FIRE

Foundation for Individual Rights in Education

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Dr. John Churchill, Secretary
The Phi Beta Kappa Society
1606 New Hampshire Ave., NW
Washington, DC 20009

Sent by U.S. Mail and Facsimile (202-986-1601)

Dear Dr. Churchill:

As you can see from our Board of Directors and Board of Advisors, the Foundation for Individual Rights in Education (FIRE) 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, freedom of religion, academic freedom, due process, and, in this case, freedom of speech and expression on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

In a 2001 article in *Academe*, former Phi Beta Kappa executive secretary Douglas Foard wrote that "for 225 years we have endeavored to place our chapters only at those American institutions of higher education that share our commitment to freedom of inquiry." Douglas W. Foard, *A Key Collaboration, available at* http://www.aaup.org/publications/Academe/2001/01nd/01ndfoa.htm.

FIRE is pleased that Phi Beta Kappa has demonstrated its intent to stand behind this commitment, as evidenced most recently by its concern over George Mason University's decision to rescind a speaking invitation to Michael Moore. If Phi Beta Kappa considers academic freedom a criterion for membership, it might interest you to know that many of its member institutions have speech codes that violate the right to free expression protected by the First Amendment. The U.S. Constitution legally binds public universities to uphold the First Amendment rights of their students and faculty. Although private universities are free to set their own speech policies, it is unacceptable, immoral, and unlawful when a private university promises free speech and instead delivers repression.

Nearly all colleges and universities maintain policies against harassment in order to comply with Title VI of the Civil Rights Act (which bans race-based discrimination at institutions receiving federal funds) and Title IX of the Education Amendments of 1972 (which bans sex-based discrimination in higher education). However, Title VI and Title IX do not, and cannot, prohibit speech that is protected by the First Amendment. In fact, in a landmark letter issued in July, 2003 (attached), the Office of Civil Rights actually had to clarify for university administrators that "OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution," and that "schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech."

As you will see from the examples that follow, however, many anti-harassment policies go far beyond what is necessary to comply with federal anti-harassment and anti-discrimination law and unconstitutionally (or unlawfully, in the case of private institutions that contractually promise free speech in their promotional materials or handbooks) restrict students' and professors' rights to free speech.

The policies highlighted in this letter are unacceptable for two fundamental reasons. First, they are overbroad, because they sweep in large amounts of constitutionally protected speech in attempts to ban some potentially constitutionally unprotected speech. Second, they are vague and ambiguous, leaving students and faculty to guess at what they prohibit, and thus leading to self-censorship.

Additionally, some of the highlighted policies have constitutional deficiencies beyond vagueness and overbreadth; where that is the case, those deficiencies are discussed in detail.

(1) **Overbreadth**

Speech cannot be prohibited simply because someone might find it offensive. According to the U.S. Supreme Court, for conduct to constitute harassment, it must be *both* "severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive" – and "subjectively perceive[d]" as harassment. *Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993). This language applies to the traditional workplace setting, where considerations of free speech and academic freedom are not considered as essential as they are in the quintessential marketplace of ideas—the college campus. Indeed, the standard for harassment is even stricter in the educational setting, where free speech enjoys robust protection. In the educational setting, harassment is conduct "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

Unfortunately, many colleges and universities have abandoned the "objectively hostile" requirement and base punishment only upon whether conduct is subjectively perceived as

harassing or offensive. Many harassment policies prohibit verbal conduct that "offends" an individual, without reference to whether it was reasonable for that individual to take offense. Federal harassment law, by contrast, requires "that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances, including the victim's age." *See* First Amendment: Dear Colleague Letter (attached).

In *Saxe v. State College Area School District*, the U.S. Court of Appeals for the Third Circuit struck down a public high school's anti-harassment policy on First Amendment grounds because it conditioned the permissibility of speech on subjective listener reaction. The policy at issue defined harassment as "verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment." *Saxe v. State College Area School District*, 240 F.3d 200, 202 (3d Cir. 2001).

The court found the policy unconstitutional because it did not "require any threshold showing of severity or pervasiveness," and thus "it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone." The court emphasized that "it is certainly not enough that the speech is merely offensive to some listener." *Saxe*, 240 F.3d at 217. *See also Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 369 (M.D. Pa. 2003) ("regulations that prohibit speech on the basis of listener reaction alone are unconstitutional both in the public high school and university settings").

(2) **Vagueness**

In order to comport with due process, laws must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). "These concerns apply with particular force where the challenged statute affects First Amendment rights." *The UWM Post, Inc. v. Board of Regents of University of Wisconsin System*, 774 F. Supp. 1163, 1178 (E.D. Wis. 1991).

Harassment policies often prohibit vague categories of speech, such as speech that "demeans" or "degrades" an individual, or speech that "can be interpreted" as harassing or intimidating. These policies leave students to guess at what constitutes "demeaning" speech or at what might "be interpreted" as harassing. As a result, students self-censor, holding back from engaging in protected expression because they do not know what their schools' policies prohibit. The result is a "chilling effect" on speech.

So many of Phi Beta Kappa's member institutions have unconstitutional speech codes that we cannot list them all here. Rather, we will highlight seven institutions that have particularly repressive speech codes. We hope that you will take action to help uphold the right to free speech at these and other member institutions.

Cornell University

Cornell University advertises itself as a school where "freedom to teach and to learn, to express oneself and to be heard, and freedom to assemble and lawfully protest peacefully are essential to academic freedom and the continuing function of the university as an educational institution." Cornell University Campus Code of Conduct, *available at* http://www.policy.cornell.edu/Campus_Code_of_Conduct.cfm.

In spite of this self-description, Cornell maintains policies that limit its students' free speech rights. For example, Cornell prohibits "bias-related incidents," defined as "an event which has the effect of demeaning or degrading an individual or a group and is motivated in whole or in part by the perpetrator's bias [based on race, religion, ethnicity/national origin, or sexual orientation]." Student Affairs and Diversity: Bias-Related Activity, *available at* http://campuslife.cornell.edu/sa_d/bias_related_activity.asp.

This policy is overbroad because it prohibits protected speech in addition to unprotected harassment. The Supreme Court has held that for student conduct to constitute unprotected hostile environment harassment, it must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999). By contrast, Cornell's policy requires only that the conduct demean or degrade another individual, without reference to whether the conduct is objectively offensive or to whether it interferes with that individual's access to educational opportunity. Moreover, this policy indicates that a single "demeaning or degrading" "event" is sufficient to establish a violation. This contradicts both Supreme Court precedent and the federal government's interpretation of the relevant harassment laws. In its July 28, 2003, open letter to college and university administrators, OCR stated that "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." *See* First Amendment: Dear Colleague Letter (attached).

Oberlin College

Oberlin College advertises itself as "an educational community in which free inquiry and free expression are indispensable." Student Bill of Rights, *available at* http://www.oberlin.edu/students/links-life/rules-regs/08-BillOfRights.pdf. Nonetheless, it maintains several vague and overbroad policies that are likely to have a powerful chilling effect on student speech. Oberlin College prohibits "sexual offense," which it defines as "behavior that calls attention to gender, sexuality, sexual identity, or sexual orientation of persons in a manner that prevents or impairs an individual's full enjoyment of educational or occupational benefits or opportunities. Enjoyment of educational or occupational benefits is to be interpreted broadly." Social Conduct and Regulations, *available at* http://www.oberlin.edu/students/links-life/rules-regs/10-SocialConduct.pdf.

As with so many other policies, this policy is overbroad. First, it requires no showing of severity or pervasiveness, once again conditioning the permissibility of speech on the reaction of the individual listener. Second, its broad sweep clearly includes constitutionally protected speech. For example, a student's opinion in a classroom discussion of gays in the military "call[s] attention to...sexual orientation," and a student's opinion in a women's studies class that males are oppressors "call[s] attention to gender." Yet, these constitutionally protected opinions are an important part of the marketplace of ideas that a university such as Oberlin, where "free inquiry and free expression are indispensable," should foster.

The policy is also impermissibly vague (what does it mean to "call attention" to gender, sexuality, sexual identity or sexual orientation?), forcing students to guess at what Oberlin might prohibit. As a result, the policy will chill speech on any matters related to the very broad categories of gender, sexuality, sexual identity and sexual orientation.

Ohio State University

Ohio State University, a public institution bound by the Bill of Rights, maintains a policy for students living in its residence halls. That policy tells students "[d]o not joke about differences related to race, ethnicity, sexual orientation, gender, ability, socioeconomic background, etc." Diversity Statement, *available at* http://housing.osu.edu/posts/documents/University%20Housing%20-%20Diversity%20Statement.pdf.

The policy also provides that "words and phrases that can be interpreted as harassing or intimidating are not acceptable" in Ohio State's residence halls.

This policy is unconstitutional. It prohibits harassment on the basis of characteristics that federal law does not deem "protected," such as "ability" and "socioeconomic background." It infringes upon constitutionally protected speech, such as jokes about certain subjects, regardless of whether those jokes rise to the level of legally actionable harassment (*i.e.*, whether they are both severe and pervasive as well as perceived by another as harassing). It prohibits "words and phrases that can be interpreted as harassing or intimidating," conditioning harassment on subjective listener response rather than objective offensiveness. Given the wide range of sensitivities among individuals, how could a person of ordinary intelligence possibly know what could "be interpreted as harassing" to every possible student?

This policy, which applies explicitly to the university's residence halls, traditionally a place for the most open and honest communication among students, undoubtedly has a chilling effect on the natural interaction among students seeking to learn about and from one another in the university setting.

Pennsylvania State University

Penn State, a public institution, has a Policy Statement on Intolerance that provides as follows:

> Intolerance refers to an attitude, feeling or belief in furtherance of which an individual acts to intimidate, threaten or show contempt for other individuals or groups based on characteristics such as age, ancestry, color, disability or handicap, national origin, political belief, race, religious creed, sex, sexual orientation or veteran status.... Acts of intolerance will not be tolerated at The Pennsylvania State University.
>
> Policy AD29 Statement on Intolerance, *available at* http://guru.psu.edu/policies/AD29.html.

A federal court in the Middle District of Pennsylvania, where Penn State is located, recently struck down a nearly identical policy as unconstitutionally overbroad. Shippensburg University, also a public institution, had a policy prohibiting "acts of intolerance" that "demonstrate malicious intent towards others." Compare this to Penn State's policy, which prohibits "acts of intolerance" that "show contempt for other individuals...." The court held that Shippensburg's policy prohibited speech protected by the First Amendment and was thus unconstitutionally overbroad. *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370 (M.D. Pa. 2003).

Penn State's policy prohibits students from showing contempt for other students or student groups based on, among other things, political belief. But isn't that a natural and predictable part of the free exchange of ideas at an institution of higher learning? Taken literally, this policy prohibits students at a pro-choice rally from shouting "get your rosaries off my ovaries." It would also prohibit personalities from Michael Moore to Rush Limbaugh to Al Franken to Ann Coulter from speaking on campus, since they arguably show contempt for groups based on their political beliefs. For example, Moore posted an essay on his website by a domestic abuse counselor suggesting that Republicans won the election "because they are abusers." *See* http://www.michaelmoore.com/words/message/index.php?messageDate=2004-12-13.

Rhodes College

Rhodes College's Policy on Discrimination and Harassment defines harassment as "actions meant to demean, debase or injure and based on race, gender, color, age, religion, disability, sexual orientation, national or ethnic origin, whether intentional or unintentional." It further provides that "[f]reedom of expression does not include the right to intentionally and maliciously aggravate, intimidate, ridicule or humiliate another person." Policy on Discrimination and Harassment, *available at* http://www.rhodes.edu/Rhodes/CampusCommunity/PoliciesandProcedures/StudentHandbook/CampusPolicies/Rhodes-Colleges-Policy-On-Discrimination-And-Harassment.cfm

According to the U.S. Supreme Court, however, freedom of expression *does*, under some circumstances, include the right to intentionally and maliciously ridicule or humiliate another person. Parody and satire—which often intentionally and maliciously ridicule and humiliate their targets—enjoy the strongest constitutional protection. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the U.S. Supreme Court upheld *Hustler*'s right to publish a parody suggesting that Jerry Falwell's first sexual experience was a drunken tryst in an outhouse with his own mother.

This is not to say that the Rhodes College policy does not apply to some speech that can properly be regulated, but the policy is impermissibly overbroad because it clearly also applies to speech that is constitutionally protected. Rhodes' policy is also overbroad because, like so many other policies, it requires no objective showing of harassment. Moreover, it does not even require a *subjective* showing of harassment; it only requires that an action was "meant to demean, debase or injure...."

Rhodes' policy is also impermissibly vague and ambiguous. It claims to prohibit actions "meant to demean, debase or injure," but then goes on to state that harassment can be "intentional or unintentional." Since it is unclear how unintentional actions can be "meant to demean, debase or injure," students at Rhodes will be forced to guess at how this policy might be applied.

University of Illinois at Chicago

The First Amendment legally binds the University of Illinois at Chicago, a public institution. Nonetheless, it maintains several unconstitutional speech codes. The University of Illinois at Chicago's Student Handbook defines sexual harassment as "any unwanted sexual gesture, physical contact, or statement that is offensive or humiliating or an interference with required tasks or career opportunities at the university." 2002-2004 Student Handbook, p. 61, *available at* http://www.ssb.uic.edu/handbook/handbook.pdf.

The description of harassment as "any unwanted sexual...statement that is offensive or humiliating" indicates that a single offensive statement is sufficient to constitute harassment. As discussed earlier, however, the offensiveness of a particular expression is not a sufficient basis for punishment. *See* First Amendment: Dear Colleague Letter (attached).

West Virginia University

West Virginia University, yet another public institution, defines harassment as "any behavior—physical, verbal, or psychological—which intimidates or victimizes another person, limiting that person's equal opportunity rights, including academic efforts, personal safety, employment, or participation in university-sponsored extracurricular activities. Such harassment may include any violation of an individual's rights through such behavior as racial innuendos and slurs, obscene telephone calls, computer messages, and graffiti." Code of Student Rights and Responsibilities of Students § 2.3.1, *available at* http://www.arc.wvu.edu/rightsa.html. This policy prohibits vague categories of speech—such as speech that "victimizes" and "racial innuendos"— and so requires a reasonable person to guess what speech is actually prohibited. The policy also conditions the permissibility of speech on the subjective reaction of the listener, contrary to the Supreme Court's requirement that the speech be objectively offensive.

Additionally, the university's sexual harassment policy instructs students and faculty to "avoid behavior that might be construed as sexual harassment." West Virginia

University Policy and Procedure Regarding Sexual Harassment, *available at* http://www.arc.wvu.edu/rightsf.html. This overbroad policy bans speech beyond unprotected harassment by telling people not to say anything that "might be construed" as harassment, whether or not it actually *is* harassment. This policy has an unconstitutional "chilling effect" on free speech because many people will censor themselves rather than risk punishment for engaging in constitutionally protected speech that "might be construed" as harassment. Allowing for unfettered and robust public discourse is one of the essential functions of the First Amendment.

As noted earlier, these are just some examples of speech codes in force at Phi Beta Kappa member institutions. Nearly all of Phi Beta Kappa's member institutions maintain speech codes of some kind, many of them unconstitutional or an unlawful violation of contractual promises made to students and faculty.

Although many institutions try to claim that the worst portions of their codes are intended to be aspirational and will not be enforced against students, FIRE has found that colleges and universities do not hesitate to use these policies against students or faculty who engage in so-called offensive speech. For example:

- The dean of Columbia Law School suggested that a professor of criminal law might have violated the school's harassment policy by posing an exam hypothetical involving a woman who was grateful for a criminal assault that resulted in miscarriage;
- At Occidental College in Los Angeles, the host of a popular student radio show was found guilty of sexual harassment for satirical jokes he made on the air;
- St. Xavier University suspended a professor for an anti-war e-mail that the university's president held contained "demeaning, degrading statements";
- At the University of New Hampshire, a student was found guilty of harassment and expelled from university housing for posting a flier in his dorm suggesting that female students could lose the "Freshman 15" by taking the stairs instead of the elevator.

As you can see, policies such as those described above pose a real and imminent threat to academic freedom at these and other Phi Beta Kappa member institutions. We urge Phi Beta Kappa to stand behind its demonstrated commitment to academic freedom by insisting that its member institutions respect the free speech rights of their students and faculty. To this end, we request that you respond to FIRE detailing how you intend to ensure that academic freedom is protected at all Phi Beta Kappa institutions.

I look forward to your reply.

Respectfully,

Samantha Harris

Samantha Harris
Program Officer

cc:
Scott Lurding, Associate Secretary, The Phi Beta Kappa Society
Kelly Gerald, Director of Public Relations, The Phi Beta Kappa Society

Encl.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
OFFICE OF THE ASSISTANT SECRETARY

July 28, 2003

Dear Colleague:

I am writing to confirm the position of the Office for Civil Rights (OCR) of the U.S. Department of Education regarding a subject which is of central importance to our government, our heritage of freedom, and our way of life: the First Amendment of the U.S. Constitution.

OCR has received inquiries regarding whether OCR's regulations are intended to restrict speech activities that are protected under the First Amendment. I want to assure you in the clearest possible terms that OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution. OCR has consistently maintained that the statutes that it enforces are intended to protect students from invidious discrimination, not to regulate the content of speech. Harassment of students, which can include verbal or physical conduct, can be a form of discrimination prohibited by the statutes enforced by OCR. Thus, for example, in addressing harassment allegations, OCR has recognized that 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. In order to establish a hostile environment, harassment must be sufficiently serious (*i.e.*, severe, persistent or pervasive) as to limit or deny a student's ability to participate in or benefit from an educational program. OCR has consistently maintained that schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech. OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment.

As you know, OCR enforces several statutes that prohibit discrimination on the basis of sex, race or other prohibited classifications in federally funded educational programs and activities. These prohibitions include racial, disability and sexual harassment of students. Let me emphasize that OCR is committed to the full, fair and effective enforcement of these statutes consistent with the requirements of the First Amendment. Only by eliminating these forms of discrimination can we fully ensure that every student receives an equal opportunity to achieve academic excellence.

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. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program. Thus, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances, including the alleged victim's age.

There has been some confusion arising from the fact that OCR's regulations are enforced against private institutions that receive federal-funds. Because the First Amendment normally does not bind private institutions, some have erroneously assumed that OCR's regulations apply to private federal-funds recipients without the constitutional limitations imposed on public institutions. OCR's regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses. Any private post-secondary institution that chooses to limit free speech in ways that are more restrictive than at public educational institutions does so on its own accord and not based on requirements imposed by OCR.

In summary, OCR interprets its regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles. No OCR regulation should be interpreted to impinge upon rights protected under the First Amendment to the U.S. Constitution or to require recipients to enact or enforce codes that punish the exercise of such rights. There is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment. With these principles in mind, we can, consistent with the requirements of the First Amendment, ensure a safe and nondiscriminatory environment for students that is conducive to learning and protects both the constitutional and civil rights of all students.

Sincerely,

Gerald A. Reynolds
Assistant Secretary
Office for Civil Rights
Department of Education