



Foundation for Individual Rights in Education

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November 12, 2013

President Jonathan Alger
James Madison University
Office of the President
MSC 7608
Harrisonburg, Virginia 22807

Sent via U.S. Mail and Facsimile (540-568-2338)

Dear President Alger:

FIRE is disappointed to be writing to you for the second time in as many years about restrictive policies that threaten James Madison University's (JMU's) reputation as a defender of students' free speech rights.

FIRE rates universities as "red light," "yellow light," or "green light" institutions based on an institution's written policies and their impact on student and faculty speech. We publicize our ratings on our website and in our annual report on campus speech codes. In 2011, FIRE awarded JMU our most favorable green light rating, a distinction currently awarded to just 16 of the more than 400 schools rated by FIRE. Following our national press release praising the university's compliance with its legal and moral obligations as a public institution bound by the First Amendment, JMU received positive publicity in articles published in *The Richmond Times-Dispatch* ("Education: Three Champs," Sept. 10, 2012) and on Fox News' website ("Southern schools dominate list of best colleges for free speech," Sept. 6, 2012), among other outlets. In 2012, we also named the university one of just seven top colleges for free speech in a widely-read feature for *The Huffington Post*.

Unfortunately, we write today about four JMU policies—including the policy about which we first wrote you in October 2012—that threaten students' free speech rights, and thus also threaten JMU's green light status. Three of these four policies are found in the 2013–2014 edition of JMU's Student Handbook.

First, as we noted in our October 2012 letter (enclosed), the judicial affairs "harassment" policy, which previously prohibited "harassment, intimidation, and exploitation," has been amended to add the term "bullying." While most conduct commonly associated with "bullying" is already prohibited by existing policies on harassment, threats, and so forth, the term is left undefined in JMU's policy and could reach a wide variety of conduct including offensive but protected speech.

While FIRE recognizes the university's desire to address "bullying" on campus, we remind JMU that it is *already* required by law to prohibit the kind of harassing behavior targeted by the new policy. Per federal laws prohibiting discrimination on the basis of race, color, national origin, sex, disability, or age by an educational institution, JMU already bears a legal obligation to prohibit discriminatory harassment.

Further, in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999), the Supreme Court defined peer-on-peer harassment in the educational context as conduct that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." That is, students engaged in actual bullying behavior can already be disciplined under the carefully tailored standard the Court announced in *Davis*, which strikes the necessary balance between a public institution's twin obligations to protect free speech and prevent harassment. Other related behaviors—such as invasions of privacy, true threats, and stalking—are also already prohibited under existing laws and university policies. Beyond such conduct, while the university is free to *discourage* offensive speech and expression that does not rise to the level of actual harassment or threats, it may not outright prohibit constitutionally protected speech simply because it may hurt the feelings of college students.

Second, the "Right of Expression" policy, which governs JMU students' ability to protest and demonstrate on campus, requires that "All demonstrations or peaceful assemblies must be registered with the University Unions director or designee at least 48 hours in advance." While universities may establish reasonable "time, place, and manner" restrictions to prevent demonstrations from interfering with essential university functions, courts have repeatedly held that to be considered lawful, "time, place, and manner" restrictions must be "narrowly tailored to serve a significant governmental interest," and must "leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Moreover, with regard to this type of prior approval requirement, the Supreme Court has held that "It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." *Watchtower Bible and Tract Society of NY, Inc. v. Village of Stratton*, 536 U.S. 150, 165-66 (2002).

The Right of Expression policy already appropriately prohibits demonstrations from disrupting classes or other university functions and from interfering with pedestrian or vehicular traffic. Since these types of disruptions are already prohibited, it is difficult to imagine what compelling interest the university has in also requiring all student protests and demonstrations to be registered two full days in advance.

By contrast, students may have a very significant interest in holding a spontaneous protest, since the emotional impact of speech on its audience often depends on its connection to unfolding events. This spring at the University of Alabama, for example, a pro-choice student group sought to hand out pro-choice fliers to counter a pro-life student group's display of graphic, abortion-related images, having only learned of the pro-life group's event the day before it was scheduled to take place. The university's policies, however, required the group to obtain a permit at least

three days in advance, by which time the pro-life event would have been over and fading from other students' memories.

The current Right of Expression policy infringes on the legitimate interest of students in having a forum for spontaneous expression, while serving no compelling university interest that is not already served by the regulations prohibiting disruption of university functions.

Third, JMU's policy on "Soliciting, Petitioning, Selling, Surveying & Publicizing" requires that "Students or student organizations must obtain written approval from the coordinator of clubs and organizations, before petitioning or surveying students." Like the 48-hour requirement discussed above, this is an impermissible prior restraint on speech. Moreover, it provides absolutely no objective criteria by which requests for approval will be judged, giving the administration total discretion to approve or deny requests. As the Supreme Court has made clear, "subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150–151 (1969). This is particularly troubling since the issues about which students and student organizations petition or survey students may well relate to discontent with university policies or leadership, giving administrators greater incentive to deny approval and having a chilling effect on students who might wish to engage in criticism of the administration without seeking the administration's approval to do so.

Finally, JMU has published an informational brochure entitled "Harassment, It's Not Academic: A Guide for Faculty, Staff and Students" that defines sexual harassment far too broadly. The brochure defines sexual harassment as "conduct that: 1. is sexual in nature; 2. is unwelcome; and 3. denies or limits a student's ability to participate in or benefit from a JMU's education program; or 4. denies or limits an employee's ability to perform their job in a safe environment." Examples of sexual harassment from the brochure include "telling sexual or dirty jokes" and "displaying or distributing sexually explicit drawings, pictures, or written materials."

This definition falls far short of the controlling legal standard for student-on-student hostile environment harassment in the educational setting, as set forth by the Supreme Court. As discussed earlier, in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999), the Supreme Court made clear that peer harassment in the educational context is conduct "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." By failing to follow this standard, JMU's policy prohibits speech that falls short of actionable peer harassment, placing constitutionally protected student expression at risk of punishment.

JMU's definition contains no requirements of severity or pervasiveness, requiring only that the conduct "limit," in unspecified ways, "a student's ability to participate in or benefit from JMU's education program."

The policy also fails to incorporate the *Davis* element of objective offense, instead banning any conduct that subjectively affects the listener in such a way as to limit his or her ability to benefit

from JMU's education programs. The lack of a reasonable person standard means that the determination of what constitutes harassment is left up to the subjective sensibilities of an individual complainant or administrator charged with enforcing the policy, no matter how unreasonable their sensibilities may be. This leaves student speech at the mercy of the most hypersensitive members of the campus community, and fails to protect students' expressive rights as required by *Davis*.

These policies all raise serious free speech concerns. Because of the university's admirable recent record of supporting free speech, we would love to be able to resolve this issue privately and allow JMU to maintain its green light rating, a designation which students and administrators at JMU worked very hard to make happen. We realize that policies are frequently revised within an administrative department without the necessary input from a university's general counsel and other relevant administrators, and that may well be the case here. Therefore, it is our hope that this matter can be resolved quickly and directly and that we can continue to give James Madison University our most favorable free speech rating.

Thank you for your attention to this important matter. We would be happy to work with you to address our concerns, each of which could be very simply remedied.

We request a response by November 26, 2013.

Sincerely,



Samantha Harris
Director of Policy Research

Encl.

cc:

Josh Bacon, Director of Judicial Affairs, James Madison University

Don Egle, Senior Director of Communications and University Spokesman, James Madison University

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