FIRE
Foundation for Individual Rights in Education

March 25, 2021

Jennifer Wiginton, Esq.
Division of Indian Affairs
Office of the Solicitor
1849 C Street Northwest
Washington, District of Columbia 20240

URGENT

Sent via Electronic Mail (jennifer.wiginton@sol.doi.gov)

Dear Ms. Wiginton:

FIRE[1] is disappointed to alert you that the state of freedom of expression continues to deteriorate at Haskell Indian Nations University (Haskell).[2] President Ronald Graham and his administration has mounted a second front in his battle against expressive rights, this time targeting the speech and academic freedom rights of faculty and other employees.

A recent directive sent by Graham forbids all faculty and other Haskell employees—whom Graham refers to as "detractors"—from discussing "issues publicly through . . . any [] means of mass communication[.]"[3] Subsequently on March 21, Vice President of Academics Melanie Daniel sent Haskell faculty an email forbidding them from using their professional titles in conversations with the news media.[4] Both of these mandates plainly violate the First Amendment and must be immediately rescinded. Haskell must also clarify that it will not continue to interfere with the expressive rights of its faculty and staff.

[1] As you will recall, 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.
[2] Due to ongoing litigation, this letter is addressed to counsel.
[3] Letter from Ronald Graham, President, Haskell, to All Haskell Employees (Mar. 11, 2021) (on file with author) ("Employee Directive").
[4] Email from Daniel to Faculty (Mar. 21, 2021, 4:35 PM) (on file with author) ("Press Policy Email").

510 Walnut Street, Suite 1250 Philadelphia, PA 19106
phone: 215-717-3473 fax: 215-717-3440
thefire.org

I. Haskell Forbids Faculty and Employee "Detractors" from Expressing Opinions

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

On March 11, 2021, Graham issued a directive aimed at restricting the speech of "All Haskell Indian Nations University Employees."[5] The Employee Directive purports to restrain Haskell employees, including faculty, from "engaging in any misconduct or behavior that is considered to be defaming, slanderous, damaging, and inflammatory towards others."[6] This includes "[d]erogatory opinions regarding coworkers, colleagues, and supervisors or administration[,]" which the Employee Directive claims "[are] not protected under 'academic freedom[.]'"[7]

The Employee Directive goes on to require that employees report any complaints through Haskell's prescribed chain of command, and that employees not air their concerns publicly.[8] The Employee Directive applies to Haskell employees "both on and off duty, and within our community[.]"[9] All of Graham's orders, the Employee Directive states, "are effective immediately and are also non-negotiable."[10]

Soon after Graham issued the Employee Directive, Daniel sent another instruction to Haskell faculty: Haskell employees may not speak to the news media if their statements are in any way "associated" with their "professional relationship with Haskell."[11] This Press Policy Email purported to invoke—but overstated—the Department of Interior's policy on employee's public communications.[12]

The Employee Directive and Press Policy Email are all the more troubling in that they came just days after FIRE filed a First Amendment lawsuit against Graham and Haskell related to a similar directive, which Graham issued in October of last year to student journalist Jared Nally.[13]

In the Nally Directive, Graham denounced newsgathering methods used by Nally in reporting for Haskell's student newspaper, *The Indian Leader*.[14] The Nally Directive threatened Nally with "disciplinary action" if he failed to show "appropriate respect" to Haskell "officials."[15]

---

[5] Employee Directive, *supra* note 3.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Press Policy Email, *supra* note 4.
[12] *Id. See* DEPARTMENTAL MANUAL, 470 DM 1, DEP'T OF THE INTERIOR, Mar. 7, 2012 (on file with author).
[13] Proof of Service of Ronald Graham, Case No. 2:21-cv-02113, executed by Geoffrey Poston on March 4, 2021.
[14] Letter from Graham to Nally (Oct. 16, 2021) (on file with author) ("Nally Directive").
[15] *Id.*

On October 26, 2020, FIRE, the Native American Journalists Association (NAJA), and the Student Press Law Center (SPLC) wrote to Haskell, asking for Graham to rescind the Nally Directive, ensure free press rights for *The Leader*, and refrain from further censorship of students.[16] Graham's subsequent rescission of the directive against Nally was only effectuated on January 13, 2021, via an email from you to FIRE.[17] On January 19, FIRE, NAJA, and SPLC wrote to Haskell once again to explain that the prolonged denial of basic First Amendment freedoms to Nally was unacceptable and to again ask that Haskell ensure these basic rights would be protected in the future by amending its student handbook.[18] Haskell did not substantively respond to this correspondence.

Due to Haskell's non-response, on March 2, 2021, Nally, represented by FIRE, sued Haskell, Graham, the Bureau of Indian Education, and Tony Dearman, Director of the Bureau of Indian Education, alleging First Amendment retaliation, violation of due process, violation of a 1989 settlement agreement between Haskell and *The Leader*, and that Haskell's Campus Expression policy in its Code of Student Conduct is both overbroad and vague.[19] Graham was personally served with this lawsuit on March 4.

II. Haskell Violates the First Amendment—Again—Through the Employee Directive and Press Policy Email

As FIRE has cautioned Haskell before, there can be no question that the First Amendment is binding upon Haskell as a public university. *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 omitted). Indeed, Haskell has recognized this fact in previous litigation.[20]

A. Faculty maintain a First Amendment right to speak as private citizens on matters of public concern.

The law is also well established that employees of government institutions like Haskell retain a First Amendment right to speak as private citizens on matters of public concern, and may not be disciplined or retaliated against for their constitutionally protected expression. *Connick v. Myer*s, 461 U.S. 138, 150 (1983). This protection applies unless the government employer demonstrates that its interests "as an employer, in promoting the efficiency of the public services it performs through its employees" outweighs the interest of the employee, "as

---

[16] Letter from Lindsie Rank, Program Officer, Found. for Individual Rights in Educ., et al., to Graham (Oct. 26, 2020) (on file with author).
[17] Email from Wiginton to Rank (Jan. 13, 2021, 3:34 PM) (on file with author).
[18] Letter from Rank, et al., to Graham (Jan. 19, 2021) (on file with author).
[19] Compl., *Nally v. Graham et al.*, No. 2:21-cv-02113 (D. Kan.).
[20] *Id.*, Ex. A. (acknowledging that inhibiting the free expression of Haskell's student newspaper would be "in violation of the First Amendment of the United States Constitution").

a citizen, in commenting upon matters of public concern[.]" *Id.*[21] This constitutional obligation prevents Haskell officials, including Graham and Daniel, from issuing overbroad directives that infringe upon faculty and employee rights.

The "critical question" in determining whether speech is that of an employee or private citizen is "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane v. Franks,* 573 U.S. 228, 240 (2014). Further, "[s]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community[.]" *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (picketers' signs outside of a fallen soldier's funeral, including "Thank God for dead soldiers," related to matters of public concern). Many issues on public university campuses are issues of public concern because, as the category implies, these universities are funded by *public* monies, overseen by *public* officials, and sit on *public* land. In other words, issues such as the leadership of public universities and workplace conditions at public universities are certainly within the public's concern.

Because the Employee Directive and Press Policy Email both reach the speech of faculty and employees speaking as private citizens on matters of public concern, the Directive and Press Policy Email are unconstitutional. Both regulate employee speech that is not within most employee's job duties and that are on matters of public concern.

This is most apparent with respect to the Employee Directive, which purports to prohibit faculty and employee disclosure of "issues," an amorphous range of speech in no way cabined to the employees' individual roles as Haskell employees. A substantial amount of speech as private citizens may address "issues" which may have no bearing on their employment. Yet even if those "issues" happen to *concern* Haskell, that speech may remain protected. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 571–73 (1968). This is especially true when these "issues" involve "derogatory opinions" about Haskell officials—speech that is highly unlikely to be pursuant to an employee's job duties. Further, these "derogatory opinions" and the "policing" of administrators' actions—types of public speech proscribed in the Employee Directive—will often be on matters of public concern, as they reflect the leadership and workplace conditions of an institution supported by funds from taxpayers across the country.

Similarly, the Press Policy Email materially misapplies Department of the Interior policy and the First Amendment, contorting what is a well-drafted policy that affirms the expressive rights of faculty to authorize broad censorship of faculty members who disclose their employment when they speak out on matters of public concern.

---

[21] These protections extend to all employees, including untenured faculty members. *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) ("[T]his Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights . . . . We reaffirm those holdings here.") (internal citations omitted).

Most Haskell faculty are likely not called upon to speak to media on Haskell's behalf, and it cannot be said that such statements are within their normal employment duties, especially when their speech is critical of Haskell. In the Press Policy Email, Daniel uses herself as an example, noting that while she can "make a statement to a local paper, as Melanie Daniel," she cannot "add Vice President of Academics, Haskell Indian Nations University."[22] While this interpretation of DOI policy may have some truth for an *administrator* like Daniel, who is likely indeed required by her ordinary job duties to make official statements to the media, the same proposition does not apply to faculty and other employees.

For purposes of First Amendment protection, it is of no significance that a faculty member discloses to a reporter that he teaches at Haskell. In fact, that a faculty member is employed by Haskell surely would surely be relevant to his remarks about university policies or actions as they relate to public importance. Despite Haskell's concerns that faculty might speak on behalf of the university, a speaker's mere mention of his employment does not automatically mean he is speaking in his capacity as an employee. "[T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. . . ." *Lane*, 573 U.S. at 240.

B. Criticism of university officials is still constitutionally-protected speech, even when the speaker is a federal employee.

As FIRE has explained to Haskell before, the First Amendment protects vehement criticism of government officials. In fact, it is at the core of our Constitution's guarantee of expressive rights.[23] So central is this ability to criticize officials that the Supreme Court of the United States, affirming that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," determined that a higher standard of fault applies to speech-related torts where a public official is the plaintiff. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

This right also protects faculty's right to publicly criticize their employer—including to the news media. Faculty are not required to share their concerns only with administrators and otherwise remain silent about the policies and practices of their own universities. In the seminal case addressing the protection of employee speech under the First Amendment—in which a public-school teacher criticized his administration in a public letter identifying himself as an employee—the Supreme Court explained:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is

[22] Press Policy Email, *supra* note 4.

[23] *See, e.g.*, *Bridges v. California*, 314 U.S. 252, 270 (1941) ("[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.").

> essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.[24]

C. Employee speech cannot be proscribed because some may find it "damaging," "inflammatory," or "derogatory."

The "inappropriate or controversial character" of the speech "is irrelevant to the question of whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (expression of hope that President Ronald Reagan might be assassinated was protected against retaliation). This is because the First Amendment, distilled to its most fundamental concepts, is intended to protect expression when it is controversial or upsetting to others.

The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted merely because some, many, or even most find it to be offensive or disrespectful. This core First Amendment principle is why the authorities cannot ban the burning of the American flag,[25] prohibit the wearing of a jacket emblazoned with the words "Fuck the Draft,"[26] penalize satirical advertisements depicting a pastor losing his virginity to his mother in an outhouse,[27] or disperse civil rights marchers out of fear that "muttering" and "grumbling" white onlookers might resort to violence.[28] In ruling that the First Amendment protects protesters holding signs outside of soldiers' funerals (including signs that read "Thank God for Dead Soldiers," "Thank God for IEDs," and "Fags Doom Nations"), the Court reiterated this fundamental principle, remarking 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." *Snyder*, 562 U.S. at 448.

This principle does not lose its salience in the context of the public college. To the contrary, a commitment to expressive rights must be robust and uncompromising if students and faculty are to be free to engage in debate and discussion about the issues of the day in pursuit of advanced knowledge and understanding. This dialogue may encompass speech that offends. For example, the Supreme Court unanimously upheld as protected speech a student newspaper's use of a vulgar headline ("Motherfucker Acquitted") and a front-page "political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice." *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973). These images were no doubt deeply offensive to many at a time of political polarization and civil unrest, yet "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Id.*

---

[24] *Pickering*, 391 U.S. at 571–73.
[25] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the "bedrock principle underlying" the holding being that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").
[26] *Cohen v. California*, 403 U.S. 15, 25 (1971).
[27] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).
[28] *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

D. Threatening retaliation against employees who exercise their constitutionally-protected rights itself violates the First Amendment.

Retaliation for participating in First Amendment-protected activity is clearly unconstitutional. Where a government actor responds to protected speech with an "adverse action" that would "chill a person of ordinary firmness from continuing in the activity," it has engaged in impermissible retaliation. *Revels v. Vincenz*, 382 F.3d 876 (8th Cir. 2004). This "well established" test does not require a "great" deal of action in order to be "actionable," and the "objective" test asks "not whether the plaintiff herself was deterred" from speaking but whether a reasonable person may be so deterred. *Garcia v. City of Trenton*, 348 F.3d 726, 728–29 (8th Cir. 2003).

The United States Court of Appeals for the Tenth Circuit, the decisions of which are binding upon Haskell, "has repeatedly stated, '*any form* of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom." *Collopy v. City of Hobbes*, 27 Fed. Appx. 980, 985 (10th Cir. 2001). Here, Haskell again threatens adverse actions against its constituents for engaging in expression protected by the First Amendment.

This is untenable at a publicly funded university led by officials who once took an oath to support and defend our Constitution.

III. Haskell Must Immediately Rescind the Employee Directive and Clarify the Press Policy Email

Graham's Employee Directive and the Press Policy Email are just as appalling as Graham's earlier Nally Directive, and they show a continued pattern of animosity toward First Amendment rights. A public college administrator who violates clearly established law will not retain qualified immunity and can be held personally responsible for monetary damages for violating First Amendment rights. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

In addition, Haskell must preserve all documents and electronically stored information as defined by Rule 34 of the Federal Rules of Civil Procedure, that are relevant to this dispute. This includes any electronically stored information located on the "haskell.edu" and "bie.gov" email servers. This includes without limitation electronic data within Haskell's custody and control that is relevant to this dispute, including without limitation emails, instant messages, and other information contained on Haskell's computer systems and any electronic storage systems. This also includes electronic data contained in computers, cellular phones, and other devices used by Haskell administrators. As such, Haskell must ensure that all Haskell administrators involved in this dispute have preserved all electronic data relating to this dispute on their personal devices.

No procedures should be implemented to alter any active, deleted, or fragmented data. Moreover, no electronic data should have been disposed of or destroyed. We trust that Haskell will continue to preserve such documents and electronically stored information.

We request receipt of a response to this letter no later than the close of business on April 6, 2021.

Sincerely,

Lindsie Rank
Program Officer, Individual Rights Defense Program