

FIRE

Foundation for Individual
Rights and Expression

August 15, 2023

Jonathan R. Alger
Office of the President
James Madison University
Alumnae Hall, Suite 208
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Harrisonburg, Virginia 22807

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

Dear President Alger:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by the ongoing investigation of Professor Gregg Henriques for his pedagogically relevant classroom speech. While his comments may seem shocking and offensive to those outside his classroom of soon-to-be psychologists, they are integral to instruction and remain protected by principles of academic freedom and the First Amendment. FIRE calls on JMU to conclude its investigation in Henriques' favor and publicly affirm its commitment to academic freedom.

I. JMU Notifies Henriques of Formal Complaint

On April 6, JMU Title IX Coordinator Amy Sirocky-Meck notified Henriques, a professor in JMU's combined Clinical and School Psychology Doctoral program for more than 20 years,² that her office had received a formal complaint of sexual harassment against him. The complaint alleges that "Dr. Henriques has continually created a hostile learning environment for students, particularly women, through inappropriate sexualized comments in the classroom. His sexualized comments are severe, persistent, and pervasive, and I believe they are objectively offensive."³

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² This recitation of facts reflects our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. To that end, please find enclosed an executed privacy waiver authorizing you to share information about this matter.

³ Written Notice of Allegation of Formal Complaint from Amy Sirocky-Meck, Title IX Coordinator, to Henriques (April 6, 2023) (on file with author).

On April 11, the complainant provided the Title IX Office a list of 24 allegedly harassing comments and interactions, which Sirocky-Meck forwarded to Henriques and incorporated into the formal complaint.⁴ The complainant is in her third year of the doctoral program and has taken six classes with Henriques.⁵ Every allegation made by the complainant took place in one of three classes—Personality Assessment, Integrative Psychotherapy Across the Lifespan, or Personality Theories—between February and June of 2022.⁶

As Henriques explains at length in his Reply, nearly every comment was made in the context of doctoral-level coursework and was directly relevant to the material.⁷ For example, allegedly harassing comments include: “emotions are like orgasms” (analogizing the human experience of emotion to the sexual response cycle in a lesson on emotion-focused therapy), “I want to have sex, I’m aware of the motive” (acknowledging a fundamental fact of human existence in a lecture on Freud), and using the phrase “pinky dick” (explaining psychotherapist Alfred Adler’s theories of the inferiority complex and overcompensation in a class on psychodynamic theory).⁸

II. The First Amendment Bars JMU from Punishing or Investigating Henriques for the Speech at Issue

The investigation of Henriques and concomitant threat of punishment for the in-class comments at issue conflicts with long-settled law that the First Amendment binds public universities like JMU,⁹ such that its actions and decisions—including the pursuit of disciplinary sanctions¹⁰ and maintenance of policies implicating student and faculty expression¹¹—must comply with the First Amendment. It is equally established that occasional, pedagogically relevant statements do not constitute actionable harassment. Because the comments on their face are not constitutionally actionable, JMU should promptly conclude its investigation of Henriques without taking any further action against him.

⁴ Email from Sirocky-Meck to Henriques (April 12, 2023 10:58 AM) (on file with author).

⁵ Henriques Reply to Full Investigative Report at 6 (June 16, 2023) (on file with author).

⁶ *Id.*

⁷ *See id.* at 6-26. Henriques classifies every allegedly harassing comment as either pedagogically relevant, misrepresented or misconstrued, or difficult to respond to. He strongly denies making one of the comments at all—“sometimes you just wanna put a dick in a pussy”—and offers evidence to support his position.

⁸ *Id.*

⁹ *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).

¹⁰ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

¹¹ *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

A. *Henriques’ Speech Does Not Constitute Actionable Harassment.*

JMU’s investigation of Henriques cannot legitimately rest on a finding that his speech constituted harassment, because isolated comments made in the context of and clearly relevant to course instruction do not constitute actionable harassment under federal law¹² or university policy.¹³

In *Davis v. Monroe County Board of Education*, the Supreme Court established a strict definition of harassment in the educational context: to constitute actionable harassment, conduct (including expression) 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.”¹⁴ In a July 28, 2003, “Dear Colleague” letter to college and university presidents nationwide, the Office for Civil Rights (OCR) of the U.S. Department of Education made clear that harassment “must include something beyond the mere expression of views, symbols, or thoughts that some person finds offensive.”¹⁵

JMU, recognizing its obligations under federal law, similarly defines harassment as “[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the university’s education program or activity[.]”¹⁶

Henriques’ comments do not meet either of these stringent standards and therefore cannot form the basis for punishment.

First and foremost, Henriques’ comments were not “objectively offensive” given their context. Henriques does not teach undergraduates—all his students are doctoral candidates enrolled in intensive training to become clinical and school psychologists, who have invested years of their lives to learn how to deal with society’s most difficult problems, including substance abuse, domestic violence, rape, pedophilia, and suicide. That doctoral-level psychology students will encounter topics and ideas that make them deeply uncomfortable is obvious.

To emphasize this point, JMU’s Clinical and School Doctoral Program Handbook cautions:

Being a doctoral level psychologist requires high level skills in managing difficult topics, and part of the training in the Clinical and School Psychology program is designed to foster

¹² See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

¹³ JAMES MADISON UNIV., *Policy 1346: Title IX Sexual Harassment* (Aug. 2021), <https://www.jmu.edu/jmu-policy/policies/1346.pdf> [<https://perma.cc/2FGC-VHBT>].

¹⁴ 526 U.S. at 650.

¹⁵ U.S. DEP’T OF EDUC., *Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec’y for Civil Rights* (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html> [<https://perma.cc/XBQ8-UKGJ>].

¹⁶ *Policy 1346: Title IX Sexual Harassment*, *supra* note 13.

self-reflective awareness and the capacity to stay thoughtful and engaged, even if some ideas or material is presented or stated in a way that results in strong emotional reactions. . . . It is the responsibility of the doctoral students to be able to listen to controversial material that can be emotionally triggering in a mature, thoughtful way and to explore disagreements with curiosity and the intent to learn and grow. If material is discussed that elicits a troubling reaction, it is expected that the student will process this as appropriate, either in the class, with fellow students outside of class, or separately with the professor.¹⁷

It thus cannot be seriously argued that comments such as “emotions are like orgasms,” “I want to have sex, I’m aware of that motive,” and “feelings are sexual gestalts,”¹⁸ made in advanced psychology courses, can be objectively offensive.¹⁹

Further, there is no evidence that Henriques’ comments were “severe” or “pervasive.” As Henriques notes, the complainant has taken six classes with him since joining the program and reported a small number of isolated comments from just three of those classes.²⁰

B. Henriques’ Speech is Protected by Academic Freedom.

In addition to not constituting actionable harassment, Henriques’ classroom speech is protected by principles of academic freedom, which the First Amendment protects and to which JMU clearly commits. As explained in the Faculty Handbook:

Each member of the faculty is entitled to academic freedom in the discharge of their professional duties. Accordingly, each member of the faculty has a right to the freedom of thought and expression, including a right to reasoned dissent, in the conduct of their professional activities. . . . Academic freedom [e]stablishes the right of the faculty member to teach, instruct,

¹⁷ JAMES MADISON UNIV., *Program Handbook for James Madison University’s Clinical and School Psychology Doctoral Program 2023–2024* at 48 (Rev. June 30, 2023), <https://psyc.jmu.edu/cipsyd/documents/ci-handbook.pdf> [<https://perma.cc/JA5C-FCYX>]. Henriques also includes this passage in the syllabus for many of his classes and often reads it aloud on the first day of class. Henriques Reply, *supra* note 5, at 3-4.

¹⁸ Henriques Reply, *supra* note 5, at 7, 14, 19. Henriques contests that he said, “feelings are sexual gestalts,” and presents strong evidence that the complainant misheard or misrepresented him and he actually said “feelings are *sensual* gestalts.”

¹⁹ Even if some students found Henriques’ comments *subjectively* offensive, the Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted on the basis that others find it to be offensive. This principle applies with particular strength to public universities, where “the mere dissemination of ideas—no matter how offensive to good taste . . . may not be shut off in the name alone of ‘conventions of decency.’” *Papish*, 410 U.S. at 667–68.

²⁰ Henriques Reply, *supra* note 5, at 6.

and examine students on the information, concepts, methodology, and content of courses without interference[.]²¹

An instructor’s right to choose how to navigate difficult material is well within the protection of pedagogical autonomy enjoyed by JMU’s faculty. This is especially so given that its policy reflects the nation’s broader commitment to academic freedom, which the Supreme Court has called “a special concern to the First Amendment” and a principle “of transcendent value to all of us and not merely to the teachers concerned.”²²

Henriques believes that, in order to be competent psychologists, his students must understand that the world outside the classroom is not filled with sunshine and rainbows. As he explains:

I’m not training historians, I’m training clinical psychologists to go out into the world. . . . [T]he content and the process can be uncomfortable. I’ve gone into the world and done therapy under bridges for heroin addicts thinking about killing themselves. I’ve been in the context of couples therapy, where an individual revealed that he thought he was a pedophile. He had fantasies about being a pedophile. We had to deal with that as a couple. I’ve been in prison to individuals who have raped and murdered. And so I think the thing that I want to be clear about is I am bringing the real world . . . it’s an impolite world out there.²³

To illustrate his approach by example, the complainant alleges—and Henriques does not contest—that Henriques said “Freud had a hot mother.”²⁴ This statement was made in *Personality Theories* and refers to Sigmund Freud, the founder of psychoanalysis and widely considered one of the most influential figures in the field. One simply cannot train psychologists without extensive discussion of Freud and his theories, including the Oedipus complex—in a nutshell, the idea that all young boys unconsciously desire to have sex with their own mothers and seek to eliminate their fathers. While this may be shocking and outrageous to some, it is a foundational idea in modern psychology (and well-known, even to laymen), and therefore must be discussed. Further, Henriques’ statement served a concrete pedagogical purpose—he said “Freud had a hot mother” to question the validity of his ideas, raising the prospect that Freud’s theories came from his own unique circumstances, *i.e.*, to show that “the Oedipal complex . . . is actually maybe the *Freudian* complex.”²⁵

²¹ JAMES MADISON UNIV., *2023-24 Faculty Handbook* (Effective 7/1/23), https://www.jmu.edu/faculty/handbook/_files/faculty-handbook.pdf [<https://perma.cc/T6VN-9FH3>].

²² *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

²³ Interview by Laura Sider Jost, Deputy Title IX Coordinator, with Henriques (July 24, 2023), at ¶ 65.

²⁴ Email from Sirocky-Meck to Henriques, *supra* note 4.

²⁵ Interview, *supra* note 23, at ¶ 25.

Academic freedom necessitates that faculty members have substantial breathing room to determine how to approach subjects and materials relevant to their courses, rather than allowing administrators, students, legislators, or outside authorities to unduly influence those decisions. Faculty must be free of institutional restraints when confronting and examining complex issues, particularly where, as here, those issues are fundamental to course instruction. JMU cannot legitimately punish Henrique for exercising these imperatives.

C. Investigations into Clearly Protected Expression Violate the First Amendment.

Investigation of constitutionally protected speech can itself violate the First Amendment even if it concludes in the speaker's favor, as the question is not whether formal punishment is meted out, but whether the institution's actions "would chill or silence a person of ordinary firmness from future First Amendment activities[.]"²⁶ Investigations into protected expression may meet this standard.²⁷ For example, when a public university investigated a tenured faculty member's offensive writings on race and intelligence, announcing an *ad hoc* committee to review whether the professor's expression—which the university's leadership said "ha[d] no place at" the college—constituted "conduct unbecoming of a member of the faculty," that institutional action itself carried an implicit threat of discipline such that the resulting chilling effect was a cognizable First Amendment harm.²⁸

Here, the threat this chilling effect poses is particularly acute, as Henriques is accused of harassment based on statements inside the classroom that were clearly relevant to advanced coursework in psychology. If JMU intends to investigate and punish professors for any uncomfortable discussion of their subject, it risks chilling protected speech and academic freedom across the entire campus.

For example, a political science professor may skip a lesson on the Israeli-Palestinian conflict out of fear a student may take issue with criticism of Israel. A biology professor could avoid teaching the genetic basis of sex, fearing a student may believe the idea marginalizes their identity. And a history professor may avoid discussion of the 2020 election out of a desire to avoid causing offense to either side. Such self-censorship would not only undermine the academic freedom JMU guarantees its faculty, but also deprive students of their right to engage with controversial ideas.

The investigation of Henriques for pedagogically relevant speech sends the unmistakable message that other JMU professors must walk on eggshells and treat even their doctoral students with kid gloves, being careful to refrain from referencing or discussing

²⁶ *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

²⁷ See, e.g., *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

²⁸ *Levin v. Harleston*, 966 F.2d 85, 89–90 (2d Cir. 1992).

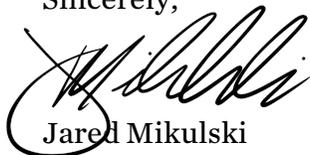
uncomfortable topics in any way. The First Amendment and principles of academic freedom do not permit such a result.

III. Conclusion

The speech here is clearly protected. This principle does not shield the speaker from every consequence from his or her expression—including criticism by students, faculty, or the broader community. Criticism is a form of “more speech,” the remedy to offensive expression that the First Amendment prefers to censorship.²⁹ However, the First Amendment limits the *types* of consequences that may be imposed, and who may impose them.

We therefore request a substantive response to this letter no later than close of business Friday, August 25, 2023, confirming that JMU will conclude its investigation of Henriques in his favor and commit to respecting the academic freedom of its faculty.

Sincerely,



Jared Mikulski
Litigation Fellow

Cc: Jack Knight, University Counsel
Meg Sander, Associate University Counsel
Justin Dillon, KaiserDillon PLLC, Attorney for Gregg Henriques

Encl.

²⁹ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).