November 10, 2008

State of New Jersey
Office of the Attorney General
Department of Law and Public Safety
P.O. Box 080
Trenton, NJ 08625-0080

Dear Attorney General Milgram,

We have reviewed your August 26 letter to New Jersey college and university administrators, and we are aware of your plans to meet with administrators on November 14 to discuss your concerns about the use of the Internet to communicate harmful speech. After reviewing your written instructions, we are concerned that they fail to provide the clear and specific constraints necessary to prevent colleges from censoring legitimate and constitutionally protected speech.

Undoubtedly, there have been some disturbing instances in which young people have used the Internet to unlawfully threaten or harass others, or to anonymously post defamatory editorial content on gossip sites like JuicyCampus.com. We in no way mean to condone truly unlawful online conduct or to suggest that it is worthy of First Amendment protection.

However, "bullying" is not a defined legal term of art. An open-ended directive to colleges to enact codes of conduct that punish the use of computers for "bullying" will invariably cause some administrators to penalize lawful speech that falls within the protection of the First Amendment. There is a difference – qualitatively, and constitutionally – between speech that threatens versus that which merely causes hurt feelings.

Following decades of similar First Amendment jurisprudence, the Supreme Court reiterated just last year in *Morse v. Frederick* that mere "offensiveness" is never a constitutionally adequate justification to censor or penalize speech – even in the setting of on-campus speech at the high school level. The protection for speech enjoyed by college-aged audiences is undoubtedly even more robust, as the Third Circuit reaffirmed in its recent decision, *DeJohn v. Temple University*, invalidating a college speech code.

In *DeJohn*, the Third Circuit struck down as vague and overbroad a campus speech code that encompassed within its prohibitions "hostile" and "offensive" speech. The court emphasized that "[u]nder the Supreme Court's rule in *Tinker*, a school must show that speech will cause actual, material disruption before prohibiting it." The Temple speech code fell short of that constitutional standard because it penalized speech based on a mere intent to harass or to disrupt the work of others, even if there was no evidence that the speech had any disruptive

effect: "[U]nless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core protected speech."

If cyberbullying is to be recognized as a new and distinct basis for discipline, colleges must be given unambiguous legal standards to apply so that protected speech is not swept up in the cyberbullying dragnet. As the Supreme Court has explicitly recognized for decades, colleges are places in which the free and open exchange of ideas – even controversial and at times disturbing ideas – is to be nurtured. If colleges are free to penalize any hurtful or upsetting speech as bullying, then the editorial commentator whose opinion is challenging to others' religious, social or political views could face punishment as a "bully." The mere uncertainty of what constitutes punishable speech will invariably cause speakers to self-censor lawful commentary, resulting in an impermissible and unconstitutional chilling effect on campus.

You may be familiar with the 2005 case of a New Jersey high school student who was suspended from school on charges of cyberbullying because she used a personal social-networking Web page to describe one of her classmates as "not fun." Cases like this one suggest that at least some college administrators, if not given explicit and constitutionally sound constraints, will apply a directive to punish cyberbullying in a nonsensical, "zero-tolerance" manner. (Of course, we will never know about the legitimate, lawful speech that never came into existence because the fear of cyberbullying sanctions chilled it.) While it is important that those truly guilty of illegally threatening or harassing others be punished, it is equally important, if not more so, that we refrain from damaging the futures of innocent students by falsely branding them as lawbreakers.

We would be pleased to work with your office on developing standards that give college students fair notice of what conduct, within constitutional constraints, constitutes punishable cyber-bullying. We believe that a closer examination may well result in the conclusion that New Jersey's current laws against threatening, stalking and harassing conduct are fully adequate without the need for enacting vague new "bullying" penalties, and that the public interest would be best served by publicizing and effectively enforcing existing law.

We would be pleased to speak with you further to make sure that these concerns are addressed. Thank you for your consideration.

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