FIRE

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Paul Tanaka
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Sent via U.S. Mail and Facsimile (515-294-1799)

Dear Mr. Tanaka:

Thank you for your January 25 response to our December 2010 letter regarding FIRE's analysis of Iowa State University's policies governing campus speech. We have reviewed these policies and are now able to provide a thorough explanation of their constitutional infirmities. Thank you for your patience in awaiting our response.

FIRE is concerned about four policies in force at Iowa State University (ISU) that unconstitutionally restrict the speech rights of ISU students. Specifically, two separate policies governing harassment, as well as ISU's policies governing the use of grounds and facilities and acceptable use of information technology, impermissibly restrict free speech on campus, a right to which ISU students are both legally and morally entitled. The mere existence of the policies in question chills expression on campus and betrays First Amendment freedoms that ISU, a public university, is legally bound to protect. Moreover, the policies undermine the mission of an institution presumptively committed to intellectual rigor, robust debate, and a free and vibrant community. We write you today to urge you to cure the defects in these policies.

We consider each policy in turn.

First, ISU's "Discrimination and Harassment" policy states, in relevant part:

> Iowa State University also prohibits harassment, which can be a form of discrimination if it is unwelcome and is sufficiently severe or pervasive so as to substantially interfere with a person's work or education. Harassment may include, but is not limited to, threats, physical contact or violence, pranks, jokes, epithets, derogatory comments, vandalism, or verbal, graphic, or written conduct directed at an individual or individuals because

> of their race, ethnicity, sex, pregnancy, color, religion, national origin, physical or mental disability, age, marital status, sexual orientation, gender identity, or U.S. veteran status. Even if actions are not directed at specific persons, a hostile environment may be created when the conduct is sufficiently severe, pervasive or persistent so as to unreasonably interfere with or limit the ability of an individual to work, study, or otherwise to participate in activities of the university.
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> While grounded in state and federal non-discrimination laws, this policy may cover those activities which, although not severe, persistent, or pervasive enough to meet the legal definition of harassment, are inappropriate and unjustified in an educational or work environment.
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> […]
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> Sexual harassment, in its legal definition, includes unwelcome sexual advances, requests to engage in sexual conduct, and other physical and expressive behavior of a sexual nature where
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> […]
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> (3) such conduct has the purpose or effect of substantially interfering with an individual's academic or professional performance or creating an intimidating, hostile, or demeaning employment or academic environment.
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> […]
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> [Sexual harassment] can range from unwelcome sexual flirtations and inappropriate put-downs of individual persons or classes of people to serious physical abuses such as sexual assault. Examples could include, but are not limited to, unwelcome sexual advances; repeated and unwelcome sexually-oriented kidding, teasing, joking, or flirting; verbal abuse of a sexual nature; commentary about an individual's body, sexual prowess, or sexual deficiencies; derogatory or demeaning comments about women or men in general, whether sexual or not; leering, touching, pinching, or brushing against another's body; or displaying objects or pictures, including electronic images, which are sexual in nature and which create a hostile or offensive work, education, or living environment.

The Supreme Court of the United States has set forth a strict standard for what constitutes student-on-student (or peer) harassment in the educational context, and only a policy that meets that standard is permissible. This exacting, speech-protective standard, set forth in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999), requires the conduct in question to be unwelcome, discriminatory, and "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit" to constitute actionable harassment. ISU's policy on Discrimination and Harassment fails to include any

requirement that the conduct be objectively offensive, leaving peer harassment to be defined according to the subjective sensibilities of the complainant.

The policy also fails to require that the behavior or expression in question be both sufficiently severe *and* pervasive to have this type of detrimental impact. Instead, it erroneously adopts the standard for workplace harassment, under which behavior that is so severe *or* pervasive as to disrupt a person's ability to work constitutes actionable harassment. In *Davis*, the Supreme Court intentionally modified that standard in its application to educational contexts, to require both severity and pervasiveness. This reflects the important distinction between the workplace and an educational environment, where the "marketplace of ideas" serves to expose students to robust dialogue and the free exchange of ideas in pursuit of learning.

The policy further conflates the workplace and educational harassment standards by allowing the "purpose or effect" of interfering with the complainant's educational opportunities to constitute actionable harassment. In *DeJohn v. Temple University*, 537 F.3d 301, 317 (3d Cir. 2008), the Third Circuit struck down a similar standard for peer harassment which examined the "purpose or effect" of the alleged conduct, noting that "the policy's focus upon the motives of the speaker is rightly criticized" because "a school must show that speech will cause actual, material disruption before prohibiting it." Consequently, ISU's definition of peer harassment falls short of the *Davis* standard and leaves protected speech at risk of punishment.

Indeed, the policy, by its own language, acknowledges its constitutional deficiencies when it states that "this policy may cover those activities which, *although not severe, persistent, or pervasive enough to meet the legal definition of harassment*, are inappropriate and unjustified in an educational or work environment." (Emphasis added.) To be clear: Expressive conduct that falls outside the boundaries of the legal definition of harassment constitutes protected speech, and that speech may not be restricted solely because ISU deems it "inappropriate or unjustified."

Nor is the policy saved by its pronouncement that it "will be interpreted so as to avoid infringement upon First Amendment rights of free speech." Courts have held that such "savings clauses" do not cure the constitutional infirmities of overbroad speech codes. In *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007), the federal district court asked, when confronting a speech code followed by a similar savings clause:

> What path is a college student who faces this regulatory situation most likely to follow? Is she more likely to feel that she should heed the relatively specific proscriptions of the Code that are set forth in words she thinks she understands, or is she more likely to feel that she can engage in conduct that violates those proscriptions (and thus is risky and likely controversial) in the hope that the powers-that-be will agree, after the fact, that the course of action she chose was protected by the First Amendment? To us, this question is self-answering -- and the answer condemns to valuelessness the allegedly 'saving' provision in the last paragraph of the Code that prohibits violations of the First Amendment.

Furthermore, by suggesting that a staggering amount of constitutionally protected speech may constitute actionable harassment at ISU, this policy is overbroad on its face. 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). The policy provides a list of examples of behavior that, unless they are part of an extreme pattern of conduct that rises to the level of actionable harassment as defined under the law, constitute protected speech and cannot be sanctioned or punished as harassment at a public university legally bound by the First Amendment. For example, the policy lists "jokes, epithets, derogatory comments … or verbal, graphic, or written conduct directed at an individual," as well as "derogatory or demeaning comments about women or men in general, whether sexual or not," as purported examples of harassment. By implying that these types of expression are prohibited across the board, this policy will have a powerful and impermissible chilling effect on student expression, since most students will refrain from engaging in controversial but protected expression rather than risk punishment. This is a particularly noxious result on a university campus, where students must be able to discuss, critique, and even satirize a wide range of ideological stances without fear of disciplinary action.

Finally, the policy is also unconstitutionally vague. 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). Here, a student reading the policy will struggle to discern exactly what is prohibited and what is permitted. Declaring that actionable harassment could include "verbal abuse of a sexual nature" and "electronic images, which are sexual in nature," for example, provides little guidance to students in determining what conduct will expose one to disciplinary action. Not only is much "sexual" speech protected by the First Amendment, but the language in this policy is so vague as to be unconstitutional because it affords the university too much discretion to define the parameters of permitted conduct after the fact, and it critically fails to give students proper notice as to their free speech rights. As a result, students will likely self-censor to such a degree that expression on campus will be chilled. Such a result is untenable. ISU must therefore revise this policy in a manner consistent with the *Davis* standard and the First Amendment.

As we explained in our December 2010 letter, the United States Court of Appeals for the Third Circuit within the past year invalidated a harassment policy maintained by the University of the Virgin Islands on First Amendment grounds. *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010). In its August 2010 decision, the Third Circuit affirmed the holding of the lower court that a "Hazing-Harassment" policy prohibiting "any act which causes … mental harm or which … frightens, demeans, degrades or disgraces any person" unconstitutionally banned a substantial amount of protected speech and therefore violated the free speech rights of students at the public university. While Iowa is of course not in the Third Circuit's jurisdiction and the *McCauley* opinion is thus not binding on ISU, the *McCauley* court's holding is entirely applicable when considering the constitutionality of ISU's harassment policy, and the policy is similarly likely to fail to pass constitutional muster.

As we also noted, the *McCauley* decision marks the second time in three years that the Third Circuit has struck down a university's harassment policy for failing to comport with the First Amendment. In *DeJohn*, the court invalidated a sexual harassment policy maintained by Temple University, citing the failure of the policy to track the *Davis* standard. *DeJohn* held, in language particularly relevant to ISU's sexual harassment policy, 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. *DeJohn*, 537 F.3d at 318. ISU's policy suffers from the same constitutional deficiency. In light of the *DeJohn* and *McCauley* decisions, all colleges—including ISU—should be on notice that their policies governing peer harassment must meet the *Davis* standard in order to be in compliance with the law. For the reasons discussed above, ISU's policy does not meet this standard and must be revised.

Second, ISU maintains a policy on "Harassment and Discriminatory Harassment" in its Student Disciplinary Regulations which states, in relevant part:

> Discriminatory Harassment, as defined by the university's Discrimination and Harassment policy, is prohibited. Discriminatory harassment is unwelcome behavior directed at an individual or group of individuals based on race, ethnicity, pregnancy, color, religion, national origin, physical or mental disability, age, marital status, sexual orientation, gender identity, status as a U.S. veteran (disabled, Vietnam, or other), or other protected class when the behavior has the purpose or effect of substantially interfering with the student's education or employment by creating an intimidating, hostile, or demeaning environment.
>
> 1. Examples can include but are not limited to threats, physical contact or violence, pranks, jokes, epithets, derogatory comments, vandalism, or verbal, graphic, written, or electronic conduct directed at an individual or group of individuals because of a protected class. Even if actions are not directed at specific individuals, a hostile environment may be created when the behavior is severe or persistent enough to unreasonably interfere with or limit the ability of an individual to work, study, or otherwise to participate in activities of the university.
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> 2. Engaging in First Amendment protected speech activities may not rise to the level of harassment, depending on the circumstances.

This policy suffers from many of the same constitutional deficiencies as the previously discussed policy. By incorporating the "Discrimination and Harassment" policy, this policy fails to adhere to the strict *Davis* standard for peer harassment in educational settings. The policy does not require that actionable behavior be sufficiently "severe, pervasive, and objectively offensive" to have the required impact on an individual's educational opportunities, and instead inappropriately implements the "purpose or effect" standard that governs workplace harassment. Furthermore, the examples listed, unless part of an extreme pattern of conduct that rises to the level required by *Davis*, are constitutionally protected. To imply that such conduct is universally prohibited renders the policy exceedingly overbroad. Finally, as discussed with respect to the

first policy, disclaiming that protected speech falls under the definition of prohibited conduct does not cure the policy's constitutional deficiencies. In fact, the "savings clause" in this policy is even more offensive to students' First Amendment rights: By using the qualifiers "may" and "depending on the circumstances," the policy implies that in some cases, speech protected by the First Amendment may actually constitute prohibited harassment. For obvious reasons, this cannot be so. By introducing an even greater level of uncertainty as to which speech is punishable and which is protected, the policy makes it nearly certain that student speech will be chilled. Due to these constitutional problems, ISU would do well to revise this policy to comport with the rights of its students.

Third, ISU's "Facilities and Grounds Use, Activities" policy states, in relevant part:

> *Designated Public Forums*
> The Edward S. Allen Area of Free Debate, located west and south of the Hub, and the area south of the Campanile have been designated as public forums for non-commercial expression. If these areas have not been reserved for use for university purposes or by student, faculty or staff organizations, any member of the public or of the university community may use these areas for expressive activities on a first come, first served basis.
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> *Uses that Require Only Notice*
> Organizations and groups of persons wishing to use outdoor areas other than a designated public forum for a public event must file a notice of intent to use an area with the Student Activities Center. If possible, such notice should be filed at least twenty-four hours in advance of the event, but in any case must be given at least three hours prior to the event. No approval is necessary if the event meets the following criteria:
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> - For events held on weekdays between the hours of 8:00 a.m. and 4:00 p.m., the event will be held at least one hundred feet away from buildings that normally hold classes;
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> […]
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> *Uses that Require Approval*
> A public event not at an open forum area, which does not meet the above criteria, requires prior approval by filing an Event Authorization Form with the Student Activities Center at least three business days in advance of the proposed event.

This policy establishing "free speech zones" on ISU's campus constitutes an unconstitutional restriction on the speech of members of the university community. A public university may implement reasonable, content-neutral restrictions on the time, place, and manner of speech, but such restrictions may not be "substantially broader than necessary to achieve the [school's] interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). ISU's restriction on spontaneous speech—an important form of expression often used in response to recent or still-unfolding events—is "substantially broader than necessary" in requiring that all unapproved demonstrations occurring outside of the "free speech zones" during weekday hours take place at

least 100 feet from any classroom building. This is an excessive and overbroad regulation that is not narrowly tailored to preventing disruption of university functions. For example, this policy would apply to a group of silent individuals leafleting on the sidewalk, who pose no threat to the functioning of the university or the rights of other students to learn.

Further, the 100-foot requirement is vague and undefined. It is unclear whether the distance is from the classroom building to the primary speaker or to the edge of the crowd. If a passerby stops to listen from a distance and happens to be within the proscribed distance to a classroom building, will the speaker be held accountable? Not only does ISU's policy require individuals spontaneously exercising their First Amendment rights to obey an arbitrary and overbroad restriction, but the vague language of the policy also prevents students from knowing whether their activity would constitute a violation. As such, this policy is unconstitutional and must be revised in order to fully protect the free speech rights of ISU community members.

Fourth, ISU's "Code of Computer Ethics and Acceptable Use Policy" states, in relevant part:

> Electronic mail (e-mail) and communications are essential in carrying out the activities of the university and to individual communication among faculty, staff, students and their correspondents. Individuals are required to know and comply with the university's policy on Mass E-Mail and Effective Electronic Communication. Some key prohibitions include:
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> - Sending unsolicited e-mail messages, including the sending of "junk mail" or other advertising material to individuals who did not specifically request such material, except as approved under the policy on Mass E-Mail and Effective Electronic Communication.
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> - Engaging in harassment via e-mail, telephone, or paging, whether through language, frequency, or size of messages.

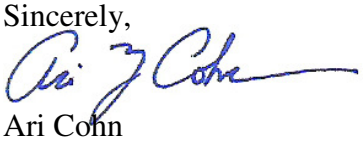
This policy is both unconstitutionally vague and overbroad. The policy prohibits any email messages not explicitly solicited, and thus exposes a student to punishment for even the most benign activity. For example, a student journalist who sends a message to a professor to inquire about a campus issue, or a student who emails a classmate to ask a question about an assignment, would be in violation of this policy. Even placing a telephone call to a friend without consent could constitute a violation of this policy. The policy effectively permits campus administrators to pick and choose which communication they will punish without providing students with even a modicum of guidance. This is an unacceptable situation. Furthermore, given the consistent and significant constitutional issues with the definitions of peer harassment in other ISU policies, it is reasonable to assume that this policy, by prohibiting "harassment via e-mail, telephone, or paging," incorporates the same flawed definitions as the previously discussed policies. Indeed, as "harassment" is left undefined in this particular policy, students (and administrators) can only look to those policies to gain notice as to what behavior constitutes harassment. ISU would do well to incorporate a definition of harassment that hews to the strict standard set out in *Davis* in order to protect the constitutional rights of its students.

Please be advised that federal and state courts across the country have consistently struck down unconstitutional speech codes, often masquerading as harassment or civility policies, at public universities over the past twenty years. In addition to *McCauley*, *DeJohn*, and *Reed*, see *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy due to unconstitutionality); *The UWM Post, Incorporated v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Corry v. Leland Stanford Junior University*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.) (declaring "harassment by personal vilification" policy unconstitutional); *Booher v. Board of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); and *Smith v. Tarrant County College District*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (invalidating "cosponsorship" policy due to overbreadth).

FIRE asks that Iowa State University revise its policies to make them consistent with the requirements of the First Amendment and, to prevent speech at ISU from being impermissibly chilled, that you clarify to students and administrators that protected expression may never and will never be investigated or punished at ISU. We ask for a response by August 19, 2011.

Thank you for your attention and sensitivity to these important concerns. I look forward to hearing from you.

Sincerely,



Ari Cohn
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