FIRE
Foundation for Individual Rights in Education

June 16, 2017

President Wayne A.I. Frederick, M.D., MBA
Howard University
2400 Sixth Street NW
Washington, D.C. 20059

Sent via U.S. Mail and Electronic Mail (HUPresident@howard.edu)

Dear President Frederick:

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.

FIRE is deeply concerned about the state of freedom of expression and academic freedom at Howard University following the university's finding that School of Law professor Reginald Robinson violated Howard's Title IX policy by including on a test a hypothetical scenario involving an individual undergoing a Brazilian wax. This finding is at odds with the plain language of several written university policies and could chill professors' teaching of basic legal principles. As a result, it puts at risk both faculty rights and the sufficiency of law students' education.

I. FACTS

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

On September 17, 2015, Robinson gave his class on agency law a Knowledge Demonstration Opportunity (KDO), a type of test Robinson employs throughout the semester to assess students' progress and discuss their analyses of relevant issues by reviewing the questions in class. September 17's KDO included the following question:

> **Question 5.**
>
> P owned and member managed "Day Spa & Massage Therapy Company, LLC." P catered to men and women. Among other services, P offered Brazilian and bikini waxes – sometimes called "Sphynx," bare waxing, or Hollywood waxing. To provide these services, P hired A, an Aesthetician, who had been fully certified

and licensed by the school at which A had studied and by the state in which P was located. One day, T visited P's company. T had never sought such services, but T's friends had raved about P's waxes. A met T at the service desk. T asked for a Brazilian wax. "A full or modified Brazilian?" A asked. T looked confused, and so A explained that a Full Brazilian ("FB") would render T hairless from belly button to buttocks, and a FB required T would be naked from the waist down. A FB required A to touch T's body and to adjust T's body so that A could access every follicle of pubic hair. Next, A explained a Modified Brazilians ("MB"). A MB left a thin strip of hair at the top of T's genitalia, viz., a "landing strip." T opted for FB. A again told T that A would have to touch T's genitals to complete the waxing. T agreed, and T signed the service contract and initialed the space for acknowledging A's information. T got undressed in a private salon, where T also drank hot herbal tea. At A's behest, T, w [sic] who was waist down naked, got on the waxing table. Once on the table, with instrumental tones wafting, T drifted into light sleep; A completed the FB. Upon awaking, T felt physically uncomfortable, asking A if A had touched T improperly. A, saying no, and feeling offended, walked out. Two weeks later, P received a letter from T's attorney, in which T alleged that A had improperly touched T, causing T to seeking counseling and drugs for post-traumatic stress disorder. Having worked with A for 10 years, P responded that A was a certified, licensed Aesthetician, who'd never had any such allegations filed by clients. T sued P, and in deposing A, P and T's attorney learned that A had properly touched T during the FB. Nevertheless, T still felt that A's touching was improper. In the suit, T alleged that A, cloaked with the apparent authority, had induced T by false representations to rely reasonably on A, so that A, while within the scope of employment, could cause harm to T. If P demurred, in effect saying "Yeah, so what!" to T's pleadings, will the court find in favor of T?

(A) Yes, because T had established that A was a servant who was placed into A's position as an Aesthetician, which enabled A to harm to T.
(B) No, because T expressly and impliedly consented to A touching T in any manner that was reasonable for A to provide the FB service that T requested.
(C) Yes, because P benefited from the revenue paid by T to P for services performed by A.
(D) No.

The correct answer to Question 5 was (D). After the test, Robinson solicited volunteers to discuss their answers to the test questions. When discussing Question 5, one volunteer opined that "T would not sleep" through the waxing process. After briefly explaining that his knowledge of Brazilian waxes was limited to the research he did for this particular test question, Robinson switched focus and asked the student about her answer choice. When she declined to explain her answer choice, Robinson moved on to another volunteer.

On December 17, 2015, Howard's Deputy Title IX Coordinator Candi N. Smiley notified Robinson via letter that two students had filed a complaint against him alleging sexual harassment and gender-based harassment. On January 13, 2016, Robinson was informed that this complaint was filed as a result of Question 5 on September 17's KDO. According to the December 2015 letter, the sexual harassment allegation was to be assessed by the following standard[1]:

> With respect to academic programs and activities, the term "sexual harassment" shall mean unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
>
> (1) Submission to such conduct is made either explicitly or implicitly a basis for any decision affecting the terms or conductions [sic] of participation in any such program or activity or status in an academic course; or
> (2) Such conduct has the purpose or effect of unreasonably interfering with a student's educational right, privilege, advantage, or opportunity; or
> (3) Such conduct is so pervasive or severe that it creates an intimidating, hostile, or offensive environment for learning and has no reasonable relationship to the subject matter of the relevant course of instruction.

On May 4, 2017, Robinson met with Provost Anthony K. Wutoh and Title IX Coordinator Veronica Love to discuss the findings. During that meeting, Wutoh gave Robinson a notice of findings, which stated that there was "sufficient evidence to sustain a finding of Sexual Harassment in violation of the Title IX policy" but "insufficient evidence to sustain a finding of Gender-Based Discrimination." During the meeting, Robinson was told that Smiley relied on four factors in coming to the conclusion that he had committed sexual harassment.

The first factor Smiley relied on was that Robinson used the word "genital" in Question 5. Second, the complainants felt that the hypothetical scenario was crafted in order to prompt them to reveal personal details about themselves. Third, the complainants believed their revelations had a negative impact on them. Fourth, Smiley believed posing the scenario described in Question 5 was not necessary to teach the subject at hand.

Because of the finding of responsibility, Robinson was subjected to several sanctions, including "a detailed reprimand placed in his file," sensitivity training, mandatory

[1] This standard substantively matches the standard articulated in Howard's Title IX Policy, 400-005.IV.N., attached to Smiley's letter, though the two versions have different typographical errors. Provisions quoted in the Analysis section below will be copied from whichever version is correct, but because they convey the same standards, all analysis applies equally both to Howard's publicly published policy and to the standard articulated by Smiley in her letter.

submission of KDO questions for prior review by the dean's office two weeks in advance, and "institut[ing] a procedure to allow . . . students to remove the KDOs, exams and questions from the classroom." Robinson attended sensitivity training with Love on May 10, 2017. Additionally, Robinson was informed that if he is found responsible for any further violations under the university's Title IX policy, he may be terminated or otherwise disciplined.

II. ANALYSIS

Question 5 of Robinson's September 17, 2015 KDO plainly does not constitute sexual harassment under Howard's Title IX policy. Howard's punishment of Robinson for this question, therefore, is unacceptable under the university's speech-protective academic freedom policy. Moreover, were Howard to apply its Title IX policy consistently in the manner as it has done in this case, professors would be unable to teach about many areas of the law, and their students would be deprived of the rigorous intellectual training necessary to become skilled, competent attorneys.

i. Robinson's use of the hypothetical question at issue does not constitute "sexual harassment" under Howard's own policy.

There are three types of "sexual harassment" defined in the Title IX policy purportedly applied to Robinson's case; each entails "unwelcome . . . conduct of a sexual nature" in addition to other conditions being met. Robinson's use of Question 5 in his test does not satisfy any of the three sets of conditions described in Howard's sexual harassment policy.

The first type of sexual harassment occurs when "submission to [unwelcome sexual conduct by a faculty or staff member] is made either explicitly or implicitly a basis for any decision affecting the terms or conditions of participation in any such program or activity or status in an academic course." Question 5 asked students to apply their knowledge of agency law to a hypothetical situation. Robinson did not solicit personal information about his students in any manner, much less condition students' grades on their sharing of private information. In fact, he did not require any students to publicly comment on this question at all—he took volunteers for the discussion of all his test questions. Further, it would be unworkable to characterize the use of the word "genitals" as "conduct" to which students had to submit—by completing the KDO—as a condition of receiving high grades. Such an interpretation would render any class assignment or test that even tangentially relates to sex a potential basis for a finding of harassment if one especially sensitive student is made uncomfortable. Therefore, his decision to include the Question 5 in the KDO cannot constitute the first type of sexual harassment in Howard's Title IX policy.

The second type of sexual harassment is that which "has the purpose or effect of unreasonably interfering with a student's educational right, privilege, advantage, or opportunity." Even if the complainants subjectively felt uncomfortable reading or discussing Question 5, the question cannot be said to *unreasonably* interfere with any student's educational opportunities. Mere discomfort with the mention of certain body

parts or sex does not transform pedagogy into sexual harassment—if it did, professors could not teach topics like human sexuality, biology, or a broad range of classic literature without the risk of being found guilty of harassment because of one particularly sensitive student's complaint.

More specifically to Robinson's class: All law students in the United States can expect to encounter descriptions of scenarios that involve sexual touching, even if they learn only the subjects tested on bar examinations in all jurisdictions, which include rape and other criminal infractions. The simple fact that a test question involves touching of a hypothetical individual's genitals and the word "genitals" would not, therefore, unreasonably interfere with any law student's education.

Any student with even the most basic understanding of the first-year topics taught almost uniformly nationwide would expect such hypothetical questions, and any law student who graduates without having encountered such a question is likely a step behind in learning the knowledge necessary to become a licensed attorney. Moreover, nothing suggests that Robinson created the question with the *purpose* of interfering with his students' education. Quite to the contrary, he explained his rationale for including the question in the KDO in a 32-page letter to Provost Wutoh that was forwarded to you on May 25.

The third type of sexual harassment defined by Howard's Title IX policy is conduct that is "so pervasive or severe that it creates an intimidating, hostile, or offensive environment for learning and has no reasonable relationship to the subject matter of the relevant course of instruction." A single question involving a hypothetical individual's genitals, among dozens of other questions throughout the semester that do not, is neither "severe" nor "pervasive." The Department of Education's Office for Civil Rights explicitly stated in a July 28, 2003, "Dear Colleague" letter, sent to the presidents of public and private universities nationwide, that "in addressing harassment allegations . . . the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR." The letter elaborated:

> Some colleges and universities have interpreted OCR's prohibition of "harassment" as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.

Howard's finding that Robinson's inclusion of Question 5 in his KDO constitutes sexual harassment rests solely on two students' judgment that this was offensive, and is therefore not within the bounds of sexual harassment prohibited by Title IX.

Additionally, Question 5 clearly has a reasonable relationship to the subject matter Robinson was teaching: agency law. As Robinson noted in his May 25 letter to Wutoh, cases like *Bowman v. Home Life Ins. Co.*, 243 F.2d 331 (3d Cir. 1957), and *Nazareth v. Herndon*

Ambulance Serv., 467 So. 2d 1076 (Fla. Dist. Ct. App. 1985), deal with questions of agency and vicarious liability in situations involving an "intimate examination" of individuals' bodies (in *Bowman*) and an alleged sexual assault (in *Nazareth*). These are real-life cases that are substantially similar to Question 5, and students who go on to practice agency law will be well-served by learning how to analyze similar circumstances. Whether this particular question is absolutely *necessary* to teach agency law is not relevant to the question of whether Robinson violated Howard's Title IX policy.

Because Robinson's use of Question 5 in his KDO does not satisfy the conditions required for any of the three types of "sexual harassment" described in Howard's Title IX policy, the finding against him is erroneous and must be reversed.

ii. Howard's punishment of Robinson does not comport with the university's promises of free speech and academic freedom.

The finding against Robinson and his subsequent punishment are flatly incompatible with Howard's express, written promises of free speech and academic freedom. Howard is a private institution, and thus not legally bound by the First Amendment. However, it is morally and legally obligated to abide by the promises it makes to its faculty. Howard has not done so in this instance.

Howard's "Academic Freedom Policy," set forth in the Faculty Handbook, states, in relevant part:

> Faculty members are entitled to freedom in the classroom in discussing their subjects, but they should be careful not to introduce matter into their teaching that has no relation to their subjects. Students are entitled to an atmosphere conducive to learning and to even-handed treatment in all aspects of the teacher-student relationship. Therefore, in exercising their freedom in the classroom, faculty members are responsible for ensuring that their treatment of students is in no way inconsistent with the university's equal opportunity policy or the university's commitment to promoting the educational aspirations and achievements of all students.

Robinson's teaching during the class in question was even-handed and consistent with university policy, as explained above. Question 5 contained only gender-neutral terminology, and the university's findings concluded that a gender-based discrimination claim could not be sustained. Accordingly, Robinson was entitled to freedom in the classroom in discussing his subject, agency law. This freedom means very little if it does not include the ability to craft questions that Robinson believes will best convey the nuances of agency law to his students. Academic freedom cannot include a requirement that professors utilize only the most anodyne or commonly employed illustrations of each principle they are teaching.

Howard's actions against Robinson are particularly untenable in light of your recent statement on freedom of speech, posted to the university website on February 28, 2017.[2] In this statement, you repeatedly emphasized that "Howard University is committed to the principle[] of free speech" and that the administration has "defend[ed] the right of community members who express a wide range of often conflicting points of view." On September 17, 2015, Robinson did not even seek to express a controversial viewpoint—he sought only to illustrate a principle of agency law using a scenario that was different from most other questions he had posed to his students. It is critically important that law students learn to apply legal principles to different scenarios, and crafting a range of hypothetical scenarios plainly falls within the scope of what a professor can expect to do when promised academic freedom.

iii. Howard's application of its Title IX policy effectively prohibits the teaching of wide swaths of the law.

Howard punished Robinson for presenting to his law students a hypothetical scenario in which one individual consented to another individual touching his or her genitals. In doing so, as noted above, he used gender-neutral and formal terminology. Myriad situations involving genitals implicate different torts and criminal laws—in fact, some laws can be illustrated and taught *only* with reference to someone's genitals. To punish a law professor for including this terminology in one question among dozens is to effectively prohibit the teaching of broad swaths of the law. Howard's students would be ill-equipped to pass the bar exam, advise clients, or seek employment without this knowledge.

Were Howard's reasoning in Robinson's case applied evenly to all law faculty, professors would be unable to teach about rape and sexual assault laws at all if one student subjectively felt uncomfortable during those discussions. As a result of the sanctions imposed on him, Robinson will feel unable to teach cases related to these topics. He may even feel unable to adequately answer questions posed by his students if the students bring up related topics on their own. Students, as a result, are likely to feel uncomfortable asking about certain areas of the law, unsatisfied with their educational experiences at the law school, and potentially unable to advise their clients.

Classroom discussion, so long as it is germane to the curriculum, should not be limited to what Howard's most sensitive students would choose to study. Exposure to a wide range of potential circumstances and nuanced fact patterns is an essential part of training students for the legal profession. Howard's decision to sanction Robinson under the guise that Question 5 constitutes sexual harassment cannot be sustained if Howard wishes its students to have a meaningful legal education.

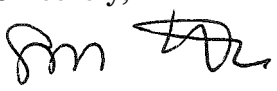
III. CONCLUSION

[2] Letter from Wayne A.I. Frederick, M.D., MBA, President, Howard Univ., to Howard Univ. Community (Feb. 28, 2017), *available at* https://www2.howard.edu/about/president/statements/freedom-of-speech-02282017.

Howard's punishment of Reginald Robinson does not comport with its own definition of sexual harassment or its promises of academic freedom. It poses a severe threat not only to professors' rights but also to students' ability to learn all areas of the law, including learning how to analyze situations that may make some students uncomfortable. For lawyers in many fields, having the ability to do so is imperative. Howard must immediately remove the finding of responsibility from Robinson's file and rescind its sanctions against him.

FIRE is committed to using all of the resources at its disposal to see this matter through to a just conclusion. We request a response to this letter by June 30, 2017.

Sincerely,



Susan Kruth
Senior Program Officer, Legal and Public Advocacy

cc:
Stacey J. Mobley, Chairman, Howard University Board of Trustees
Candi N. Smiley, Title IX Coordinator
Veronica Love, Title IX Coordinator
Anthony K. Wutoh, Provost & Chief Academic Officer
Florence Prioleau, General Counsel
Danielle Holley-Walker, Dean, Howard University School of Law