledgment of Dr. Finley's presence. (*Id.*).

Also at the earliest point the video footage captured any of the event, Mr. MacInnis was involved in grabbing at a banner Group Member 2 and Group Member 4 were attempting to unfurl. (*Id.*). President Finley then grabbed onto a portion of the banner that no one else was touching, and moved himself through the doorway with the banner to attempt to pull it and the Group members out of the room. (*Id.*; Finley Interview). The Group members physically resisted leaving the room. (FB Remembers Video; Audience Member Video; Duffiney Interview). At around this time, Shantelle Duffiney contacted 911 to report the event as request assistance. (Duffiney Interview).

"they blasted in" (Audience Member E Interview); "they stormed in" (Audience Member K Interview); "people started crashing in" (Audience Member N and Audience Member O Interview); "they popped up out of nowhere...yelling in a loud and threatening manner" (Audience Member P Interview); "they entered yelling" (Audience Member T Interview); "came in screaming and yelling" (Audience Member U); "they barged in and started yelling, it was chaos" (Audience Member V Interview); and "they barged in" (Audience Member X Interview).

⁵ Witnesses who were critical of the College's response likewise acknowledged verbal comments by Mr. MacInnis and/or Dr. Finley. For example, Audience Member G stated of Mr. MacInnis and Dr. Finley, "They tried to talk over them," referring to the Group. Audience Member G remarked, "You're just not going to do that." (Audience Member G Interview). Audience Member M likewise stated that Mr. MacInnis was "basically yelling at them to get out" though Audience Member M disagreed with him doing so. (Audience Member M Interview). Other community member witnesses recalled Mr. MacInnis stating, "Please leave," but did not recall or specify the timing. (Audience Member K Interview; Audience Member X Interview).

Mr. MacInnis then moved to place his hands on the shoulders of Group Member 2, who was then near the doorway, and attempt to push Group Member 2 (with apparently steady force as opposed to a shove) out through the doorway. (FB Remembers Video, Group Member 2 Video). Within a few moments thereafter, Christy Lyons can be observed pushing on the shoulders of Group Member 4, who was hanging onto the banner and resisting being removed from the room. (*Id.*). During this portion of the events, President Finley can be heard stating to Group members that "there is a place you can protest." (*Id.*).

Within the same time frame as these moments, two audience members, neither of whom are employed by or affiliated with the College, became involved in the incident. (Audience Member Video). The first audience member was a male with a beard and wearing a short-sleeved light gray shirt. (*Id.*). He is depicted in the video holding his arms up in front of Group Member 1, pointing his finger at Group Member 3 while Group Member 3 was taking video, unsuccessfully pushing Group Member 1 toward the doorway; pushing Group Member 2 through the doorway multiple times while Group Member 2 and Group Member 3 attempted to re-enter; and, at a time when Group Member 4 continued to be pulling on the banner and resisting being moved out of the room, grabbing the shirt of Group Member 4 by the front and heaving Group Member 4 out of the doorway to the room. (*Id.*). The second audience member was a tall male wearing a plaid shirt. That individual walked briskly toward Group Member 1, put his hands under Group Member 1's underarms, and physically walked Group Member 1 backward all the way out of the room into the hallway. (*Id.*). These two audience member individuals were not employees or associated with the College. (Strom Interview; Finley Interview; Mansfield Interview; Cousino Interview). The identities of these individuals have not been confirmed.

At the time the audience members were becoming involved, Jim Cousino can be seen on video approaching the scuffle while talking on his cell phone. (Audience Member Video). Mr. Cousino was concerned about potential escalation particularly with audience members becoming involved in responding. (Cousino Interview). Mr. Cousino was in the course of speaking with the police and informing them assistance was needed as he was moving toward the scuffle. (Cousino Interview). Mr. Cousino stated to Group Member 4 that Group Member 4 should "leave." (Cousino Interview). The first audience member then stepped in and grabbed Group Member 4's shirt collar and exited Group Member 4 from the room as indicated above. (Audience Member Video). Mr. Cousino placed his hand on Group Member 4's shoulder as Group Member 4's body was exiting the room. (*Id.*). Mr. Cousino's action did not have the appearance of a push or a forceful act. (*Id.*).⁶ Mr. Cousino then stepped out into the hallway, where several Group members and President Finley were located. (Cousino Interview). Group Member 4 was at that point walking away from the doorway to the room. Mr. Cousino accordingly advised Dr. Finley to let go of the banner. (*Id.*).

During this time frame, Mr. MacInnis had walked back into the room and was attempting to restore order. He commented to the audience to put "cameras down." (Audience Member Video). At that point, Group Member 5 appeared at the doorway through which the Group had first entered. (Group Member 5 Video; Lyons Interview). Group Member 5 began to enter and speak loudly to the audience about being from Kalamazoo and her experience with Enbridge there.

⁶ Mr. Cousino's action rather had the appearance of attempting to steady or guide Group Member 4 following the push by an audience member.

(Group Member 5 Interview). Mr. MacInnis approached Group Member 5 and repeatedly stated "out" while physically ushering her back toward the doorway. (Group Member 5 Video). A preponderance of the evidence supports that Mr. MacInnis put his hand(s) on either side of Group Member 5's face and turned her to look at him, stating, "Will you please get out of here?"⁷ Group Member 5 responded "yes" and left. (Audience Member F Interview; Audience Member P Interview; Group Member 5 Video).

In the hallway, President Finley continued to try and inform the Group the location of the designated area they could protest. (Group Member 5 Video; Finley Interview; Cousino Interview; Group Member 1 Interview; Group Member 2 Interview). One such comment by him is captured on audio of the Group Member 5 video. (Group Member 5 Video). The Group members perceived President Finley's informing them of a protest area to be disingenuous and an "after the fact" effort to avoid responsibility. (Group Member 1 Interview; Group Member 2 Interview). This perception is contradicted by the record, however, which confirms a designated protest area had indeed been established. (Mansfield 10:14 a.m. E-mail). Certain Group members were using profanity in responding to President Finley and Mr. Cousino as they were speaking and moving toward the exit of the building. (Cousino Interview; Finley Interview; Group Member 5 Video; 911 Call).⁸

Around this time, Shantelle Duffiney remained on the phone with the 911 dispatcher. (Duffiney Interview; 911 Recording). While speaking with the dispatcher, Ms. Duffiney walked around to the hallway alongside the lecture room where the Group members had been exited and where they were continuing to attempt to engage and resist leaving. (Duffiney Interview; 911 Recording). Shortly thereafter, one of the Group members stated words to the effect of "we need to go" and the Group members departed. (Duffiney Interview). Ms. Duffiney followed the Group members out of the building while speaking to the 911 dispatcher, providing their descriptions and the direction they headed, which was through an area with tall grasses and trees and a hill that led down away from campus. (Duffiney Interview). Police headed to the scene within minutes thereafter. (Duffiney Interview). They promptly located the Group members, detaining four of them temporarily. (Police Dashcam and Bodycam footage).

While police were in the course of locating the Group members, a police officer went into the College and spoke with President Finley and others about the incident. (Finley Interview). Upon inquiry as to whether the College wished to press charges, President Finley stated the College did not wish to do so. (Finley Interview; Cousino Interview; Police Report). The police officers therefore issued "trespass" notices to the Group members confirming they should not return to the premises of the College and released them. (Police Dashcam and Bodycam Footage; Police Report).

⁷ Two Audience member witnesses stated that when Mr. MacInnis and Group Member 5 were by the doorway and she continued her comments despite his request that she leave, Mr. MacInnis took his hand or hands and turned Group Member 5's face toward him and stated, "Will you please leave?" A similar comment is captured on the audio portion of video. (Group Member 5 Video). No visual evidence is captured at that point of the video as the camera is pointed toward the door. (Group Member 5 Video). Mr. MacInnis does not remember details regarding his physical contact with Group Member 5 during this time. (MacInnis Interview.)

⁸ Mr. Cousino and Dr. Finley recalled that Group members referred to them as "MFers" (but used the whole term) and used other profanity toward them in the hallway. (Cousino and Finley Interviews). Video recording evidence indicated references such as "asshole" and "fuck you."

The entire incident prior to the Group members' departure occurred within the span of approximately 90 seconds to 2 minutes. Based on security footage time stamp, the Group members entered the presentation room at 12:10:18 p.m. (Library Conference Center Video). Less than one minute later, at 12:11:10, Ms. Duffiney had exited the presentation room and retrieved her phone to call 911. By 12:11:49 p.m. Group Member 5 was already exiting the presentation room and walking around to the side hallway, which occurred after the other Group members had already been exited out the other presentation room door. (*Id.*).

d. College Personnel Perceptions and Motivations.

The investigation included findings of fact as to the perceptions and motivations of the College personnel that had any engagement with Group members, as such perceptions and motivations could bear upon whether any of their engagement constituted an "assault," or other threatening or violent behavior as referenced within the College's policies. Each of these individuals' accounts was deemed credible upon assessment of demeanor, internal consistency, and review of the overall evidentiary record.

i. President Finley

President Finley stated that the Group's entry and behavior was an "ambush" that was "scary." Dr. Finley explained that his assessment of the situation was impacted by the context of recent events, including the Michigan State University ("MSU") shooting event that had happened just months previously, and two Nashville shootings that had occurred shortly after the MSU event. Dr. Finley stated that in consideration of those events, when those individuals rushed the room, that "you have aggressive folks yelling, wearing masks, having backpacks and metal poles, and it is difficult to ascertain whether you are dealing with a volatile incident."

Dr. Finley stated, "I did not want the situation to escalate. Some of the audience members got into the fray. I wanted to restore order. I wanted to protect the audience members who were threatened." Dr. Finley explained that audience members at such luncheon events are generally his age or older. He mentioned that a couple of them had "gotten into the mix" and he surmised that many present were afraid, and again, he wanted to restore order.

President Finley recalled at that time that a couple years previously, he had undergone "shooter training." The messaging in that training was "run, hide, fight." Dr. Finley stated that the College "appeared at that moment to be in peril," and he tried to evaluate what to do. He stated, "I thought, don't touch anyone, don't fight, what can I do to diffuse?" Dr. Finley stated that he realized the protesters wanted to display a banner. Dr. Finley stated that he grasped an exposed section of the banner between people. The banner was not completely unfurled at that point. He stated his thought process was that there were "no people there,"⁹ and he might be able to get the people to leave the room by pulling out the banner they were holding. Dr. Finley stated he pulled on that banner with all his might and pulled it toward the doorway in an attempt to lead the protesters and the banner outside and diffuse the situation.

⁹ Upon review of his summary, Dr. Finley clarified that what he meant by his statement was that there were no hands in that area of the banner.

Dr. Finley stated he does not know what the banner said. He stated his purpose in grabbing the banner was to try to take the "wind out of the sails" of the protesters and get them to leave the area. Dr. Finley stated that it "seemed to play out like that" when he did so.

Dr. Finley stated with respect to his actions during the incident, "I was protecting a 76-year-old man (Mr. MacInnis), and a woman who is in her 50s (Ms. Lyons) as well as an audience that consisted of approximately 70 people." Dr. Finley, upon inquiry, clarified that the metal poles he observed were for the banner. He stated, "You don't know that in real time." In "two-tenths of a second" he had to decide what to do. Dr. Finley stated that, under those circumstances when someone is rushing in and yelling with masks and backpacks, he made the best decision he could.

ii. Charlie MacInnis

Charlie MacInnis stated that he first observed that people with "poles and backpacks" "burst into" the lecture room and were yelling. Mr. MacInnis explained that the Group made "a startling, disruptive entrance." Mr. MacInnis expressed that he was shocked by what was occurring, had not experienced a situation like it before, and felt the situation to be "clearly a threat." Mr. MacInnis stated that, although the Group members were "younger, stronger, and taller," he felt responsible for getting the Group members out of the room. Mr. MacInnis stated that the Group was "confronting an elderly" audience, and he felt that he had to get the situation under control.

iii. Christy Lyons

Christy Lyons stated that the Group "burst through the doorway and rushed into the room." She stated they had poles, backpacks, and masks. She stated that "overall, it was a very threatening situation." (Lyons Interview).

iv. Jim Cousino

Jim Cousino, who entered near the end of the incident, stated he became concerned at the physical contact and particularly the development of audience members becoming involved. He was concerned about how the situation could escalate. (Cousino Interview).

e. Audience Member Perceptions and Observations.

Factual findings regarding audience member perceptions and observations were made on the basis that they may be relevant to the nature of the speech and activity at issue and/or whether the actions of the College officials were offensive or reasonable. Audience member perceptions were split into three main groups: those who perceived the response of College officials as appropriate, those whose opinions were mixed, and those who perceived the response of College personnel as excessive and inappropriate. Below is a summary of main points expressed:

i. Response was Appropriate

- Audience Member A and Audience Member B expressed that Mr. MacInnis was "forceful but not excessive." They stated that anyone who would make the assertion that the removal of the protestors was "oppressive" is "nuts."
- Audience Member I and Audience Member J expressed their observation that the College responders acted "reasonably." They stated regarding the College

personnel, "They did a good job and there was nothing they could have done any better."

- Audience Member K stated she did not perceive any of the response by College officials to be disproportionate to what was occurring.
- Audience Member E stated he did not observe any behavior on the part of College personnel that was disproportionate to what was occurring.
- Audience Member F stated that the actions of College personnel actions were, in his observation, not excessive or inappropriate.
- Audience Member N and Audience Member O expressed that the Group members' behavior was "frightening" to them, and that they were "fearful" and felt "trapped." Their observation of the College officials' conduct was that they were "trying to protect us."
- Audience Member P expressed the perception that President Finley and Charlie MacInnis were "trying to contain the threat" and "showed incredible restraint." He stated, "They were trying to protect the guests in that room."
- Audience Member R and Audience Member S expressed their observation that the "protesters were ushered out as politely as possible."
- Audience Member T stated, based on her observation, "I felt the actions of Charlie and the other people were appropriate." She stated further, "I would have called security instead. I don't know if they have security or where they would have been."
- Audience Member U stated her observation that President Finley "was just trying to restore order and protect the innocent bystanders." Audience Member U expressed that she was frightened. Audience Member U stated, "I thought it was necessary and they were completely justified to try and restore order."
- Audience Member V expressed the view that College officials were "composed," were "trying to restore order," and "weren't excessive."
- Audience Member W expressed that the College officials' actions were "necessary and appropriate."
- Audience Member X expressed the observation that the Group members were "aggressive" to begin with. Audience Member X's view was that the College response was not over-aggressive and "no one acted out of order."

ii. Mixed

- Audience Member L stated that College officials appeared "unprepared" but to be doing what they were doing in order to "protect the College."
- Audience Member C and Audience Member D stated their observation that there was "no pushing with intent to hurt" Group members, but they were not sure it was handled in the "most appropriate way."

iii. Response was Inappropriate

- Audience Member G described the actions of Charlie MacInnis and President Finley as "manhandling" and inappropriate.
- Audience Member H expressed that the behavior of those responding was "unprofessional" and that officials should not have gotten physical.

- Audience Member M expressed that the physical removal of the protestors was "completely inappropriate and excessive."
- Audience Member Q expressed the perception that Charlie MacInnis' physical reaction (to a female protester) was "too much."

Various audience members in all categories expressed that it would have been good to have "more security" support at the event.

f. Group Member Perceptions and Observations

The Group members interviewed acknowledged that, at the time the Event occurred, they did not know the identities of College personnel at the event. (Group Member 1 Interview). They learned the identities of some College officials following the Event and in connection with reviews of video. (*Id.*). The Group members reported a mistaken perception that at least one of the audience members involved was a staff member of the College, which was not the case. (*Id.*).

The Group members interviewed described the actions against them as an "assault," and described feeling "scared," and that their "health and safety" was threatened. (Interviews of Group Member 1, Group Member 2, and Group Member 3.) With respect to actions the Group members identified as being taken by College officials, the Group members identified certain actions by College officials as noted in the above findings of fact. Such actions were supported by the Group members' specific recollections and/or were consistent with other record evidence.¹⁰

The Group members expressed their view that their activity within the lecture room of the Event was their constitutionally protected exercise of First Amendment rights. (Interviews of Group Member 1 and Group Member 3). The Group members expressed a belief they were entitled to be in the lecture room and to have undertaken the activities they did there. (*Id.*; Group Member 2 Interview).

g. Evidence Regarding Group Member Injuries.

While the Petoskey Police were temporarily detaining four of the Group members, the Group members were asked if they needed any medical attention and they each responded they did not. (Police reports; bodycam footage.) Certain group members stated in their interviews for this investigation that they did experience physical injuries such as scratches and bruises during the incident that occurred at the Event, however. (Interviews of Group Member 2 and Group Member 3.)

¹⁰ The Group members also made other conclusory allegations regarding the motivations of College officials, and/or of certain additional alleged actions by College officials that were devoid of evidentiary support and/or were contradicted overwhelmingly by the evidentiary record. Such accounts were not credited as having occurred. With respect to still other actions, the Group members were not able to identify the particular individuals responsible for such actions and deferred to the video and/or other evidence. The video and other evidence was reviewed in the investigation, and factual findings made accordingly. Finally, there was a third category of additional actions Group members identified as assaultive and that they could attribute to specific individuals, but attributed those actions to individuals who are not affiliated with the College.

The evidence does support the occurrence of some minor physical injuries to certain Group members. There was not sufficient evidence to allow for a finding as to what action or sequence of events caused the injuries in some cases. In other cases, the action that occurred was remembered, but the identity of any individual or individuals responsible, and whether such individuals were College personnel or individuals unaffiliated with the College, was not discernable either by the Group Member or by other evidence in the investigative record.

Group Member 2 claimed that someone took his glasses and threw them in the hallway. He does not know who. Group Member 2 states that someone also grabbed his arm and "squeezed it very hard" as people were trying to push them into the hallway, leaving red marks and ultimately a bruise. Group Member 2 stated he does not know which individual did this, but that he suspected it to be a particular individual identified on the videos. Such individual is not affiliated with the College. Evidence of red marks on Group Member 2's arm is apparent on the police bodycam footage. Group Member 2 stated he also had a laceration on his forehead. He stated he felt it during the scuffle but does not know which person may have been involved in its occurrence. A scratch on Group Member 2's forehead is visible on the police bodycam footage.

Group Member 3 stated he experienced some "bruising" from the scuffle. Group Member 3 stated that another Group member had a scraped knuckle. Photos were provided of these injuries. The photos did not contain any time stamp or allow for identification of who was being photographed, but were accepted, for purposes of the investigation, as being related to the Event based on the representations of Group Member 3. Group Member 3 was uncertain who or what particular action was the cause of the alleged injuries.

Careful review of the video evidence and testimonial accounts of all witnesses was undertaken in an effort to identify the events and individuals responsible. The overall record did not support a finding that any College personnel caused any physical injury any Group Members.

¹¹

B. Policy Findings.

1. Whether the actions of President Finley or any College personnel violated College policies.

The potentially applicable policies in this case include the College's Freedom of Assembly policy (Policy 406) and the Employee Handbook policy regarding Weapons, Threats, and Violence (Section 411).

¹¹ Group Member 1, Group Member 2, and Group Member 3 also stated that they and all the Group members experienced and still experience mental trauma from the incident. Although in-depth assessment of this issue was outside the scope of the investigation, evidence revealed through the investigation raises a substantial question of causation regarding alleged trauma for at least some Group members. While conducting initial research for contact information for the Group members in the investigation, articles and public record information surfaced that Group Member 2, Group Member 3, and Group Member 4 had been involved in previous protest activity in Kalamazoo in October 2021, against the clearing of a homeless encampment. That protest activity resulted in police intervention, altercations between protesters and police, use of pepper spray both by and against the protestors, a protestor striking a police officer with a flagpole, and criminal charges against Group Member 2, Group Member 3, Group Member 4, and others. Group Member 4 pled guilty in September 2022 to assaulting an officer in connection with that incident. That incident appears to have been significantly more aggravated and more likely to have a causal connection to any ongoing trauma to involved Group members than does the Event.

a. Policy 406 - Freedom of Assembly

A preponderance of the evidence did not support that President Finley or any College personnel violated the Freedom of Assembly policy. The College retains the right to regulate the time, place, and manner of expressive activity under its policy. The policy designates those areas of its campus in which expressive activity may occur; namely "outdoor and indoor common areas" defined explicitly to exclude indoor areas reserved for use. (Policy 406.) The Group's activities occurred inside a reserved lecture/event space that was not a "common area," and were in direct conflict with the College's policy. The policy states that the College will not interfere with expressive activity, but this limitation does not extend to situations in which the learning environment is disrupted, or safety is compromised. The Group's activities in this case were disruptive to the learning environment and created a safety risk. The evidence did not support a finding that the actions of any College officials were based on the viewpoints expressed in the Group's speech. Rather, the evidence indicated that the response of College personnel was based on the disruptive, alarming, and unauthorized nature of the Group's behavior.

b. Handbook Section 411 - Weapons, Threats, and Violence

As to the College's handbook policy regarding weapons, threats, and violence, which applies to employees as well as volunteers, the answer to this question hinges upon whether the conduct of College officials or volunteers was threatening, intimidating, or coercive or constituted an "assault." The preponderance of the evidence indicated that the actions of College personnel in response to the incident were appropriately characterized as defensive against an intrusion rather than offensive, threatening, intimidating, or coercive.

As to whether any actions constituted "assault" under the policy, a preponderance of the evidence substantiated that several College personnel did have physical contact with the Group members or their property. Specifically, the evidence substantiated that:

- President Finley pulled on the Group members' banner;
- Charlie MacInnis pulled on the Group members' banner and had physical contact with Group Member 1, Group Member 2, Group Member 4, and Group Member 5 in efforts to move each out of the room;
- Christy Lyons had physical contact with Group Member 4 in an effort to move Group Member 4 out of the room; and
- Jim Cousino had incidental physical contact with Group Member 4 as an individual unaffiliated with the College expelled Group Member 4 from the room.

"Assault" is not defined under the policy. Principles of Michigan law are instructive. In Michigan, the elements of assault are the same under criminal and civil law. There are two types of assault under Michigan common law; assault is defined as either "an attempted battery" or "an act that would cause a reasonable person to fear or apprehend an immediate battery, for which the defendant either intended to injure or cause fear of immediate battery." *United States v. Mills*, 378 F. Supp. 3d 563, 580 (E.D. Mich. 2019). Thus, "when one attempts an intentional, unconsented, and harmful or offensive touching of a person, one has committed an assault." *Id.* This element is "satisfied where an actor engages in some form of threatening conduct designed to put another in apprehension of an immediate battery." *People v. Reeves*, 458 Mich. 236, 240–41; 580 N.W.2d 433 (1998). Critically, the standard is only that the apprehension be reasonable. *Id.* But when an

attempted assault results in a touching, the assault rises to the level of a battery, defined as "a forceful or violent touching, which includes any use of physical force against another person so as to harm or embarrass that person." *Mills*, 378 F. Supp. 3d at 580. Thus, every battery necessarily includes an assault.

A battery is "an intentional, unconsented and harmful or offensive touching of the person of another." *People v. Starks*, 473 Mich. 227, 234; 701 N.W.2d 136 (2005). The touching does not need to be applied directly, rather contacting "something closely connected with the person" is sufficient. *Id.* "It does not matter whether the touching caused an injury." *People v. Cameron*, 291 Mich. App. 599, 614; 806 N.W.2d 371 (2011). In addition, "the definition of assault does not require force or strength." *Harlan v. Detroit Pub. Sch. Cmty. Sch. Dist.*, unpublished opinion of the Court of Appeals, issued March 18, 2021 (Docket No. 353823), 2021 WL 1050368, p. *7.

To clarify the lower boundaries of what constitutes a touching, Michigan courts have found that acts directed at a person such as spitting, throwing change, and pushing, as well as pulling a door shut when another is trying to open it, are enough to support a charge of assaultive conduct. *E.g., People v. Terry*, 217 Mich. App. 660, 661; 553 N.W.2d 23 (1996) (finding that spitting on a person is a battery); *People v. Meissner*, 294 Mich. App. 438, 454; 812 N.W.2d 37 (2011) (explaining that throwing change at a person is assaultive conduct); *People v. Kinsey*, unpublished opinion of the Court of Appeals, issued September 21, 2023 (Docket No. 361281), 2023 WL 6168356, p. *3 (finding "defendant committed a battery by forcefully and intentionally grabbing the door handle and 'rip[ing] it' from [her] hand" when she was pulling the other way); *Cameron*, 291 Mich. App. at 615 (holding that "pushing, punching, or jabbing" constitutes an offensive touching).

Michigan law recognizes the rights of self-defense and defense of others. MCL 780.972. A person may use non-deadly force in defense if the person "honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual." *Id.* The Michigan Court of Appeals has defined non-deadly force as "[f]orce that is neither intended nor likely to cause death or serious bodily harm; force intended to cause only minor bodily harm, or [a] threat of deadly force, such as displaying a knife." *People v. Ogilvie*, 341 Mich. App. 28, 39; 989 N.W.2d 250 (2022) (citing Black's Law Dictionary, 11th edition).

"Generally, the defense-of-others defense is used to excuse assaultive conduct, i.e., the use of force directly against a person." *People v. Leffew*, 508 Mich. 625, 639; 975 N.W.2d 896 (2022). It follows that the defense of others "requires that a defendant has acted in response to an assault." *City of Detroit v. Smith*, 235 Mich. App. 235, 238; 597 N.W.2d 247 (1999). Thus, if a person reasonably fears imminent injury, then a person may use non-deadly force to protect themselves or others, negating their liability for the assaultive conduct.

i. Application to Actions of College Personnel

(A) President Finley

With regard to President Finley's conduct, there was no substantiated direct physical contact between President Finley and any of the Group members. However, it was substantiated that President Finley pulled forcefully on the Group members' banner, which was at the time

"closely connected" to Group Member 4 and Group Member 2 who were also pulling on the banner. Although a preponderance of the evidence does not support that President Finley's actions were motivated by an intent to threaten, the action appears to meet the threshold of a "touching" based on legal principle, was unconsented, and was offensive at least subjectively to the Group members if not from the standpoint of a reasonable person. While this is true, a preponderance of the evidence also supports that President Finley honestly and reasonably believed, at the time the events were unfolding, that the use of that force was necessary to defend those in the room from the imminent unlawful use of force. For this reason, the evidence does not support a finding that President Finley's actions constituted an assault under the policy.

(B) Charlie MacInnis

Policy 411 applies to Charlie MacInnis as a volunteer. The evidence substantiated that Mr. MacInnis had physical contact with Group Member 1, Group Member 2, Group Member 4, and Group Member 5 in the course of efforts to exit them from the room. The contact constituted a touching that was unconsented. As to whether Mr. MacInnis' action was "offensive," it was subjectively offensive to the Group members, but presents a closer question as to whether it would be considered offensive from the standpoint of a reasonable person. Among the audience members interviewed, for example, opinions were split. However, a majority did not consider the actions to be unreasonable or offensive.

As to Mr. MacInnis' contacts with Group Member 1, Group Member 2, and Group Member 4, a preponderance of the evidence also supports that Mr. MacInnis honestly and reasonably believed, at the time the events were unfolding, that the use of that force was necessary to defend those in the room from the imminent unlawful use of force. Review of the evidence also indicates Mr. MacInnis' physical contact with those individuals did not appear to be more than necessary to move the individuals out of the room. For this reason, the evidence does not support a finding that Mr. MacInnis' actions toward Group Member 1, Group Member 2, or Group Member 4 constituted an assault under the policy.

As to Group Member 5, the question is closer. Group Member 5 was at the other doorway and was not engaged in the physical "tussle" in which the other Group members were involved. Further, Mr. MacInnis' actions went beyond attempting to move her out the door to taking her face in his hand and turning it toward him while asking her to leave. It is less clear that, at that point, a reasonable person would not consider such a touching offensive, or that there was still a reasonable basis for Mr. MacInnis to have believed there was imminent risk of the Group members using unlawful force against himself or the audience. Mr. MacInnis' action toward Group Member 5 is also not as clearly defensively motivated as his efforts to move people out of the room. We recognize that the interaction with Group Member 5 was only moments after the other Group members had been moved out of the room and happened in the course of a series of events that all transpired within the span of 90 seconds. We further do not question whether Mr. MacInnis honestly believed his actions were necessary. However, with respect to Group Member 5, we do not find that a preponderance of the evidence supports that his action in turning her face was "reasonable." For that reason, we do determine that such action violated the College's policy. In terms of the gravity of the violation, we would not consider the violation to be egregious, but rather as grounds for some form of retraining or other corrective action.

(C) Christy Lyons

The evidence substantiated that Ms. Lyons was involved in pushing on Group Member 4's shoulders in an attempt to move Group Member 4 out of the room. Ms. Lyons' actions did not appear to be excessive for the situation, but were a "touching," were forceful, and were unconsented. The actions were offensive to Group Member 4, but a closer question is presented as to whether the actions would be considered unreasonable from the standpoint of a reasonable person. Among the audience members interviewed, for example, opinions were split. However, a majority did not consider the actions to be unreasonable or offensive. Further, a preponderance of the evidence supported that Ms. Lyons honestly and reasonably believed at the time of her actions that they were necessary for the safety of those in the audience, and that her actions do not support a finding of a violation of the policy.

(D) Jim Cousino

The physical contact by Mr. Cousino with Group Member 4 does not meet the standard of an "assault" as his contact with Group Member 4's shoulder would not cause a reasonable person to fear or apprehend an immediate battery. His action was neither forceful nor violent and would not be construed by a reasonable person to be offensive. There is not a preponderance of the evidence to support any finding of policy violation by Mr. Cousino.

2. Whether a Violation of the First Amendment Occurred.

a. First Amendment Legal Principles

The First Amendment, which applies to the federal government and, by virtue of the Fourteenth Amendment, to state and local governments, prohibits the government from making any law that "abridge[s] the freedom of speech." U.S. Const. amend I; *Parks v. City of Columbus*, 395 F.3d 643, 647 (6th Cir. 2005). State colleges and universities are state governmental entities whose activities are governed by these constitutional principles.

i. Deprivation of Free Speech

Under the First Amendment, protected speech is not "equally permissible in all places and at all times." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985). The fact that government property is open to the public is not dispositive of whether speech may be regulated. *Helms v. Zubaty*, 495 F.3d 252, 255 (6th Cir. 2007). Rather, three elements must be considered in evaluating whether a First Amendment violation has occurred: (1) whether the speech at issue is of a type that is protected by the First Amendment; (2) the type of forum in which the speech occurred and the constitutional standard that applies to such forum; and (3) whether the governmental entity's regulation or restriction satisfies the applicable constitutional standard. *Miller v. City of Cincinnati*, 622 F.3d 524, 533 (6th Cir. 2010).

The first element, whether the speech is of a type protected under the First Amendment, is very broad. Protest speech in general is a type of speech considered to be within the scope of the First Amendment, subject to time, place, and manner restrictions that are permissible based on the type of forum.

As to the forum element, the four types of fora are "nonpublic," "public," "designated public" and "limited public." *Hartman v. Thompson*, 931 F.3d. 471, 478 (6th Cir. 2019), *citing Pleasant Grove City v. Summum*, 555 U.S. 460, 469-470 (2009). Varied constitutional standards apply to each.

"Traditional public" fora are public areas such as streets, sidewalks, and parks that "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The government's ability to restrict speech is most circumscribed in a traditional public forum. *Id.* For a state to enforce a content-based exclusion on expressive activity in a traditional public forum, it must show that the regulation is necessary to serve a *compelling* state interest and that it is narrowly drawn to achieve that end. *Id.* Content-neutral regulations that restrict the "time, place, and manner" of expression are subjected to a different, less restrictive standard and may be enforced so long as they are narrowly tailored to serve a *significant* government interest and leave open ample alternative channels of communication. *Id.*

A "limited public forum" is one in which a designated area of government property is "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Miller v. City of Cincinnati*, 622 F.3d 534, 534-35 (6th Cir. 2010)). College and university facilities, such as lecture halls, and programming, such as student activity funds, are limited public fora. *See Christian Legal Soc. v. Martinez*, 561 U.S. 661, 679, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. at 828-29, 115 S. Ct. 2510 (2009). A college or university is not deprived of authority to impose reasonable regulations compatible with its educational mission upon the use of its campus and facilities. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981). Nor are such institutions required to "make all of their facilities equally available to students and nonstudents alike," or "grant free access to all of its grounds or buildings." *Id.* A limited public forum may exclude a speaker who is not a member of the class for whose special benefit the forum was created. *Cornelius*, 473 U.S. at 806. **The government may regulate speech so long as its rules or limitations do not discriminate based on viewpoint and are reasonable in light of the purpose served by the forum.** *Good News Club*, 533 U.S. at 106-07.¹²

¹² As to the other types, a "designated public forum" is "government property that has not traditionally been regarded as a public forum" but that has been "intentionally opened up for that purpose" as a general matter. *Christian Legal Soc'y Chapter of the Univ. of California, Hastings College of the Law v. Martinez*, 561 U.S. 661, 679 n.11 (2010). Thus, a public building entry, lobby, commons, or other area that a public entity has *chosen* to open *indiscriminately* to public use and assembly can become a designated public forum. *Agema v. City of Allegan*, 826 F.3d 326, 336 (6th Cir. 2016) (J. Merritt, concurring). Speech restrictions for such locations must satisfy the same strict scrutiny test applied to traditional public fora. *Cornelius*, 473 U.S. at 802. A "nonpublic forum" is government property that is not by tradition or governmental designation a forum for public communication. *Freedom from Religion Found., Inc. v. City of Warren*, 873 F Supp. 2d 850 (W.D. Mich. 2012). There, government may regulate speech based on subject matter and/or speaker identity if the distinctions are reasonable in light of the forum's purpose and are viewpoint neutral.

In applying the above standards to limited public forum cases involving ticketed events, public meetings, or guest speakers on college or university campuses, courts have upheld rules such as limiting admission to registered attendees, regulating the format of questions and answers during an event, restricting interruptions, disruptive behavior, the display of signs or banners, video and/or phone use, and the like. *See, Kushner v. Buhta*, 2018 WL 1866033 (D. Minn. 2018). Such rules have been found to be "reasonably related to the purpose" of the event and the forum. *Id.* Provided such rules are applied equally to people regardless of the viewpoint they express, such restrictions satisfy the applicable constitutional standard. *Id.* Courts have noted that a certain degree of regulation of speech at public meetings is necessary to avoid "allow[ing] a speaker to try to hijack the proceedings, or to filibuster them, [which] would impinge on the First Amendment rights of other would-be participants." *Olasz v. Welsh*, 301 Fed. Appx. 142 (3rd Cir. 2008).

ii. First Amendment Retaliation

A government or government official's retaliation against an individual for exercise of First Amendment rights is also prohibited under the law. To establish a First Amendment retaliation claim, a claimant must prove three elements: (1) the claimant was engaged in protected conduct; (2) an adverse action was taken against the claimant that would deter a person of ordinary firmness from engaging in that conduct; and (3) the adverse action was motivated, at least in part, by the protected conduct. *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 255 (6th Cir. 2006).

When a speaker's speech or activity violates reasonable time, place, and manner restrictions imposed by a governmental entity, the speech or activity is not "protected conduct" for purposes of a First Amendment retaliation claim. *Olasz*, 301 Fed. Appx. at 144 (plaintiff who was reprimanded and removed from public meeting for disruption of the meeting was not subject to retaliation for his exercise of protected free speech, because, in part, the plaintiff's speech in violation of reasonable rules was not protected).

To establish that adverse action was motivated, at least in part, by a speaker's protected conduct, it must be shown that protected activity was a "substantially motivating factor." *Vereecke v. Huron Valley Sch. Dist.*, 609 F.3d 392, 400 (6th Cir. 2010). This means essentially "but-for" causation. *See, e.g. Leonard v. Robinson*, 477 F.3d 347, 355 (6th Cir. 2007).

b. Application to the Event

In the present case, a preponderance of the evidence does not support either that a violation of First Amendment rights or retaliatory activity based on the exercise of First Amendment rights occurred. As to whether the College's action unlawfully infringed on First Amendment rights, the Event constituted a "limited public forum" for which the College was entitled to set reasonable rules and regulations of speech, provided such rules were viewpoint neutral. The College's policy and its planned regulations for the Event consisted of steps that have been recognized by the courts as reasonable. There was no evidence to suggest that the College's rules were anything but viewpoint neutral.¹³

¹³ While not an issue that came to bear in this case, we recommend that the College apply its Freedom of Assembly policy and the designated areas for expressive activity on a content-neutral and viewpoint-neutral basis. If, for safety or other lawful reasons, a further narrowing of designated areas for expressive speech could become necessary under particular circumstances, the College may wish to consider adding provisions to the policy to this effect; and should ensure that any criteria for such action are objective, content-neutral, and viewpoint-neutral.

As to First Amendment retaliation, the evidence did not support any finding of this type of violation either. First, because the Group members' conduct violated the College's reasonable time, place, and manner restrictions, their actions were not "protected." *See, Olasz, supra*. Even if the Group members were not advised in advance of the specific designated protest area the College had identified, the College's general policy permitting and providing reasonable guidelines for free expression was publicly available online and made clear that expressive activity needed to be limited to outdoor and indoor public common areas, which did not include the lecture presentation room. Further, notices were posted prohibiting the display of signs in the presentation room. In addition to the conduct not being protected, the evidence did not support a finding that the content of the Group members' speech, rather than their disruptive conduct and rule violation, was any factor in the actions of any College personnel.

VII. Suggestions to Consider for Future Events.

Although the investigation did not reveal a violation of First Amendment rights, or reveal a violation of College policies by College officials aside from the one isolated action above, there can be no question the series of developments that occurred at the Event was unfortunate and undesired. There appeared to be a genuine misconception and/or lack of understanding on the part of the Group members as well as certain other witnesses as to the scope and limits of constitutionally protected activity. The Group members and some witnesses appeared genuinely to believe they had a constitutional entitlement to engage in the activities they did regardless of the limited nature of the forum in which they conducted them. The College, as a learning institution, is in a unique position to promote education and awareness regarding the importance of First Amendment expressive activity and how it can be undertaken in a way that is robust and effective, but still within the scope of reasonable limitations and the protection of the Constitution.

The College had in place prior to the Event several advisable measures to balance its interests in safety, order, and freedom of expression. The College maintains a descriptive Freedom of Assembly policy. The College implemented several appropriate steps in preparation for the Event as well, such as implementing reasonable, viewpoint neutral rules for the Event, seeking support from public safety, and offering an outlet for countering views through an independent lecture topic. Following the event, College personnel began to consider and implement additional steps to help better ensure safety and continue to support expressive activity at future events. To the extent it is not already doing so, the College should consider the following additional measures:

- Posting additional notices, beyond what is already posted on the College's website, regarding the College's support for expressive activity and the Campus areas it may occur, perhaps including reference to a link to the Freedom of Assembly policy. For example, a reference and link to the policy might appear on pages advertising events.
- Establishing a uniform set of conduct rules applicable to all College lecture events. Such rules could be included or incorporated by a link to them on the event registration page and confirmation. Such rules could reference the Campus Access, Freedom of Assembly and/or other relevant policies, as well as protocols the College may wish to include for lecture events.
- Requiring pre-registration for all events in coordination with the above to help ensure specific notice is provided to interested parties of the College's conduct expectations.

- Though the College has conducted incident response training in the past, renewing such training and including a segment regarding expressive activity.
- Periodically reviewing the Freedom of Assembly policy to ensure alignment with legal requirements and lawful College operational considerations, allowing for consistent application on a content-neutral and viewpoint-neutral basis.
- Ensuring that College officials are trained for future situations to have a protocol to identify themselves, request that the individuals leave, and to inform such individuals the police will be contacted and they will subject to arrest for trespass if they remain.
- For future events, on a viewpoint neutral basis, having security personnel, police support, or trained freedom of expression facilitators present and in attendance inside events.
- Increased security at event entry points.
- Modifying its online registration program to provide more clarity to waitlisted registrants regarding their status.
- Periodically testing all security cameras to ensure they are in working order.

VIII. Conclusion.

Thank you for the opportunity to assist with this investigation. If we can provide further assistance, please contact us.