FIRE
Foundation for Individual Rights in Education

May 1, 2014

Fred Logan, Chair
Kansas Board of Regents
1000 SW Jackson Street, Suite 520
Topeka, Kansas 66612-1368

Sent via U.S. Mail and Facsimile (785-296-0983)

Dear Chairman Logan:

FIRE is writing to again urge the Kansas Board of Regents to revise its policy on the "improper use of social media" by faculty members, approved on December 17, 2013. Although the Board's stated commitment to the First Amendment is commendable, the Board Governance Committee (BCG) Proposed Policy Revisions retain the problematic provisions that FIRE, the National Coalition Against Censorship, and the American Civil Liberties Union Foundation of Kansas discussed in our letter dated December 20, 2013, (enclosed) to the Kansas Board of Regents. As we explained in that letter, the broad and vague language defining "improper use" poses an impermissible threat to the academic freedom and freedom of expression of faculty members employed by Kansas' public institutions of higher education. The fact that 80 professors have endorsed the draft of the workgroup tasked with reviewing the policy suggests that, at the very least, many faculty members will interpret this unclear language as limiting their constitutionally protected speech. The policy must be clarified so that faculty members do not self-censor in order to avoid possible punishment.

Further, in limiting the applicability of principles of academic freedom to severely narrow categories, Chapter II.F.6.b.2 of the Board Governance Committee Proposed Policy Revisions excludes a wide range of speech that contributes to the "marketplace of ideas" that all institutions of higher education are meant to be. We therefore urge the Board to adopt language that more closely tracks the language proposed by the workgroup.

As we reminded you on December 20, the Board of Regents is both legally and morally bound to uphold First Amendment protections for faculty and staff at Kansas' public

170 S Independence Mall W, Suite 510 Philadelphia, PA 19106
phone: 215-717-3473 fax: 215-717-3440
thefire.org

colleges and universities.[1] Chapter II.F.6.b.3.iv of the BCG proposed revisions permits the punishment of a faculty member for his or her speech without adequate consideration of the competing interests at stake required by the law according to the Supreme Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968). For example, under the Board's policy, a professor may be punished even when his speech has not "impeded the teacher's proper performance of his daily duties in the classroom or ... interfered with the regular operation of the schools generally," a situation in which the Court stated that the institution's interest in regulating the professor's expression would be no greater than its interest in regulating expression by a member of the public. *Id.* at 568, 573.

In determining whether a teacher's First Amendment rights were violated when she was terminated for her speech, The United States Court of Appeals for the Tenth Circuit enumerated five elements of the "*Pickering* test":

> (1) whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct."

Dixon v. Kirkpatrick, 553 F.3d 1294, 1302 (10th Cir. 2009). It further clarified: "The first three 'prongs' are said to be issues of law to be decided by the court; the last two are factual issues to be decided by the factfinder." If the Board chooses to include language in its social media policy authorizing punishment for speech that would be protected if made by a non-employee, it must make clear that faculty can be sanctioned only if the first three prongs of the test are satisfied. The board's current policy does not reflect this standard.

While the Board's current policy and the BCG proposed revisions borrow some language from *Pickering*, they apply it to reach a different, unconstitutional result. The *Pickering* Court held that dismissing the appellant teacher because of his speech violated his First Amendment rights *in part* because "no question of maintaining either discipline ... or harmony among coworkers [was] presented" in that case. *Id.* at 571. That does not mean, however, that his speech necessarily could have been subject to punishment if there *were* questions of faculty discipline or harmony. In cases where working relationships among faculty are affected, a number of other factors may be considered, including whether the speech "impede[s] the teacher's proper performance of his daily duties." *Id.* at 573. Again,

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[1] *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) (internal citation omitted) ("[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.'").

the BCG's proposed revisions incorporate similar language in Chapter II.F.6.b.3.iv, but as an *alternative* justification for punishment, not as an *additional* factor that must be considered in conjunction with questions of "harmony" among co-workers. Applying the *Pickering* test in *Conaway v. Smith*, 853 F.2d 789, 797–98 (10th Cir. 1988), the Tenth Circuit reversed the summary judgment granted to the defendant employer on the First Amendment retaliation claim, noting the problem with this justification for restrictions on speech:

> Disruptions in the working relationship between [plaintiff-appellant] Conaway and his supervisors, and general disharmony in the office, are foreseeable consequences when an employee reports improper activities of coworkers or supervisors. ... It would be anomalous to hold that because the employee's whistle blowing might jeopardize the harmony of the office or tarnish the integrity of the department, the law will not allow him to speak out on his perception of potential improprieties or department corruption.
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> [Footnotes and citations omitted.]

The Fourth Circuit rejected a similar purported justification for transferring a teacher to a school 40 miles from his home after he spoke out about the school board's controversial decision not to renew the contract of another faculty member. The court said that where "the school board asserted only a threat of 'turmoil' at the school," that interest did not outweigh the interest in preserving the plaintiff's free speech rights. *Piver v. Pender County Bd. of Education*, 835 F.2d 1076, 1078 (4th Cir. 1987).

Analogous situations are likely to arise in the university setting. Professors are often tasked with discussing important and controversial issues, and it would be a strange result if those topics most in need of discussion resulted in punishment because of the tension they might create among coworkers. The Board's repurposing of *Pickering*'s dicta creates the significant possibility that constitutionally protected speech will be punished or chilled under the Board's current policy.

Further, proposed Chapter II.F.6.b.3.ii's ban on statements that "when made pursuant to (i.e., in furtherance of) the employee's official duties, [are] contrary to the best interest of the university" puts a wide range of core academic expression at risk. While the Supreme Court held in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) that public employees may be punished for speech made "pursuant to ... official duties," it explicitly reserved the question of whether that holding is applicable to "expression related to academic scholarship or classroom instruction." *Id.* at 425. Appellate courts have recognized this reservation in declining to apply *Garcetti* to faculty speech,[2] and the Board should follow suit in order to

[2] *See Demers v. Austin*, No. 11-35558, 2014 U.S. App. LEXIS 1811, *3–4 (9th Cir. Jan. 29, 2014) ("We hold that *Garcetti* does not apply to teaching and writing on academic matters by teachers employed by the state."); *Adams v. Trs. Of the Univ. of N. Carolina- Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011) ("Applying *Garcetti* to the academic work of a public university faculty member ... could place beyond the reach of First Amendment

ensure that its policies do not hinder the purpose of the university and its professors' work. For example, if a professor researches a university's effectiveness in teaching and concludes that the school is being outperformed by others, sharing those results may not be, in the Board of Regents' view, in the "best interest of the university," but it is nonetheless constitutionally protected speech. Chilling or censoring such speech is ultimately to the detriment of not only the faculty and its students but also the university itself.

Again, we remind you that several of the terms in proposed Chapter II.F.6.b.3—"harmony," "loyalty," and "confidence"—are impermissibly vague and provide administrators with unfettered discretion to silence faculty expression. Faculty members are likely to refrain from engaging in protected speech in order to avoid punishment according to these nebulous concepts. This is an unacceptable result. As the Supreme Court has stated, regulations must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," or else they are unconstitutionally vague. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

The faculty workgroup's draft does not suffer from these problems. Instead, statements about refraining from certain types of speech either track existing exceptions to the First Amendment or are framed as voluntary best practices and social considerations, making clear to school administrators and faculty alike what speech is punishable.

> [C]ontent on social media may violate existing law or policy and may be addressed through university disciplinary processes if it:
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> i. is directed to inciting or producing imminent violence or other breach of the peace and is likely to incite or produce such action;
> ii. violates existing university or Board of Regents policies;
> iii. discloses without lawful authority any confidential student information, protected health care information, personnel records, personal financial information, or confidential research data.

These provisions ensure that Kansas' public institutions of higher education may take action against employees who put students' privacy rights or safety at risk or engage in otherwise unlawful expression, while disallowing administrators to abuse these policies to censor speech with which they simply disagree.

The draft states that each university shall adopt its own guidelines, but specifically states that "existing protections for academic freedom and other expression remain in place in the following":

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protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment.").

> i. the content of any academic research and other scholarly activities;
> ii. the content of any academic instruction;
> iii. the content of any statements, debate, or expressions made as part of shared governance at a university whether made by a group or employee; or,
> iv. in general, any communication via social media that is consistent with First Amendment protections and that is otherwise permissible under the law.

While the BCG's proposed revisions affirm protection of some of the above research and expression, its provisions are narrower. The policy states that the following "shall not be considered an improper use of social media in the following contexts" (emphasis added):

> i. academic research or other scholarly activity **within the creator's area of expertise**;
> ii. academic instruction **related to the subject being taught**; and
> iii. statements, debate, or expressions made as part of shared governance and in accordance with university policies and processes, whether made by a group or individual employee.

These added, restrictive clauses narrow the protection for academic speech to unacceptably limited categories that contravene the Board of Regents' claim that it fully supports academic freedom. Both subsections i and ii limit academic freedom to only particular subjects for each faculty member, leaving them at risk for punishment if they venture outside their typical area of study. Such restrictions place particular burdens on faculty members who endeavor to undertake novel and groundbreaking research, without which the pursuit of knowledge will stagnate and wither. To allow protection under principles of academic freedom only for "experts" discourages not only research in areas where there are no experts, but also interdisciplinary research, doing considerable damage to the "marketplace of ideas" that institutions of higher education should strive to embody. The workgroup's language, in contrast, broadly protects academic research and teaching, as well as other expression that is constitutionally protected.

Adopting the workgroup's draft in full would achieve the Board's permissible goals while ensuring faculty members can safely and fully exercise their First Amendment rights. The draft properly articulates employees' fundamental expressive rights while making clear that unprotected speech and disclosure of confidential information may be punished. The language of the American Association of University Professors' 1940 *Statement of Principles on Academic Freedom and Tenure,* included in the Board's policy revision, is an appropriate reminder to employees to be aware of the potential social repercussions of their speech. Kansas' public colleges and universities may encourage their employees to use social media in a civil and respectful manner, but they must make clear, as the workgroup's draft does, that the desire for civility cannot be used as justification for unlawful censorship.

The workgroup draft's broad affirmations of the First Amendment rights of faculty and staff are critically important in order to ensure that colleges and universities do not take

action against employees for protected speech. Of course, this concern is not hypothetical: The University of Kansas punished Professor David Guth for a constitutionally protected statement he made on his personal Twitter account this past September. Particularly because the policy revisions enacted in December were prompted by the controversy surrounding that incident, faculty and administrators are likely to misunderstand the fact that Guth's speech was protected by the First Amendment unless the Board sets forth clear and speech-protective rules in a timely manner. If the workgroup's provisions are enacted, they will provide a necessary clarification that speech cannot be censored or punished merely because it causes discomfort or, as the current policy allows, "impairs ... harmony among co-workers." These necessary revisions will allow employees to fully exercise their First Amendment rights without fear of reprisal.

In sum, the faculty workgroup's discussion draft appropriately includes an unambiguous affirmation of employees' rights to free speech and academic freedom, a clear and concise articulation of what may be punished or prohibited, and aspirational language asking employees to consider the effect that their words might have on the profession or the community. This is the correct balance to strike. The Board of Regents should adopt this language and discard the provisions that continue to chill faculty expression throughout Kansas' public universities. We hope to see the Board of Regents take decisive action to renew its commitment to free expression.

Sincerely,

Robert Shibley
Senior Vice President

Encl.

cc:
Kenny Wilk, Vice Chair, Kansas Board of Regents
Andy Tompkins, President and CEO, Kansas Board of Regents
Shane Bangerter, Kansas Board of Regents
Ann Brandau-Murguia, Kansas Board of Regents
Mildred Edwards, Kansas Board of Regents
Tim Emert, Kansas Board of Regents
Ed McKechnie, Kansas Board of Regents
Robba Moran, Kansas Board of Regents
Helen Van Etten, Kansas Board of Regents
Derek Schmidt, Attorney General
Michael D. Shonrock, President, Emporia State University
Edward H. Hammond, President, Fort Hays State University
Kirk H. Schulz, President, Kansas State University
Steven A. Scott, President, Pittsburg State University
Bernadette Gray-Little, Chancellor, University of Kansas

John W. Bardo, President, Wichita State University
Jerry B. Farley, President, Washburn University
Kevin Johnson, General Counsel, Emporia State University
Max McCoy, Associate Professor, Department of English, Modern Languages, and Journalism, Emporia State University
Kristin Rupp, Web Content Manager, Fort Hays State University
Melissa J. Hunsicker Walburn, Assistant Professor, Department of Informatics, Fort Hays State University
Julia Keen, Associate Professor, Department of Architectural Engineering and Construction Science and President, Faculty Senate, Kansas State University
Jeff Morris, Vice President for Communications and Marketing, Kansas State University
Browyn Conrad, Professor, Department of History, Philosophy, and Social Sciences and President, PSU-KNEA, Pittsburg State University
Dacia Clark, Senior Administrative Specialist in Alumni and Constituent Relations and President, Classified Senate, Pittsburg State University
Charles Epp, Professor, School of Public Affairs and Administration, University of Kansas
Easan Selvan, Associate Director in Information Technology Services, University of Kansas
Mark Fisher, Professor, Department of Biochemistry and Molecular Biology, University of Kansas Medical Center
Victoria Mosack, Professor, School of Nursing and President, Faculty Senate, Wichita State University
Richard Muma, Associate Vice President for Academic Affairs, Wichita State University
Joan Bertin, Executive Director, National Coalition Against Censorship
Doug Bonney, Chief Counsel and Legal Director, American Civil Liberties Union Foundation of Kansas