



May 24, 2017

Father John P. Fitzgibbons, S.J.
Office of the President
Regis University
3333 Regis Boulevard B-4
Denver, Colorado 80221-1099

Sent via U.S. Mail and Electronic Mail (president@regis.edu)

Dear President Fitzgibbons:

As you know from our March 22 and April 14 letters, the Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses. Regis' May 5 response to FIRE's letters failed to address our concerns about the university's response to student Alexander Beck's "Social Justice Bake Sale" event, and instead raised new concerns about Regis' commitment to freedom of expression.

FIRE is disappointed to yet again have cause to write to Regis University regarding Beck. Regis must immediately cease investigating Beck for alleged violations of the university's "discrimination" and "harassment" policies. Regis must reassure its students that they will not face investigation or punishment for engaging in activism on campus—or admit that it does not truly value freedom of expression.

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

FIRE's March 22 letter concerned Dean of Students Diane McSheehy's unilateral decision to shut down student Beck's March 16 tabling event after Beck had received permission for the event from Event Coordinator Chelsie Bowmar. Beck's demonstration took the form of a bake sale, offering different prices for baked goods depending on students' gender, race, sexuality, or religion.¹ In an April 14 letter, FIRE contested the Regis administration's repeated statements that Beck's bake sale—an act of political protest seen at universities across the country²—"violated university policy and federal law."

¹ Alexander Beck (@realAlexBeck), TWITTER (Mar. 16, 2017 1:12 PM), <https://twitter.com/realAlexBeck/status/842423406813429766>.

² See, e.g., Press Release, Found. for Individual Rights in Educ., (Victory for Free Speech at William & Mary (Feb. 2, 2004), <https://www.thefire.org/victory-for-free-speech-at-william-mary>); Press Release, Found. for Individual Rights in Educ., Twin Victories for Free Speech on Campus (Feb. 13, 2004), <https://www.thefire.org/twin-victories-for-free-speech-on-campus-2>; Press Release, Found. for Individual Rights in Educ., Partial Victory for Free Speech at DePaul (Feb. 20, 2006), <https://www.thefire.org/partial-victory-for-free-speech-at-depaul>.

On May 2, Equal Opportunity & Title IX Compliance Coordinator Michelle Spradling issued Beck a notice informing him that he was under investigation for alleged violations of Regis' "Nondiscrimination and Sexual Misconduct" policy:

We received a report that you may have violated the Regis University Nondiscrimination and Sexual Misconduct policy ("Policy"), particularly the definition of "discrimination" and "harassment."

Specifically, it is alleged that you:

- Sold baked goods on Regis University property at distinct, preferential and detrimental prices based upon an individual's gender, race, religion and sexual orientation on March 16, 2017.
- Made discriminatory comments to students, including: "white people are smarter than black people," and "black people commit more crimes than white people," on March 16, 2017.

Based on the report, I have determined that we must investigate this allegation under Policy. This letter is to notify you that we are opening an investigation into this allegation. Please note that opening this investigation does not mean that we have made a determination about the merits of this report.

This letter is also to notify you that I have appointed Jody Luna as the investigator in this case. Ms. Luna's role will be as a neutral fact finder. She will collect and analyze relevant information from you, from the complainants, from any other witness and from other sources if necessary. As part of this process, she will ask to interview you in person during which time you will be given a full opportunity to present any information you believe is relevant.

Regis' Nondiscrimination and Sexual Misconduct policy defines discrimination as:

Any distinction, preference, advantage for or detriment to an individual compared to others that is based upon an individual's actual or perceived gender, race, color, religion, sex, marital status, parental status, national origin, age, disability, citizenship, sexual orientation, veteran status, and any other groups protected by federal, state or local statutes. The conduct must be so objectively offensive as to alter the conditions of the individual's employment or educational experience.

The Nondiscrimination and Sexual Misconduct policy includes a definition for "sexual harassment," but no definition for "harassment." Instead, the following definition for harassment is found in the Regis Student Handbook.³

³ *STUDENT HANDBOOK 2016 - 2017*, REGIS UNIVERSITY, http://www.regis.edu/~media/Files/University/Student%20Activities/Student_Handbook_2016_17_final_October_10_2016_LO.ashx (last visited May 8, 2017).

Any intentional or persistent act that is intimidating, hostile, or coercive, or any intentional or reckless interference with the legitimate right(s) of another member of the University community to pursue their business, residential, employment or educational activities with the University, without unreasonable disruption or interference. Examples of proscribed harassment may include, but are not limited to: publicizing false, defamatory or private information about another with an intent to antagonize, embarrass, physically intimidate or threaten another; nonconsensual physical touching of another; engaging in unlawful discriminatory conduct directed toward another; or communicating false material information to another with the intent of causing emotional distress or with a reckless disregard for the consequences of such communication.

As stated in both FIRE’s March and April letters, Regis is a private university, and thus not legally bound by the First Amendment. But it is both morally and contractually bound to honor the promises it has made to its students in its official materials. For example, Regis’ “Student Conduct Expectations” policy states:⁴

Within the traditions of its mission and Catholic, Jesuit heritage, Regis University expects its students to develop a high standard of behavior and personal values. Among these expectations are included:

. . . .

- Respect for the University’s academic traditions of honesty, freedom of expression and open inquiry;

Additionally, Regis’ Student Handbook states that “the Regis community seeks to live the Jesuit mission by . . . providing opportunities for self-expression and growth in the Regis community” and that “[i]ntentionally and substantially interfering with the freedom of expression of others in or on University Property or at University sponsored activities” constitutes prohibited conduct.⁵

Via these statements, Regis has committed itself to protecting free expression. But its investigation of Beck abandons that commitment and unacceptably chills the expressive rights of all Regis students—rights the college has pledged to vigorously protect.

The principle of freedom of speech does not exist to protect only non-controversial expression; it exists precisely to protect speech that some members of a community may find controversial or offensive, like the comments Beck is alleged to have made at his tabling event. The Supreme Court of the United States stated in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), that speech “may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger.

⁴ *Community Standards of Conduct*, REGIS UNIVERSITY, <http://www.regis.edu/About-Regis-University/University-Offices-and-Services/Student-Activities/Judicial-Affairs/Community-Standards-of-Conduct.aspx> (last visited Mar. 20, 2017).

⁵ *STUDENT HANDBOOK 2016 - 2017*, REGIS UNIVERSITY, http://www.regis.edu/~media/Files/University/Student%20Activities/Student_Handbook_2016_17_final_October_10_2016_LO.ashx (last visited May 8, 2017).

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.” The Court reiterated this fundamental principle in *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011), proclaiming that “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”

The first allegation against Beck—that he “[s]old baked goods on Regis University property at distinct, preferential and detrimental prices based upon an individual’s gender, race, religion and sexual orientation”—was addressed fully in FIRE’s April 14 letter. Beck’s bake sale, while perhaps considered offensive to some or even many members of the campus community, constituted a satirical protest against Regis’ “Social Justice Week.” By categorizing the bake sale as a violation of federal law or Regis’ discrimination policy, Regis willfully ignores the expressive purpose of the event. It can hardly be argued that Beck’s table, which students could easily avoid, “alter[ed] the conditions of the individual’s employment or educational experience.” Beck did not seek to create a profitable commercial enterprise but to make a statement. Protests that rely on satire—such as Beck’s “Social Justice” bake sale and feminist “wage gap” bake sales, both of which utilize proposed transactions to highlight perceived flaws in society or policy—exist to challenge, provoke, and, indeed, to offend.

Satirical political protest is at the very heart of our country’s honored tradition of free expression. 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. In that case, a satirical advertisement offered a purported interview with the Reverend Jerry Falwell, as he recounted how he lost his virginity in a drunken encounter with his own mother in an outhouse. The Court emphasized the necessity of protecting even the most offensive satire, noting “[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.” *Id.* at 50. A university seeking to honor the tradition of freedom of expression should acknowledge that Beck’s bake sale, like the advertisement ridiculing Falwell, should not be the basis of investigation or punishment.

Likewise, the comments Beck is accused of making during the bake sale event, “white people are smarter than black people” and “black people commit more crimes than white people,” do not constitute actionable harassment. Those comments cannot be punished at a university that promises to protect free speech, offensive as those comments may be to members of the Regis community.

In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Supreme Court set forth the definition of student-on-student (or peer) harassment. In order for student conduct (including expression) to constitute actionable harassment, it must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, and (3) “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 typically repetitive behavior—conduct so serious that it would prevent a reasonable person from receiving his or her education. Indeed, the Department of Education’s Office for Civil Rights (OCR), the federal agency responsible for implementing and enforcing federal anti-discrimination laws on our nation’s campuses, made clear in its 2001 Revised Sexual Harassment Guidance that its definition of harassment is “consistent” with and “intended to capture the same concept” as the Court’s definition

in *Davis*. This standard is what students would reasonably expect a university to adhere to in determining whether speech is protected or unprotected, when the university holds itself out as, and commits itself to, protecting students' expressive rights.

Two comments allegedly made by Beck to students who voluntarily chose to seek out his tabling event and engage with him cannot be said to be so severe, pervasive, and objectively offensive as to have prevented these students from obtaining an educational opportunity or benefit. There is no indication that Beck's comments were intended to or had the effect of deterring anyone from attending class or participating in university life.

The comments Beck is alleged to have made do not even meet the standard set by Regis' own policy, which defines harassment as "intimidating, hostile, or coercive, or any intentional or reckless interference with the legitimate right(s) of another member of the University community to pursue their business, residential, employment or educational activities with the University, without unreasonable disruption or interference." While some may have been offended by Beck's comments, Regis cannot reasonably argue that they were so "intimidating, hostile, or coercive" as to constitute a "reckless interference" with the "legitimate right(s) of the University community to pursue their . . . educational activities."

Again, as stated above and in FIRE's past letters, Regis is both morally and contractually bound to honor the free speech promises it makes to students. However, a May 5 letter to FIRE from Vice President and General Counsel Erika Hollis suggests that Regis does not believe its treatment of Beck contradicts the free speech values professed by the university:

Regis University is a private Jesuit, Catholic University. Accordingly, the University is not subject [to] the [F]irst [A]mendment protections you cite in your letter. Rather each student, electing to attend Regis University, agrees to abide by the University Standard of Conduct.

The Standard of Conduct includes embracing and honoring the traditions of honesty, freedom of expression and open inquiry. Students are also required to abide by the university's rules related to becoming a recognized student organization[], holding protests and tabling events.

In addition, the Standard of Conduct, expects each student to tolerate and respect the different backgrounds, religious traditions, personalities and beliefs of the students, faculty and staff that make up the Regis community. Similarly, the university prohibits any Regis University community member, including students, from discriminating on the basis of race, color, national origin, sex, disability, age, religion, veteran status, marital status, pregnancy, parental status, gender identity, sexual orientation, genetic information or any other legally protected status.

In sum, Regis University students are welcome to engage in freedom of expression so long as they follow the University's rules.

Hollis' response can be summarized as: "Regis students have free speech until the university decides they don't." But freedom of expression is something students either do or do not possess—there is no in-between. Your actions with regards to Beck suggest the latter: that Regis University intends to allow students to express themselves only when Regis approves of their speech. This betrays a fundamental—and perhaps intentional—misunderstanding of freedom of expression. If Regis intends to investigate and punish students for offensive speech, we ask Regis to notify the campus community, amend its handbooks, and let students decide if they truly want to attend a school that does not offer the free speech protections they were promised.

As Hollis stated in her reply to FIRE, and as we noted in this letter and the two before it, Regis is not bound by the First Amendment and is free to determine its own mission and values. Some students and faculty members may indeed wish to be part of an institution that places other values above freedom of expression as it is enjoyed by any other citizen. However, Regis may not promise something that it simultaneously refuses to deliver, and punish students for speech they have every reason to believe will be protected. FIRE will do its part to ensure current and prospective students are aware that Regis University not only makes promises it won't keep, but is hostile to the very rights it promises.

You have been offered a number of opportunities to acknowledge that Regis' treatment of Beck and his tabling event violated the commitments to free speech espoused by the university. You again have an opportunity to change course and defend students' rights. Regis University must immediately end its investigation into Beck's speech and reaffirm to students that they will not face censorship or investigation for engaging in speech that may offend some members of the student body—or admit to the campus community that Regis University does not, and will not, protect free speech.

FIRE is committed to using all of the resources at our disposal to see this matter through to a just conclusion. We have enclosed with this letter a signed FERPA waiver from Alex Beck, permitting you to fully discuss this case with FIRE.

We request a response to this letter by June 7, 2017.

Sincerely,



Sarah McLaughlin
Senior Program Officer, Individual Rights Defense Program

cc:

Erika M. Hollis, Vice President and General Counsel