



April 9, 2025

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Sent via U.S. Mail and Electronic Mail (pives@cuddymccarthy.com)

Dear Ms. Salazar Ives:

FIRE appreciates your response to our letter concerning the sanctions imposed on student David McNicholas for printing material critical of Institute of American Indian Arts officials in the *Young Warrior* student magazine. Unfortunately, your response only deepens our concerns that IAIA not only punished McNicholas for protected expression, but also lacks any regard for its constitutional obligations as a public, tribal institution.

Your response states that McNicholas “was disciplined for publishing harmful, hurtful, unsubstantiated and damaging statements about the persons and reputations of members of the IAIA community,” and not merely “critical commentary about IAIA officials.”¹ That is not a legal or moral justification for IAIA’s actions. As we previously explained, the First Amendment protects publishing “harmful, hurtful, unsubstantiated and damaging statements about the persons and reputations of members of the IAIA community” unless they meet the standards for unprotected defamation or discriminatory harassment.²

Yet IAIA has not even attempted to meet its threshold burden of demonstrating the falsity of the published material, let alone McNicholas’s knowledge of its falsity, as required to support a claim that he could be punished for his speech.³ Nor do the published allegations’ seriousness or IAIA’s claim of harm justify punishment for material that does not constitute unprotected

¹ Letter from Patricia Salazar Ives, attorney, to Jessie Appleby (Jan. 31, 2025) (on file with author).

² *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (protected public debate includes “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”); *see also Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973) (student newspaper’s use of vulgar headline, “Motherfucker Acquitted,” and front-page “political cartoon ... depicting policemen raping the Statue of Liberty and the Goddess of Justice” were protected speech); *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011) (holding signs outside of soldiers’ funerals reading “Thank God for Dead Soldiers,” “Thank God for IEDs,” and “Fags Doom Nations” was expression protected by the First Amendment).

³ *N.Y. Times Co.*, 376 U.S. at 279–80; *see also Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991) (actual malice is a subjective standard that requires the accuser to prove by clear and convincing evidence that the speaker “‘in fact entertained serious doubts as to the truth of his publication,’ or acted with a ‘high degree of awareness of ... probable falsity’” (internal citations omitted)); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (failure to investigate does not demonstrate actual malice).

defamation.⁴ As the Supreme Court held long ago, “Criticism of [public officials’] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.”⁵

McNicholas’s statements that he “acted without ‘integrity’ and should ‘have done more research and sought out balance’” are also irrelevant to the constitutionality of IAIA’s actions.⁶ To be sure, the veracity of these statements is doubtful given that they were written after McNicholas experienced months of severe criticism and sanctions from his own school. Nevertheless, IAIA may not, as a public, tribal institution, discipline students for protected speech it claims lacks integrity or is “contrary to the Indigenous values of respect, truth, responsibility, and accountability that are taught and practiced at IAIA.”⁷

Second, the school-sponsored speech doctrine articulated in *Hazelwood School District v. Kuhlmeier* does not apply because the *Young Warrior* is an independent student publication that is neither formally affiliated with IAIA nor subject to the oversight of IAIA faculty.⁸ School-sponsored speech refers to expressive activities that “may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, *so long as they are supervised by faculty members and designed to impart knowledge or skills* to student participants and audiences.”⁹ Thus, “a school may *in its capacity as publisher of a school newspaper or producer of a school play*” restrict speech that is “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences”—so long as its restrictions are “reasonably related to legitimate pedagogical concerns.”¹⁰ The key element in determining whether student speech qualifies as school-sponsored is “the level of involvement the school had in organizing or supervising the contested speech,” because “certain expressive activities may be closely tied to the school, yet *not* school-sponsored speech bearing the school’s imprimatur.”¹¹

⁴ *Thompson v. Ragland*, 23 F.4th 1252, 1259–60 (10th Cir. 2022) (university may not restrict student’s speech urging classmates to submit negative performance evaluations on the basis that “negative evaluations would disrupt [the professor’s] career and her relationship with her students, as well as [the university’s] efforts in employing faculty to conduct the class”); *see also Seamons v. Snow*, 84 F.3d 1226, 1237–38 (10th Cir. 1996) (school’s “fear of a disturbance stemming from the disapproval associated with [the student’s] unpopular viewpoint regarding hazing in the school’s locker rooms” was insufficient reason to restrict student’s speech).

⁵ *N. Y. Times Co.*, 376 U.S. at 271–72.

⁶ *See* letter from Salazar Ives, *supra* note 1 (quoting David McNicholas, *Accountability Statement Toward and Understanding of Responsibility and Rights* (on file with author)).

⁷ IAIA’s repeated attempts to silence student criticism and cover up its own administrators’ alleged wrongdoing certainly belie its stated commitment to practicing “the Indigenous values of respect, truth, responsibility, and accountability.”

⁸ *See* 484 U.S. 260 (1988). *Hazelwood* explicitly reserved the question “whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level, *id.* at 273 n. 7, where “the students and their school’s relation to them are different and at least arguably distinguishable from their counterparts” in high schools, *Bd. of Regents of the Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 238 n. 4 (2000) (Souter, J., concurring).

⁹ *Hazelwood*, 484 U.S. at 270–71 (emphasis added).

¹⁰ *Id.* at 271–72, 273 (emphasis added).

¹¹ *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1228 (10th Cir. 2009) (emphasis added); *see also Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 925 (10th Cir. 2002), as amended on denial of reh’g and reh’g en banc (Aug. 16, 2002); *Planned Parenthood of S. Nev., Inc. v. Clark Cnty. Sch. Dist.*, 941 F.2d 817, 828–29 (9th Cir. 1991) (en

Contrary to IAIA’s assertion, the student submissions printed in the *Young Warrior* are not school-sponsored speech. The *Young Warrior* is a private student publication, created and managed by McNicholas.¹² IAIA faculty did not supervise the publication’s operations or play any role in its editorial process.¹³ It is not IAIA’s official student newspaper,¹⁴ nor a recognized student group,¹⁵ and receives no funding from the school.¹⁶ In fact, it is not formally affiliated with IAIA at all.¹⁷ IAIA is not the *Young Warrior’s* publisher but its *subject*.¹⁸ As a result, the content of the *Young Warrior* falls within the category of student speech that IAIA must “tolerate” under *Tinker*, rather than the speech IAIA may choose “affirmatively to promote” under *Hazelwood*.¹⁹

banc) (school officials’ editorial control over the athletic programs, including “specifically approv[ing] the speech at issue,” would lead the public to perceive that the speech bore “the imprimatur of the school”).

¹² McNicholas founded the *Young Warrior* based on an idea discussed during an extracurricular writing club. It did not originate as part of an academic course at IAIA, as you asserted.

¹³ Faculty oversight is a necessary but not sufficient condition to classify a student publication as school-sponsored speech. See *Corder*, 566 F.3d at 1228; *Fleming*, 298 F.3d at 925.

¹⁴ Even an official student publication overseen by a faculty advisor may not qualify as school-sponsored speech. See, e.g., *Kincaid v. Gibson*, 236 F.3d 342, 352 (6th Cir. 2001) (college yearbook was not school-sponsored speech because it was not a “closely-monitored classroom activity in which an instructor assigns student editors a grade, or in which a university official edits content,” but a student publication for which the faculty advisor maintained a “hands off” approach to content); *Draudt v. Wooster Cty. Sch. Dist. Bd. of Educ.*, 246 F.Supp.2d 820, 829 (N.D. Ohio 2003) (high school newspaper was not school-sponsored speech even though it was published as part of an academic course for which students received course credit and grades because students had broad editorial reign subject only to the faculty advisor’s approval, outside writers contributed to the paper, the paper was widely distributed in the community, and high school students are less impressionable than elementary school students); *Lueth v. St. Clair Cnty. Cmty. Coll.*, 732 F. Supp. 410, 1414–15 (E.D. Mich. 1990) (official student newspaper was not school-sponsored speech because it was “not operated under the guise of a specific academic course” nor “created under the direction of a faculty member,” but run entirely by students); *Romano v. Harrington*, 725 F.Supp. 687 (E.D.N.Y. 1989) (high school student newspaper funded by the school, but published as an extra-curricular activity under the direction of a faculty advisor, was not necessarily school-sponsored speech).

¹⁵ The expression of recognized student groups is generally protected by the First Amendment. See *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (recognizing student groups’ speech endorsing religion at a public high school as private speech protected by the First Amendment, not government speech forbidden by the Establishment Clause); *Fleming*, 298 F.2d at 925 (“Expressive activities that do not bear the imprimatur of the school could include a variety of activities conducted by outside groups that take place on school facilities after school, such as club meetings.”).

¹⁶ Institutional funding is not decisive, as student expression funded by the school often does not qualify as school-sponsored speech. See generally *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217 (2000).

¹⁷ Cf. *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (“*Hazelwood* ... allows a school to regulate what is in essence the school’s own speech, that is, articles that appear in a publication that is an official school organ.”) (Alito, J., concurring).

¹⁸ Student expression is not subject to a school’s authority merely because its topic is the school itself. See *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

¹⁹ *Hazelwood*, 484 U.S. at 270–71 (“The question whether the First Amendment requires a school to tolerate particular student speech—the question ... addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular speech.”); *Pompeo v. Bd. of Regents of the Univ. of N.M.*, 852 F.3d 973, 982 (10th Cir. 2017) (“[S]chool-sponsored speech’ ... is ‘speech that a school affirmatively promotes, as opposed to speech that it tolerates.’”); see also *Seamons*, 84 F.3d at 1237 (“[I]f the speech involved is not fairly considered part of the school curriculum or school-sponsored activities, then it may only be regulated if it would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’”). While the *Young Warrior’s* expression clearly falls on the *Tinker* side of the *Tinker-Hazelwood* dichotomy between private student speech and school-sponsored speech, it is unclear whether *Tinker’s* “substantial disruption” standard itself is appropriate for higher education. See *Southworth*, 529 U.S. at 238 n. 4 (Souter, J., concurring) (“[Our] cases dealing with the right of teaching institutions to limit expressive freedom of students

Nothing in the Tenth Circuit’s jurisprudence, including *Pompeo v. Board of Regents of the University of New Mexico*, changes that analysis. More than twenty years ago, the Tenth Circuit expressly limited application of *Hazelwood* in the higher education context to only “speech that occurs in a classroom as part of a class curriculum.”²⁰ The court has reaffirmed that decision on multiple occasions, and has never extended *Hazelwood* to reach non-curricular speech in the collegiate setting.²¹ Thus, IAIA faculty may require McNicholas to satisfy particular journalistic standards in his academic coursework, such as “avoid[ing] inflammatory language when writing for an academic audience.”²² But IAIA may not require that McNicholas refrain from “inflammatory and divisive” speech outside the classroom—even when its restrictions are intended to teach proper journalistic standards.²³

IAIA’s conduct here is a particularly stark illustration of a “reckless or callous indifference to the federally protected rights of others.”²⁴ As a public tribal institution, IAIA is obligated to respect the First Amendment rights of its students. In this case, it has fallen woefully short of the mark. IAIA must lift any remaining sanctions on McNicholas and revise its policies to align with its First Amendment obligations.

We request a substantive response to this letter no later than April 23.

Sincerely,



Jessie Appleby
Program Counsel, Campus Rights Advocacy

Cc: Robert Martin, President

Encl.

have been confined to high schools, whose students and their school’s relation to them are different and at least arguably distinguishable from their counterparts in college education.”).

²⁰ *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) (“[T]he *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum.”). The only exception the court has recognized is a professional school’s enforcement of professional standards on speech outside the classroom. See *Hunt v. Bd. of Regents of Univ. of N.M.*, 792 F. App’x 595, 604 (10th Cir. 2019)

²¹ See *Pompeo*, 852 F.3d at 982 (assigned class paper was school-sponsored speech); *Hunt*, 792 F. App’x at 604 (professional schools may enforce customary professional standards on a graduate student outside the classroom); *Thompson v. Ragland*, 23 F.4th 1252, 1259 (10th Cir. 2022) (student’s email to classmates expressing dissatisfaction with a professor and urging them to submit negative evaluations was not school-sponsored speech).

²² *Pompeo*, 852 F.3d at 989; cf. *Mergens*, 496 U.S. at 237 (defining “curriculum” as “the whole body of courses offered by an educational institution or one of its branches” (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 557 (1976))).

²³ *Papish*, 410 U.S. at 667 (university’s punishment of student for distributing newspaper on campus containing “indecent speech” in violation of university policy violated the First Amendment); cf. *E. High Gay/Straight All. v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1194 (D. Utah 1999) (rejecting argument that, “by establishing a limited public or nonpublic forum for ‘curriculum-related’ student clubs, a school thereby ‘lends its name and resources to the dissemination of student speech’ and converts ‘school-tolerated’ student expression within that forum under *Tinker* into ‘school-sponsored speech’ under *Hazelwood*”).

²⁴ *Smith v. Wade*, 461 U.S. 30, 56 (1983).

Authorization and Waiver for Release of Personal Information

I, David McNicholas, born on 5 dec 1977, do hereby authorize institute of american indian arts (the "Institution") to release to the Foundation for Individual Rights and Expression ("FIRE") any and all information concerning my current status, disciplinary records, or other student records maintained by the Institution, including records which are otherwise protected from disclosure under the Family Educational Rights and Privacy Act of 1974. I further authorize the Institution to engage FIRE's staff members in a full discussion of all matters pertaining to my status as a student, disciplinary records, records maintained by the Institution, or my relationship with the Institution, and, in so doing, to fully disclose all relevant information. The purpose of this waiver is to provide information concerning a dispute in which I am involved.

I have reached or passed 18 years of age or I am attending an institution of postsecondary education.

In waiving such protections, I am complying with the instructions to specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom disclosure may be made, as provided by 34 CFR 99.30(b)(3) under the authority of 20 U.S.C. § 1232g(b)(2)(A).

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights and Expression, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

Signed by:

0D4975305B58423

Student's Signature

12/14/2024

Date