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June 7, 2010

Dr. Evan Dobelle
Office of the President
Westfield State College
P.O. Box 1630
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Sent via U.S. Mail and Facsimile (413-572-4843)

Dear President Dobelle:

As you can see from the list of our 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 expression on America's college campuses. Our website, www.thefire.org, will give you a greater sense of our identity and activities.

FIRE is deeply concerned about a policy in force at Westfield State College (WSC) that unconstitutionally restricts the speech rights of WSC students.

WSC's discrimination policy explicitly bans speech protected by the First Amendment to the United States Constitution. The mere existence of the policy chills expression on WSC's campus and ignores First Amendment liberties that WSC, as a public college, is legally bound to protect. Moreover, WSC's discrimination policy undermines the mission of an institution presumptively committed to intellectual rigor, robust debate, and a free and vibrant community. It is for these reasons that FIRE named WSC's discrimination policy our "Speech Code of the Month" for February 2010, and we write you today to urge you to revise the policy immediately.

The WSC Student Handbook prohibits "discrimination," which it defines to include "making disparaging remarks that insult or stigmatize a student's cultural background or race," as well as "making insensitive remarks that reflect a student's disability." This policy violates WSC students' rights to free expression for several reasons.

First, WSC's policy relies on impermissibly vague formulations—namely, prohibiting speech that "disparag[es]," "insult[s]," or "stigmatize[s]" others—that

could, in application, mean virtually anything. A regulation is said to be unconstitutionally vague when it does not "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). Exactly what speech constitutes actionable discrimination under this policy can only be determined, in this context, by an entirely subjective judgment. Thus, no student seeking to ascertain precisely what speech is or is not forbidden could possibly determine what is actually prohibited by the terms of the policy.

Moreover, the policy is impermissibly overbroad. A statute or law regulating speech is unconstitutionally overbroad "if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate." *Doe v. University of Michigan*, 721 F. Supp. 852, 864 (E.D. Mich. 1989), citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Even assuming that a student could determine what speech is or is not "disparaging," "insult[ing]," or "stigmatiz[ing]," the fact that a student may be sanctioned under the policy for such expression means that engaging in wide swaths of constitutionally protected expression may serve as grounds for punishment. Standing alone, such expression may not be lawfully proscribed, and may only be punished when it is part of a larger pattern of conduct that constitutes harassment or an existing exception to the First Amendment. Most speech that a listener would find disparaging, insulting, or stigmatizing is nonetheless constitutionally protected. Indeed, the Supreme Court has declared that freedom of expression "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

This policy also arguably bars, among other forms of protected speech, any kind of sharp-edged humor on campus. Yet, parody and satire exist precisely to challenge, to amuse, and even to offend, and these kinds of speech are unambiguously protected under the First Amendment. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the U.S. Supreme Court ruled that the First Amendment protects even the most outlandishly offensive parody—in that case, a cartoon suggesting that the Reverend Jerry Falwell lost his virginity in a drunken encounter with his mother in an outhouse. Such blatantly ridiculing speech is protected under the First Amendment.

Finally, the policy suppresses speech that has been explicitly protected by courts, including core political speech. For example, the policy bans "insensitive remarks" about a student's disability. However well-intentioned, this prohibition effectively bans student arguments against the requirements of the Americans with Disabilities Act, if a disabled student were to find such an argument offensive. It is unconstitutional to suppress free speech on the ground that it is subjectively offensive to some listeners. Indeed, there is "no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive." *Saxe v. State College Area School District*, 240 F.3d 200, 206 (3d Cir. 2001).

WSC must recognize the dangers of the continued enforcement of its current speech policy. Not only does the policy threaten punishment for protected forms of expression, in violation of the First Amendment, but as formulated, this policy cannot help but have the effect of eliminating the discussion of controversial topics. When students cannot be sure

that their speech on controversial topics will be protected, they will most likely keep their beliefs to themselves to avoid punishment. The resulting chilling effect runs counter to the Supreme Court's pronouncement 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).

This chilling effect may very well have been the college's intention in enacting its policy. But while there may be well-intentioned reasons to prefer the calm of politically correct speech to potential conflict and dispute, such a preference runs contrary to the very principles behind our Bill of Rights. As the Supreme Court declared in the landmark case of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." The Court concluded that "the purpose of the First Amendment to our Constitution" was precisely to protect "from all official control" the domain that was "the sphere of intellect and spirit." Nowhere are these statements more applicable than on the campus of a modern American college, where young adults should have the freedom to define their own beliefs by exposure to an open marketplace of ideas.

That the First Amendment's protections fully extend to the public college campus is settled law. The Supreme Court has long held that public colleges occupy a special place in our nation's First Amendment jurisprudence, stating that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" and that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (internal quotation and citation omitted). 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."

In light of this robust national commitment to free speech on public campuses, WSC's policy is indefensible. Outlawing "disparaging remarks" undoubtedly has a powerful chilling effect on expression at the college, undermining the entire purpose of the institution. Under this discrimination policy, WSC is reduced to a place where students are forced to walk on eggshells, rather than the marketplace of ideas it is supposed to be. If WSC is to be an institution where intellectual inquiry can flourish, the chilling effect on expression engendered by WSC's flawed discrimination policy must be addressed and eliminated.

To that end, WSC must immediately revise its policy to be consistent with the requirements of the First Amendment. Please spare WSC the embarrassment of fighting against the Bill of Rights, by which it is legally and morally bound. To prevent speech at Westfield State College from being impermissibly chilled, we ask that you revise the

discrimination policy and clarify to students and administrators at the college that protected expression may never and will never be investigated or punished.

We request a response on this matter by June 28, 2010.

Sincerely,

William Creeley
Director of Legal and Public Advocacy

cc:
Barry M. Maloney, Vice President for Student Affairs
Carlton Pickron, Dean, Diversity and Affirmative Action Office of the President