



Foundation for Individual Rights in Education

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March 29, 2007

Lee N. June
Vice President for Student Affairs and Services
Michigan State University
450 Administration Building
East Lansing, MI 48824-1046

Sent via U.S. Mail and Facsimile (517-355-4670)

Dear Vice President June:

Thank you for your March 7 letter regarding the conclusions and findings of Michigan State University's (MSU's) internal review of the Student Accountability in Community (SAC) program. While we appreciate your attention to the important constitutional questions raised by the SAC program, your letter raises more questions concerning the SAC's continued operation than it answers.

As a threshold matter, FIRE is disappointed to learn that MSU has chosen to retain the SAC program in any capacity. The SAC program is in direct tension with MSU's constitutional obligations as a public university, and while reform is possible, we believe the outright dismantling of the program remains MSU's most effective means of complying with the school's legal requirements under the Constitution. However, since MSU perceives value in the preservation of the SAC program, we respectfully ask only that you take the requisite steps to ensure the program in no way encroaches upon the individual rights of MSU students.

To that end, FIRE has outlined three specific requirements for the satisfactory reform of the SAC program. First, the SAC's speech code element (i.e., whereby students may be referred to the SAC as punishment for engaging in constitutionally protected speech) must be eliminated, and conclusive documentation of the change must be provided. Next, the possibility of referral to the SAC must only arise after a student is found guilty of a serious offense by a proceeding that comports with constitutional standards of due process. Finally, referral to the SAC must be truly optional—the student must choose whether or not to attend the program—and made only with the student's informed consent.

As it now stands, it is difficult to ascertain whether the changes announced meet our criteria for acceptable reform of the SAC program. The information provided in your March 7 letter is sparse, and the SAC website has not yet been updated as promised. I will assess each criterion in turn using the information currently available from your letter and MSU's Student Life website.

It is inconclusive whether the SAC's speech code element has been eliminated.

In the March 7 letter, you state plainly that "MSU does not have a speech code." It is unclear whether you make this statement generally, or with specific reference to the SAC's conditions for referral. Regardless, this claim is either untrue or unverifiable. Generally speaking, MSU *does* have a speech code. As cited in the Spartan Life Student Handbook and Resource Guide, the school's Anti-Discrimination Policy states:

[T]he University community holds itself to certain standards of conduct more stringent than those mandated by law. Thus, even if not illegal, acts are prohibited under this policy if they:

[...]

Harass any University community member(s) on the basis of age, color, gender, disability status, height, marital status, national origin, political persuasion, race, religion, sexual orientation, veteran status, or weight.

Further, MSU's policy on Harassment and Intimidation states:

To succeed personally and academically, an individual must be able to live free from unnecessary emotional stress caused by others. Physical or emotional harassment will not be tolerated in a residence hall community.

3.1 No person shall harass or abuse any other person. (This shall include, but not be limited to, harassment or abuse based on race, creed, ethnic origin, sex, age, political persuasion, sexual orientation, or disability.)

By providing a means for punishing constitutionally protected speech, these policies function as speech codes, as defined by *Doe v. University of Michigan*, 721 F. Supp. 852, 863 (E.D. Mich. 1989), which held that a public university can neither "establish an anti-discrimination policy which has the effect of prohibiting certain speech because it disagrees with ideas or messages sought to be conveyed," nor "proscribe speech simply because it is found to be offensive, even gravely so, by large numbers of people." As the United States Department of Education's Office for Civil Rights wrote in a July 28, 2003 open letter:

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.

Aside from determining that “offensive” speech remains protected by the First Amendment, under no circumstances has “emotional stress” on the “basis of political persuasion or weight,” for example, been considered a matter for federal law.

In the SAC program materials that prompted FIRE’s initial concerns about the program’s constitutionality, “[e]xamples of situations that would generally be appropriate for SAC” included “[h]umiliating a boyfriend or girlfriend,” “disrespecting other students’ academic freedom,” “[i]nsulting instructors or teaching assistants,” and “making sexist, homophobic, or racist remarks at a meeting,” and, with regard to student organizations (which implies that entire student organizations may be forced to attend), “failing to understand how members’ actions affects [sic] others.” While perhaps unsympathetic, each of these examples clearly qualifies as protected speech under the First Amendment.

As far as the SAC’s function as a speech code is concerned, it is difficult if not impossible to determine, given the limited information contained in your letter, whether the SAC program still singles students out for referral for engaging in constitutionally protected speech. If you have changed the relevant SAC materials, please send us the new materials in which you have made it clear that the SAC program is not to be used to punish protected speech.

It is inconclusive whether SAC referral now arises only after a student is found guilty of a serious offense by a proceeding that comports with commonsense standards of due process.

Your letter indicates that the bulk of the changes made to the SAC involve the referral process. You write that based on the school’s review, MSU “saw the need to immediately adjust who is authorized to refer a student to the SAC program.” Specifically, you explain:

For the past two years, the program has been exclusively used by the Judicial Affairs office as a sanction that may be applied in the remediation phase of student judicial proceedings. For those students who have been sanctioned through the judicial process, we see no problem in their participating in the SAC program. Nevertheless, in the future, students will not be required to enter this program as the only sanction for a violation but it will be offered as an option. Students who were not faced with a disciplinary sanction have not been referred to the SAC program for more than two years now, and this practice will not occur in the future.

As such, you seem to indicate that students will no longer be referred to the SAC program without first facing judicial sanctions. But while information available at MSU’s Department of Student Life website indicates that students facing complaints or accused of violations of the school code are afforded hearings that comport with standards of due process, it is not clear that only students found guilty of serious offenses are subject to possible referral to the SAC program. We wonder, for example, whether “offenses” that previous SAC program materials indicate would result in referral—such as slamming a door in an argument with a significant other—remain legitimate grounds for SAC referral. Additionally, because MSU maintains a speech code that allows for punishment

for engaging in constitutionally protected speech, it is entirely possible—perhaps even likely, given your characterization of the SAC program as a means to “enhance understanding within our community”—that a student found guilty of “harassment on the basis of political persuasion,” for example, could be referred to the SAC program. For the SAC program to pass constitutional muster, students must not face referral to the program as a punishment for constitutionally protected expression.

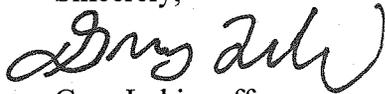
It is inconclusive whether referral to the SAC is truly optional and made only with the student’s informed consent.

You write that from now on “students will not be required to enter this program as the only sanction for a violation but it will be offered as an option.” From this statement alone, it is presently unclear whether this means that the student him- or herself will have the option of attending the program as punishment, or whether the judicial administrator will have the option of referring the student to the program as but one of several punishment alternatives.

In sum, it is difficult to fully grasp from your March 7 letter alone if the changes made to the SAC program are satisfactory. Although you write that MSU is “updating the Student Life website to more accurately describe the nature of the program and to reflect the changes referenced in this letter,” the SAC page on the Student Life website has been unavailable to the public since FIRE’s receipt of your letter. While FIRE appreciates your efforts to address the constitutional problems with the SAC program outlined in our previous letters, as of this writing we cannot be sure that the substantive changes required have been made. If MSU is indeed serious about addressing concerns about the constitutionality of the SAC program, please provide updated program materials demonstrating that the necessary reforms have in fact been implemented.

FIRE requests clarification on each of the points discussed above. We request a response on this matter by April 18, 2007.

Sincerely,



Greg Lukianoff
President

cc:

Lou Anna K. Simon, President, Michigan State University
Kim A. Wilcox, Provost, Michigan State University
Robert A. Noto, General Counsel and Vice President for Legal Affairs, Michigan State University
Fred L. Poston, Vice President for Finance and Operations, and Treasurer, Michigan State University

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Encl.

MICHIGAN STATE
U N I V E R S I T Y

March 7, 2007

Greg Lukianoff, President
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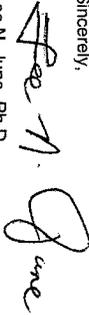
Dear Mr. Lukianoff:

I write in response to your correspondence originally addressed to President Lou Anna K. Simon regarding concerns about the Student Accountability in Community Program (SAC) at Michigan State University (MSU). We have conducted a review, as promised, and below, I will outline our findings and conclusions.

In our review, we examined various materials, conferred with staff, reviewed the Student Life website, looked at how the program has actually operated, and consulted with legal counsel. MSU does not have a speech code. However, based on our review, we saw the need to immediately adjust who is authorized to refer a student to the SAC program. For the past two years, the program has been exclusively used by the Judicial Affairs office as a sanction that may be applied in the remediation phase of student judicial proceedings. For those students who have been sanctioned through the judicial process, we see no problem in their participating in the SAC program. Nevertheless, in the future, students will not be required to enter this program as the only sanction for a violation but it will be offered as an option. Students who were not faced with a disciplinary sanction have not been referred to the SAC program for more than two years now, and this practice will not occur in the future.

We found no basis for believing that the program has employed offensive tactics. SAC program activities have not entailed calling upon participants to adopt specified responses in given situations. Rather, the program allows student participants to explore alternative responses to challenging interpersonal situations they may face. The idea is to enhance understanding within our community, not to force any given behavior. Finally, we are updating the Student Life website to more accurately describe the nature of the program and to reflect the changes referenced in this letter.

Sincerely,



Lee N. Jume, Ph.D.
Vice President for Student Affairs and Services



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