



Foundation for Individual Rights in Education

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August 30, 2010

Larry Rice, President
Rogers State University
Office of the President
1701 W. Will Rogers Boulevard
Claremore, Oklahoma 74017

Sent via U.S. Mail and Facsimile (918-343-7896)

Dear President Rice:

The Foundation for Individual Rights in Education (FIRE; thefire.org) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses.

FIRE is deeply concerned about the threat to freedom of expression posed by Rogers State University's (RSU's) unconstitutional restrictions on student distribution of non-commercial handbills and on placement of posters on campus, RSU's unconstitutional rejection of a poster on the basis of content, and forthcoming policies restricting the speech of student organizations. FIRE is also concerned about the threat to freedom of association posed by RSU's method of having the Student Government Association (SGA) vote on recognizing new student organizations.

This is our understanding of the facts. Please inform us if you believe we are in error.

Rogers State University student Renee Morse-Heenan has founded a new student organization, Organization for Advocating the Rights of Students (OARS). The organization appears to have met all requirements for official recognition and is awaiting final approval from the SGA.

First, on August 9, 2010, RSU Coordinator of Student Activities Lynn Brown e-mailed Morse-Heenan stating that in order to be approved as an official student organization, the Student Government Association must "vote and approve the organization."

Second, on August 11, 2010, Brown e-mailed RSU Professor Larry Green, OARS' faculty advisor, about a poster that OARS had submitted for approval. In relevant part, the poster read, "You have the right to post and distribute flyers." Brown rejected the poster on the basis of content, explaining to Green:

In accordance with posting policies, we have the right to limit the time, location, and the manner in which they are distributed. We also have the right to regulate speech as long as it is rational and not content specific ...

For all distribution and/or postings of materials, they must be approved by Student Affairs prior to distribution or posting. The current flyer, [sic] will not be approved since the information is not correct. For example, the first bullet on the flyer states "You have the right to post and distribute flyers". This is not a correct statement, flyers need to be approved through student affairs in order to post and distribute them.

Third, on August 25, 2010, Brown e-mailed Morse-Heenan explaining restrictions on the online speech of official student organizations—and perhaps of all students. Brown wrote:

Ideally, PR [RSU Public Relations] would like to be the creator of all Facebook accounts so that as students come and go they can add/remove administrators accordingly. Also, this would prevent the creation of multiple accounts for the same organization.

The specific requirements and policies/procedures for creating social media accounts (ie: Facebook, twitter, myspace, etc.) [sic], that contain the name of the university in any format, are being added to the Student Activities Handbook. The revised handbook will be available soon.

Brown's statements are significant threats to the First Amendment on campus. We take each statement in turn.

First, Brown's August 9 e-mail suggests that RSU has appointed the SGA as its agent in the process of group recognition, which makes the SGA an arm of RSU for this purpose. RSU is thus both morally and legally responsible for any violations by the SGA of the First Amendment rights to freedom of speech and freedom of association. Such violations would include any vote not to recognize OARS on the basis of its viewpoint or mission or, for example, because its expression had not been pleasing to the SGA or RSU. Please be aware that if OARS has met the university's lawful criteria for becoming an official student organization, the SGA must vote to approve the organization, and RSU likewise must accept OARS into the ranks of official student organizations.

That the First Amendment's protections fully extend to public universities like RSU is settled law. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967) ("[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere

by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment”); *Healy v. James*, 408 U.S. 169, 180 (1972) (citation omitted) (“[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’”); *Widmar v. Vincent*, 454 U.S. 263, 268-69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities”).

Putting a prospective student organization’s constitutional right to freedom of association up to a student government vote is problematic unless the student government is bound to use objective criteria to determine its vote. A student organization may not be rejected because, for example, its viewpoint is unpopular with the members of the student government. See *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000) (overturning a referendum allowing students, by majority vote, to fund or defund student groups because “[i]t is unclear to us what protection, if any, there is for viewpoint neutrality in this part of the process. ... To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires”); *Amidon v. Student Association*, 508 F.3d 94, 103 (2d Cir. 2007) (holding that a student body vote on funding is viewpoint discriminatory because it “injects a substantial risk of undetectable viewpoint discrimination into the allocation process.”).

Second, in contrast to Brown’s August 11 e-mail, students do have a right to distribute non-commercial flyers and handbills on campus. RSU’s *Student Code of Responsibilities and Conduct* correctly explains students’ right to distribute flyers on campus:

A student has the right to establish and/or disseminate publications free from any censorship or other official action controlling editorial policy on content.

[...]

Orderly picketing and other forms of peaceful expression are permitted in public places on University premises so long as there is neither interference with ingress or egress at University facilities, interruption of classes, damage to property, or disruption of the operation of the University, nor blocking vehicular or pedestrian traffic, unless such traffic is diverted by previous arrangement with the Campus Police.

Brown thus was incorrect to state that students’ “flyers need to be approved through student affairs in order to ... distribute them.” Brown’s misrepresentation of RSU policy threatens the free speech rights of all RSU students.

Third, students do have a right, generally speaking, to post flyers on campus. Brown appears to have misinterpreted OARS’ flyer as referring only to the university’s regulated posting boards. Even there, however, RSU has recognized the right of student organizations to post

materials or to have them posted according to certain RSU rules. Furthermore, students do have the right to post flyers in various places on campus, such as students' own private bedrooms in residence halls. RSU's *Student Organization Handbook* even names a place where students appear to have a right to post commercial flyers, "the Community posting board in the Student Union." Thus, OARS' flyer is correct to state that "You have the right to post ... flyers." Brown's interpretation of the flyer is incorrect, and banning the poster on the ground that it is false is a violation of OARS' freedom of expression.

Brown's errors highlight the dangers of making approval of flyers contingent on the RSU administrators' subjective judgment of the truthfulness of the content expressed. RSU's approval policy, particularly as stated by Brown, appears to give extremely great discretion to RSU administrators to approve flyers. This degree of discretion is unconstitutional. According to the U.S. Supreme Court, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, **without narrow, objective, and definite standards to guide the licensing authority**, is unconstitutional." (*Shuttlesworth v. Birmingham*, 394 U.S. 147, 150–51 (1969) (emphasis added)). Indeed, in requiring prior approval of student publications that will be posted, the university may not condition approval on the protected content or viewpoint of the materials to be distributed.

Federal case law regarding freedom of expression does not support the transformation of public institutions of higher education into places where constitutional protections are the exception rather than the rule. In addition to other requirements, the Supreme Court has made clear that "time, place, and manner" restrictions must be "narrowly tailored" to serve substantial governmental interests. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

In addition, it would have been unconstitutional to ban OARS' flyer even if the flyer had been false. RSU's "Campus Postings" policy does not include any restriction related to whether the postings are true. Nor would such a policy be constitutional. First Amendment protection does not hinge on the truth of the matter expressed; see *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth"). The Court in *Sullivan* added:

[E]rroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the breathing space that they need to survive.

376 U.S. at 271–72 (internal quotation marks and ellipsis omitted). Accordingly, the best response to seemingly false speech, absent a clear and present danger, is more speech—not censorship. This is how a free university in a free society engages in a marketplace of ideas.

Fourth, Brown's August 25 e-mail suggests even more unconstitutional restrictions on the expression of students and student groups. On university campuses across America, student groups speak in their own names, and their speech is not confused with the speech of their universities. Recognized student groups very commonly use the name of their universities as part of their organization names, also without any confusion between the university's speech

and the students' speech. Only in genuine instances of potential ambiguity may a university require the student group to make clear whether the students are speaking in the name of the university. That is, all reasonable persons understand that the expression of student groups on Facebook and other social media is their own speech, not that of the university. Again, any restrictions on such private speech by RSU must be "narrowly tailored" to serve substantial governmental interests.

In the case of *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161 (C.D. Cal. 1998), a federal court ruled that Bally Total Fitness (Bally) could not stop a man from operating a website called "Bally Sucks," which included a modified Bally logo on the front page and used the term "ballysucks" in the URL of the website. In that case, Bally argued (among other things) that allowing a critic to use its mark was likely to cause confusion among those who were searching for its official website. The court found against Bally, ruling that there was no likelihood of consumer confusion and that "[a]pplying Bally's argument would extend trademark protection to eclipse First Amendment rights. The courts ... have rejected this approach by holding that trademark rights may be limited by First Amendment concerns." 29 F. Supp. 2d at 1166, citing *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir. 1987), cert denied, 483 U.S. 1013 (1987). At RSU, an argument similar to Bally's would fail constitutional muster.

Courts have also determined that so-called "cybergripping" websites, which are generally dedicated to harsh criticism of an organization and which often use its marks, are usually considered constitutionally protected speech. In *Taubman Co. v. Webfeats*, 319 F.3d 770, 775 (6th Cir. 2003), the court determined that "any expression embodying the use of a mark not 'in connection with the sale ... or advertising of any goods or services,' and not likely to cause confusion, is ... necessarily protected by the First Amendment." In that case, the defendant had established five different websites, such as *taubmansucks.com* and *willowbendmallssucks.com*, that criticized plaintiff Taubman and his business, "The Shops at Willow Bend," with the purpose of hurting his business and reputation. *Id.* at 772. Similarly, names of "cybergripping" social networking accounts that use RSU's name are protected by the First Amendment.

Preventing "multiple [Facebook] accounts for the same [student] organization," as stated by Brown, is far from a substantial interest within the purview of RSU. Furthermore, any restriction on "social media accounts ... that contain the name of the university in any format" must be narrowly tailored to serve a substantial governmental interest, such as ensuring that a group does not falsely pretend to be speaking in the university's name and does not use the university's name for commercial purposes. The vast majority of possible social media accounts that use RSU's name in any format, however, have no commercial purpose and do not tend to confuse or mislead readers into believing that they are officially sanctioned or endorsed by the university.

FIRE is committed to using all of its resources to uphold the First Amendment at RSU. We request that you (1) remind the SGA of its First Amendment responsibilities when voting on whether to approve new student organizations; (2) make clear to all students that they have the right to distribute non-commercial flyers on campus without prior review; (3) use only

narrow, objective, and definite standards for prior approval of flyers intended for posting on designated bulletin boards (including OARS' flyer), standards which shall be clearly stated and which shall not rely on the perceived truth of the flyers; and (4) ensure that any new restrictions on students' social media accounts accord with the First Amendment.

We request a response by September 13, 2010.

Sincerely,



Adam Kissel

Director, Individual Rights Defense Program

cc:

Tobie R. Titsworth, Vice President for Student Affairs

Lynn Brown, Coordinator of Student Activities

Larry Green, OARS Advisor

Adrean Shelly, President, Student Government Association