



Foundation for Individual Rights in Education

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January 15, 2014

Chancellor Brian Rogers
University of Alaska Fairbanks
3rd Floor Signers' Hall
P.O. Box 757500
Fairbanks, Alaska 99775

Sent via U.S. Mail and Facsimile (907-474-6725)

Dear Chancellor Rogers:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is deeply concerned about the threat to freedom of expression posed by the University of Alaska Fairbanks' (UAF's) repeated and ongoing investigations of the student newspaper *The Sun Star*. Subjecting a student publication to multiple investigations spanning nearly a year based on constitutionally protected expression engenders an unacceptable chilling effect at a public university such as UAF, which is legally and morally obligated to uphold the First Amendment. UAF must end its investigations and assure students that protected speech will never be the target of investigation or discipline in the future.

The following is our understanding of the facts. Please inform us if you believe we are in error.

The Sun Star traditionally publishes an April Fool's Day issue, titled *The Fun Star*, which includes mock news and satirical articles. The 2013 *Fun Star* issue, published April 2, 2013, included an article announcing UAF's plan to construct "a new building in the shape of a vagina" named the "Kameel Toi Henderson Building" (a play on a previous *Fun Star* joke regarding penis-shaped buildings), satirizing UAF's predominantly female enrollment and certain attitudes regarding gender roles and feminism. The article, written by former *Sun Star* reporter and current editor-in-chief Lakeidra Chavis, also included a fake quote attributed to Kayt Sunwood, coordinator for the UAF Women's Center.

Offended by the article and the accompanying image, UAF Professor Jensine Anahita filed a sexual harassment complaint against *The Sun Star* on April 5, 2013. Anahita claimed that the article's accompanying graphic—a still depicting oversized legs protruding from a building, taken from the 1998 PG-13 film *Patch Adams*—was “patently offensive to reasonable persons such as myself” and stating, “sexual jokes, graphic displays of women’s genitals, and use of sexual slang creates a hostile environment because it comprises sexual harassment.” Anahita also claimed that many UAF students, faculty, and staff had told her that they were upset by the graphic.

UAF Director of Diversity and Equal Opportunity Mae Marsh reviewed Anahita’s complaint in consultation with UAF’s legal department. On April 15, 2013, Marsh informed Anahita via letter that UAF would not investigate the complaint, because the article and its accompanying image were protected by the First Amendment and did not constitute sexual harassment. In this letter, Marsh expressly noted that “an investigation of [Anahita’s] sexual harassment complaint or any action against the student newspaper would be inappropriate.”

On April 23, *The Sun Star* published an article titled “UAF Confessions harbors hate speech,” detailing interactions on the public Facebook group UAF Confessions. The article posted several screenshots of student conversations from the public Facebook page, including the names and profile photographs of UAF students commenting on the site. All information contained in the article was publicly available.

On April 30, Anahita filed a second complaint accusing *The Sun Star* of harassment. Anahita claimed that *The Sun Star* committed further sexual harassment by publishing the April 23 article. Anahita argued that the article’s content was “sexually harassing in nature” and constituted “cyberbullying,” which she stated was “definitely prohibited under Title IX.” She also accused *The Sun Star* of having engaged in “sexual slander” against Sunwood (to whom the fake quote had been attributed) and the students named in the April 23 article. Anahita additionally claimed that the article “perpetuat[ed] a hostile environment for women and for LGBTs.” Finally, Anahita renewed her complaint that *The Sun Star*’s April 5 article violated UAF’s sexual harassment policy, and stated that UAF had violated Title IX by declining to investigate her April 5 complaint.

Jennifer McConnel, the University of Alaska system’s Labor Employee Relations Coordinator, investigated Anahita’s April 30 complaint. The investigation included interviews of several *Sun Star* staff members, *The Sun Star*’s advisor, and other UAF personnel. The concluding report, signed by UAF Title IX Coordinator Ana Richards, was dated September 27, 2013, but *The Sun Star* staffers implicated by the complaint were not provided copies. *Sun Star* advisor Robyne did not receive a copy until October 31.

The report rejected Anahita’s claims. The 22 page report found, among other conclusions, that “[n]o evidence was presented that portrayed the failure to investigate the [April 5] complaint negatively impacted any students or employees [sic];” “there is no evidence that the fake quote led to a tangible employment action or altered Sunwood’s conditions of employment;” and that “[t]here is no evidence that the articles affected any students [sic] education.” The report flatly

rejected the general claim that the cumulative effect of the two articles was sufficiently pervasive to constitute harassment:

There is no evidence that the conduct affected the work environment or Sunwood or any other UAF employee. There is no evidence that the conduct affected the learning environment of any student at UAF. There were two articles written. The two articles were isolated. Without a pattern of discriminatory intimidation, ridicule or insult, pervasiveness cannot be found.

Anahita appealed both Marsh and McConnel's findings on October 11. Following Anahita's appeal, UAF retained attorney Parry Grover to review the investigations and their conclusions. Grover is conducting yet another investigation, during which he has contacted Robyne for the purpose of requesting copies of other articles written by Chavis. Chavis has repeatedly contacted Grover to request updates on his review, only to be told in emails of December 13, 2013 and January 1, 2014 that he was waiting for "additional information."

In total, UAF's investigations of *The Sun Star* have now been ongoing for more than nine months, with no indication that a conclusion is near.

FIRE recognizes and affirms UAF's moral and legal obligation to promptly and thoroughly respond to allegations of harassment. Accordingly, Anahita's right to file complaints is not at issue. However, when harassment complaints solely concern expression protected by the First Amendment, no further investigation or consideration is warranted or permissible. As such, the repeated investigations of *The Sun Star* are unacceptable. The newspaper's articles are unequivocally protected by the First Amendment and do not meet the legal standard for harassment in the educational setting. By subjecting *The Sun Star* to further investigation—even after correctly finding the speech to be protected on two separate occasions—UAF has disregarded its binding obligation to uphold the First Amendment on campus. Given the stress and disruption caused by lengthy formal investigations and the ongoing prospect of punishment, UAF students and student journalists will rationally refrain from engaging in protected expression for fear that they will face similarly lengthy investigations and potential discipline at the whim of any offended observer. Chilling speech violates the First Amendment rights of UAF students and cannot be tolerated.

It is well-settled law that the First Amendment is fully binding on public institutions like UAF. See *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.") (internal citation and quotation marks omitted).

The principle of freedom of speech does not exist to protect only non-controversial speech; indeed, it exists precisely to protect speech that some members of a community may find

controversial or offensive. The right to free speech includes the right to say things that are deeply offensive to many people, and the U.S. Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends some, or even many, listeners. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (noting that free speech “may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”). Indeed, much protected expression—including parody and satire—exists precisely to challenge, to amuse, and even to offend, and such speech is unambiguously protected under the First Amendment. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Supreme Court ruled that the First Amendment protects even the most blatantly ridiculing, outlandishly offensive parody. There can be no doubt that *The Sun Star*’s satire of campus architecture and gender issues is entitled to full First Amendment protection.

Moreover, neither of the articles at issue constitutes actionable harassment. In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Supreme Court set forth a strict definition of student-on-student (or peer) harassment. In order for student behavior to constitute actionable harassment, it must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, (3) directed at an individual, and (4) “so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school.” *Id.* at 650. By definition, this includes only extreme and unusually repetitive behavior—conduct so serious that it would prevent a reasonable person from receiving his or her education. Furthermore, in a July 28, 2003, “Dear Colleague” letter sent to all college and university presidents, Assistant Secretary Gerald A. Reynolds of the Office for Civil Rights (OCR) of the U.S. Department of Education made clear that harassment “must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.” In a 2010 “Dear Colleague” letter regarding bullying, Assistant Secretary Russlynn H. Ali explicitly reaffirmed the 2003 letter’s understanding of the relationship between the First Amendment and harassment.

Nothing in the April 2 *Fun Star* article approaches the level of severity, pervasiveness, and objectively offensive conduct required to satisfy the Supreme Court’s binding standard for actionable harassment. It would in fact be difficult for anything printed in a single issue of a newspaper, let alone a single article, to reach the necessary level of severity and pervasiveness to constitute harassment—particularly given that no student is required to read either *The Sun Star* or *The Fun Star*.

The Sun Star’s April 23 article similarly fails to meet the Supreme Court’s definition of hostile environment harassment in the educational context. Foremost, the article cannot reasonably be interpreted as discriminatory. Rather, the article was an objective investigative report of controversial and often hostile speech transmitted anonymously through a publicly available website. The publication of such a news article is deserving of the highest constitutional protection and does not constitute discriminatory harassment any more than would an article describing a rally, protest, or other expressive activity of a racist or homophobic group. The publication of images captured from the public Facebook page discussed by the article is similarly protected by the First Amendment. Finally, as noted, the publication of a single article

does not constitute sufficiently severe and pervasive conduct to transform this protected speech into actionable harassment. Nor do the two articles, taken together, render *The Sun Star*'s speech hostile environment harassment. Indeed, McConnel's findings expressly acknowledge that the two articles at issue failed to meet the threshold of pervasiveness necessary for a finding of actionable harassment due to their separate and distinct nature.

FIRE is encouraged by the fact that UAF's internal investigators expressly concluded that the articles in question were constitutionally protected speech rather than harassment. However, pursuant to its obligations as a public institution bound by the First Amendment, UAF should have recognized that it had no grounds to investigate *The Sun Star* in the first place, let alone to subject it to repeated investigations spanning months. UAF ought to have immediately recognized that the articles are unambiguously protected by the First Amendment and disposed of Anahita's complaints. Instead, not only did UAF investigate *The Sun Star*, it has now authorized another months-long investigation that continues to this day, even after explicitly determining that the speech at issue is constitutionally protected.

The nearly year-long investigation of *The Sun Star* must be concluded immediately. Government actions violate First Amendment rights when they "would chill or silence a person of ordinary firmness from future First Amendment activities." *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999). Accordingly, courts have long acknowledged that government investigations into protected speech risk violating the First Amendment. In *Sweezy v. New Hampshire*, 354 U.S. 234, 245, 248 (1957), the Supreme Court noted that government investigations "are capable of encroaching upon the constitutional liberties of individuals" and have an "inhibiting effect in the flow of democratic expression." Similarly, the Court later observed that when issued by a public institution like UAF, "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" may violate the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

The United States Court of Appeals for the Ninth Circuit—the decisions of which are fully binding on UAF—has held that an eight-month government investigation into clearly protected expression chilled protected speech, and therefore violated the First Amendment. *See White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000). Additionally, in *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992), the United States Court of Appeals for the Second Circuit upheld a trial court's finding that a university president's creation of a committee to investigate protected speech by a professor unconstitutionally chilled protected expression because it implied the possibility of disciplinary action.

UAF has declined to comment on these investigations, stating its desire to avoid creating "a chilling effect on people's willingness to report things."¹ Sadly, UAF has not demonstrated similar concern about the chilling effect that its investigations have had on student speech. To be clear: UAF's prolonged investigations of *The Sun Star* have undoubtedly chilled protected speech on campus. If UAF is willing to subject *The Sun Star* to investigation because of mere offense taken to its satire and reporting on important campus issues, what reasonable student

¹ Samantha Sunne, *University of Alaska Fairbanks student newspaper under investigation following sexual harassment claims*, SPLC NEWS FLASHES (Nov. 26, 2013), available at <http://www.splc.org/news/newsflash.asp?id=2641>.

would *not* refrain from expressing views, making jokes, or engaging in other constitutionally protected speech that might offend others?

These concerns are not hypothetical. *The Sun Star* and its staff have been left uncertain as to whether they will face disciplinary action for the articles being investigated as a result of Anahita's complaints. The stress, uncertainty, and fear of future complaints and subsequent investigations have affected *The Sun Star's* operations and organizational approach, leaving it far less likely to publish materials that would cause offense. Moreover, UAF's actions have demonstrably chilled campus expression more broadly. On September 10, 2013, Lakeidra Chavis published an article in *The Sun Star* regarding UAF's investigations, noting that "students are hesitant to speak out against the university because they are either planning on attending graduate school, applying for a job or working for a department and are afraid of retaliation."² Indeed, UAF's actions have cast such a severe chill that even its student journalists have to question whether it is worth the trouble to engage in traditional journalism: "If this is the price of Journalism, the price of reporting the truth, of writing satire," Chavis wrote, "it is time to re-evaluate our current expectations, perceptions and understanding of the role of media."

FIRE reminds you that in the past, the University of Alaska system has been stalwart in its defense of free speech on campus, despite the offense that some may take to controversial, dissenting, or otherwise unpopular speech. In a memorandum issued March 13, 2001, Mark R. Hamilton, former President of the University of Alaska system, responded to a controversy involving University of Alaska at Anchorage (UAA) Professor Linda McCarriston, a renowned poet. McCarriston's poem "Indian Girls," concerning the sexual abuse of children, had generated controversy following its publication in the December 2000 issue of *Ice-Floe: International Poetry of the Far North*. UAA administrators called for an investigation of the matter. Concerned, FIRE co-founder and former President Alan Charles Kors wrote Hamilton in January in defense of McCarriston's right to freedom of expression.

Following Kors' letter, Hamilton issued his March 13 memorandum to system chancellors. Leaving no doubt about the primacy of freedom of expression on Alaska's public campuses, Hamilton instructed that "[o]pinions expressed by our employees, students, faculty, and administrators don't have to be politic or polite, however personally offended we might be." Hamilton could not have been clearer. "I insist that we remain a certain trumpet on this most precious of constitutional rights," he wrote; "What I want to make clear and unambiguous is that responses to complaints or demands for action regarding constitutionally guaranteed freedoms of speech CANNOT BE QUALIFIED." [Emphasis in original.] Hamilton was equally clear with regard to the chilling effect of investigations into protected speech, such as that at issue presently. He notified chancellors that protected speech must not be subject to investigation: "Noting that, for example, 'The University supports the right of free speech, but we intend to check into this matter,' or 'The University supports the right of free speech, but I have asked Dean X or Provost Y to investigate the circumstances,' is unacceptable. There is nothing to

² Lakeidra Chavis, *On silence and accountability*, SUN STAR, Sept. 10, 2013, available at <http://www.uafsunstar.com/2013/08/on-silence-and-accountability>.

‘check into,’ nothing ‘to investigate.’” Hamilton’s brave and necessary defense of freedom of expression earned local and national commendation.³

The University of Alaska Fairbanks must follow Hamilton’s sterling example by taking immediate action to repair the damage it has done to student speech rights. We urge you to immediately end all investigations of *The Sun Star* and to assure the campus community that constitutionally protected speech will never again be subjected to investigation or threats of discipline.

FIRE is committed to using all of the resources at our disposal to see this matter through to a just conclusion. Please spare UAF the embarrassment of fighting against the constitutional rights it is bound by law to uphold.

We request a response by January 31, 2014.

Sincerely,



Will Creeley
Director of Legal and Public Advocacy

cc:

Ana Richards, Title IX Coordinator
Mae Marsh, Director of Diversity and Equal Opportunity
Donald Foley, Dean of Students
Michael Sfraga, Vice Chancellor for University and Student Advancement
Michael Hostina, General Counsel

³ See, e.g., Stephen Haycox, *UA President Worthy of Top Honors*, ANCHORAGE DAILY NEWS, Mar. 15, 2002, available at <http://thefire.org/article/4151.html>; Scott Smallwood, *U. of Alaska President Calls for Unambiguous Defense of Free Speech*, CHRON. OF HIGHER EDUC., Mar. 27, 2001, available at <http://thefire.org/public/pdfs/3ecd82677539780045e9ef924965e1ea.pdf?direct>; *The Few and the Brave*, WALL ST. J., Apr. 13, 2002, available at http://thefire.org/public/pdfs/4211_2509.pdf?direct.