Foundation for Individual Rights in Education
601 Walnut Street, Suite 510 • Philadelphia, Pennsylvania 19106
T 215-717-3473 • **F** 215-717-3440 • fire@thefire.org • www.thefire.org

December 17, 2008

Chancellor Samuel Goldman
Office of the Chancellor
Southern Illinois University Carbondale
Carbondale, Illinois 62901-6899

Sent via Certified U.S. Mail

Re: Compliance with First Amendment

Dear Chancellor Goldman:

As you can see from our list of Directors and Board of Advisors, FIRE unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, due process, freedom of conscience, academic freedom, and freedom of speech on America's college campuses. Our website, www.thefire.org, will give you a greater sense of our identity and activities.

At present, FIRE rates Southern Illinois University Carbondale a "red light" institution on Spotlight: The Campus Freedom Resource, FIRE's database of speech restrictions at colleges and universities across the country. The "red light" rating indicates that in our judgment, one or more of your policies unconstitutionally restricts freedom of speech, as defined by established legal precedent.

In light of Southern Illinois University Carbondale's rating, I write today to strongly recommend a thorough review of your institution's policies to verify compliance with the legal obligation to fulfill the First Amendment's guarantee of freedom of expression.

Recent rulings against university speech codes from the U.S. Court of Appeals for the Third Circuit and the U.S. District Court for the Northern District of California demonstrate that from coast to coast, the tide has turned against public colleges and universities that still insist on restricting the freedom of expression they are legally required to provide to students on campus. Indeed, these rulings should come as no surprise to public universities. That the First Amendment's protections fully extend to the public university campus is settled law, and federal and state courts have struck down unconstitutional

speech codes masquerading as harassment or civility policies at public universities across the country over the past twenty years.

This past August, the U.S. Court of Appeals for the Third Circuit issued a ruling in *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008) striking down Temple University's former sexual harassment policy as unconstitutional. In *DeJohn*, the Third Circuit held that Temple's policy—which prohibited "expressive, visual, or physical conduct of a sexual or gender-motivated nature" when "such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or… such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment"—was impermissibly overbroad because it potentially prohibited constitutionally protected expression. The court held that because Temple's policy failed to require a showing of both severity and pervasiveness (i.e., "a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work"), the policy "provide[d] no shelter for core protected speech" and thus violated the First Amendment rights of all Temple students. More broadly, *DeJohn* makes clear—again—that public universities cannot abridge the First Amendment on campus, whether via harassment policies (like the one at issue in *DeJohn*), civility policies, free speech zones, or other unconstitutional speech codes.

In California last November, U.S. Magistrate Judge Wayne Brazil sent a similar message when he issued a preliminary injunction prohibiting San Francisco State University (SFSU) and the California State University (CSU) System as a whole from enforcing a "civility" policy which had served as the basis for an investigation of an SFSU student group that had engaged in protected but unpopular political speech on campus. The injunction led to a settlement in March 2008 that permanently revised the CSU System's civility policy, affecting more than 400,000 students. In issuing the injunction, Judge Brazil quoted the United States Supreme Court, emphasizing that the Court's "precedents '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.'" *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, 1015–16 (N.D. Cal. 2007), quoting *Healy v. James*, 408 U.S. 169, 180 (1972).

Indeed, the Supreme Court has long held that public universities occupy a special place in our nation's First Amendment jurisprudence. The Court has made clear that the "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" and that its precedent "leave[s] no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Healy* at 180; *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981). The Court has further held that "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.'" *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (internal citation omitted).

As if further clarification of the legal obligations of public colleges and universities regarding the First Amendment were needed, the Department of Education's Office for Civil Rights made clear in a 2003 letter that "[n]o 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." Most recently, the United States Congress, voting in August 2008 to reauthorize the Higher Education Act with broad bipartisan support, included a "sense of Congress" resolution stating that "an institution of higher education should facilitate the free and open exchange of ideas"—the second time in a decade Congress has passed a resolution supporting the expressive rights of students at our nation's colleges and universities. See Pub. L. No. 105–244.

Despite such a clear and sustained judicial, administrative, and legislative response to unconstitutional speech codes at our nation's colleges and universities, however, FIRE must note with dismay the disappointing prevalence and hardiness of such codes—including the code at Southern Illinois University Carbondale. A recent FIRE report (*Spotlight on Speech Codes 2009: The State of Free Speech on Our Nation's Campuses*) found that 77 percent of the 260 public universities surveyed maintained at least one policy that both clearly and substantially restricts freedom of speech. The policies at Southern Illinois University Carbondale that FIRE has determined to be constitutionally suspect may be found by visiting www.thefire.org/spotlight.

With the authority of the Third Circuit behind the *DeJohn* ruling, Temple's former sexual harassment policy has now become the latest in a long line of speech codes to fail in court. In light of this important development, FIRE hopes that our nation's public institutions of higher learning will finally understand this crucial imperative: Harassment policies must be carefully tailored so as to target only that speech which constitutes "true harassment" under binding Supreme Court precedent, and unconstitutional restrictions on free expression on campus are unacceptable.

We ask that after visiting FIRE's website, you review Southern Illinois University Carbondale's policies and make any necessary changes. While FIRE does not engage in litigation, we believe you should be aware that any public university policy prohibiting constitutionally protected expression is an unlawful deprivation of constitutional rights under 42 U.S.C.S. § 1983 for which university administrators can be sued in their individual capacities. When the law is so clearly established with regard to unconstitutional speech codes, claims of immunity from liability on the part of individual administrators will likely fail. State officials and employees are offered *qualified* immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This means that administrators may be held personally liable for continuing to maintain unconstitutional speech codes in violation of students' First Amendment rights.

As the Supreme Court declared—and as I am sure you will agree—"[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Healy* at 180 (1972) (internal citation omitted). In that spirit, I trust you will ensure that your

institution is in full compliance with the First Amendment, and I thank you for your attention to ensuring for your students the full exercise of their constitutional rights on campus.

Sincerely,

William Creeley
Director of Legal and Public Advocacy

cc:
Jerry D. Blakemore, General Counsel