



MEMORANDUM

To: Jeremiah Baky, Troy University
From: Azhar Majeed, Director, Individual Rights Education Program, Foundation for Individual Rights in Education
Date: March 20, 2014
Re: Speech Codes at Troy University

Introduction

This memorandum is in response to your request for information about Troy University's speech codes, and about how those policies can be revised to better protect students' right to free speech and expression under the First Amendment.

FIRE rates a university as a "red light," "yellow light," or "green light" institution depending on the extent to which the university's written policies restrict constitutionally protected speech. Troy currently maintains five speech codes earning FIRE's worst, red light rating, reserved for those policies that clearly and substantially prohibit protected speech. Additionally, Troy has four yellow light speech codes, which we define as ambiguous policies that could ban or excessively regulate protected expression and too easily invite administrative abuse and arbitrary application. The university therefore earns an overall red light rating from FIRE—a disappointing abandonment of its legal and moral obligations as a public institution bound by the First Amendment.

Fortunately, Troy's policies can be revised to protect campus discourse and meet the requirements of the First Amendment. FIRE would be pleased to work with Troy's administrators and you and your fellow students in this effort. By improving its policies, Troy would send an unmistakable signal to students, faculty, parents, and concerned citizens that the university takes seriously its constitutional obligations and values unfettered expression on campus.

This memorandum discusses the First Amendment problems with each of Troy's red light policies, as well as proposed solutions for remedying those defects.

I. Standards of Conduct: Misconduct Defined

This policy states, in relevant part:

A student or organization may be disciplined, up to and including suspension

and expulsion, and is deemed in violation of the “STANDARDS OF CONDUCT,” for the commission of or the attempt to commit any of the following offenses:

[...]

Any activity which creates a mentally abusive, oppressive, or harmful situation for another is a violation. Use of the mail, telephone, computer and electronic messages, or any other means of communication to insult, threaten, or demean another is prohibited.

This policy is substantially 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). By prohibiting expression that merely “insult[s]” or “demean[s]” another person, this policy restricts a wide swath of speech protected by the First Amendment. As the Supreme Court has declared, “[A] function of free speech under our system of government is to invite dispute. It 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). Under this and other precedents, Troy’s ban on any and all “insulting” and “demeaning” expression is likely facially overbroad.

This speech code is also likely void for vagueness under the First Amendment. A policy or 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, Troy students are given no notice of what “creates a mentally abusive, oppressive, or harmful situation” for another student, leaving open the possibility that those terms, in the university’s eyes, include mere hurt feelings and the like. Given that these amorphous terms are hardly self-defining, students may understandably be confused about the extent to which this policy regulates their expressive rights. As a result, students will be likely to self-censor rather than risk punishment under the policy’s uncertain terms. This “chilling effect” does grave harm to the marketplace of ideas that a public university campus is meant to be.

II. Student Handbook: Technology Use Policy

This policy provides, in pertinent part:

Cruelty, obscenity, crudity, and offensiveness, for the sake of offensiveness, have no place in the public discourse of a University community. As members of the University community, we are all responsible to one another and to the thinking and thoughtful community of which each of us ought to be a valuable part. Each of us must be considerate of other users of University computer resources and facilities.

For your information, use of campus e-mail, the Internet, or networks for the following purposes have been subject to criminal, civil, and/or university sanctions at other institutions:

[...]

Messages deemed offensive to the receiver because of their pointlessly hateful, obscene, harassing, or libelous content.

Like the Standards of Conduct, this policy is both overbroad and vague. Under First Amendment precedents spanning decades, most “cruel,” “crude,” and “offensive” speech is entitled to protection. Consider, for example, the Supreme Court’s pronouncement in *Texas v. Johnson* that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). In a case concerning similar campus restrictions, the Court declared 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). As a public institution of higher education, Troy is fully bound to follow these precedents and thus to remove its ban on “cruel,” “crude,” and “offensive” expression.

The policy also fails to explain or illustrate what constitutes “[c]ruelty,” “crudity,” and “offensiveness.” Instead, these broad terms are left standing alone, providing students with little to no idea of what speech is allowed and what is prohibited. Once again, this will lead to a harmful chilling effect on campus discourse. As the Supreme Court has observed, “[W]here a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.” *Grayned*, 408 U.S. at 109 (internal citations omitted).

The policy additionally chills speech by suggesting to students that they may face disciplinary action for “[m]essages deemed offensive to the receiver because of their pointlessly hateful ... content.” This provision does not indicate who gets to make the determination whether a message is “offensive,” nor does it elaborate upon what is considered “pointlessly hateful.” As such, students’ expressive rights are left at the mercy of the subjective sensibilities of individual students or administrators, no matter how strained or unreasonable those sensibilities may be. Given that, as covered above, “offensive” expression is almost always constitutionally protected at a public university, this contributes further to the problems of overbreadth and vagueness faced by Troy’s Technology Use Policy.

III. Student Handbook: Policy on Harassment and Discrimination

This policy states, in relevant part:

For purposes of Troy University's policy, harassment is any comments or conduct consisting of words or actions that are unwelcome or offensive to a person in relation to sex, race, age, religion, national origin, color, marital status, pregnancy, disability or veteran's status.

[...]

Examples of harassment include gestures, remarks, jokes, taunting, innuendo, display of offensive materials, threats, imposition of academic penalties, hazing, stalking, shunning or exclusion related to the discriminatory or harassing grounds.

This speech code restricts such protected expression as "words or actions that are unwelcome or offensive to a person in relation to" listed personal characteristics, as well as "gestures, remarks, jokes, taunting, innuendo, [and] display of offensive materials." As previously discussed, speech that is merely "unwelcome" or "offensive" to a person on the basis of a trait such as gender or race is almost always protected under the First Amendment, and thus may not be prohibited by a public university such as Troy.

With respect to the examples provided in this policy, it is not clear whether these forms of expression must be "related to the discriminatory or harassing grounds" in order to be actionable, or whether simply all such speech is prohibited. Likewise, it is unclear what the university intends by its ban on "shunning or exclusion related to the discriminatory or harassing grounds." These ambiguities will leave students understandably confused as to their speech rights at Troy, and likely renders the policy both overbroad and vague under First Amendment standards. After all, even "taunting" and "innuendo" that offends someone else is almost always protected by the First Amendment. Consider, for instance, the Supreme Court's famous decision in *Hustler v. Falwell*, 485 U.S. 46 (1988), in which it upheld *Hustler* magazine's right, under the First Amendment, to publish a satirical advertisement suggesting that the Reverend Jerry Falwell lost his virginity to his own mother in an outhouse. Troy's policy untenably threatens not only this type of satire and humor, but many other forms of "jokes," "innuendo," and speech that someone may subjectively find "offensive."

In place of its problematic definition of harassment and the subsequent examples, the university would be better served by incorporating the Supreme Court's controlling standard for student-on-student (or peer) harassment in the educational setting into this and any other policy addressing peer harassment. In *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999), the Court established that peer harassment in the educational context is only that conduct which is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." By definition, this is an exacting, speech-protective standard, and only a policy meeting this standard is permissible at a public university such as Troy. Moreover,

as the Court's only decision to date regarding the substantive definition of peer harassment, *Davis* is controlling on this issue.

IV. Student Handbook: Sexual Harassment

This policy provides, in pertinent part:

Sexual harassment as defined by this policy includes unwelcome sexual advances, requests for sexual favors, and any other verbal, graphic, or physical conduct. If these events are of sexual nature it constitutes sexual harassment when submission to, or rejection of this conduct explicitly or implicitly, affects an individual's employment or educational experience, unreasonably interferes with an individual's work performance or academic performance, or creates an intimidating, hostile, or offensive work or educational environment.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following: [...] Derogatory or demeaning comments about gender, whether sexual or not [...] Name calling, relating stories, gossip, comments, or jokes that may be derogatory toward a particular sex.

This policy threatens students' free speech rights by defining sexual harassment, in part, as any "verbal ... conduct" of a sexual nature. While the policy goes on to clarify that verbal conduct will constitute sexual harassment if it "creates an intimidating, hostile, or offensive work or educational environment," the policy is likely to chill the speech of students confused by its broad terms. Moreover, even speech of a "sexual nature" that another person subjectively deems to be "offensive" will often be protected under the First Amendment. For example, a student could find himself or herself charged under this policy for merely participating in classroom discussion about literature such as *Lady Chatterley's Lover* or *A Catcher in the Rye*. After all, those texts touch upon sexual themes, meaning that a fellow student complaining that the discussion is "offensive" to him or her could trigger university action under this policy. Rather than threaten protected speech under such subjective interpretations, Troy would be better served incorporating the Supreme Court's *Davis* standard—including its crucial element of objective offense—into this policy.

The First Amendment problems presented by this policy are made even more evident by the listed examples of sexual harassment, which include "[d]erogatory or demeaning comments about gender, whether sexual or not," as well as "[n]ame calling, relating stories, gossip, comments, or jokes that may be derogatory toward a particular sex." These examples encompass much protected expression and make clear that FIRE's free speech concerns about the policy are far from theoretical. Indeed, it is deeply chilling to suggest to students that certain categories of speech are simply prohibited across the board, irrespective of whether they meet the legal standard for peer harassment in the educational context. Again, it would be prudent for the university to adopt the *Davis* definition as its controlling standard for peer harassment (including sexual harassment), and to clarify that any stated examples of peer harassment will be actionable only if they are part of a pattern

of conduct that rises to the level of the *Davis* standard. This would allow Troy to maximally protect student discussion and dialogue while balancing its legal obligation to prevent truly harassing behavior in the educational setting.

V. Housing and Residence Life: Harassment

This policy states, in relevant part:

Discrimination, harassment, exclusion, abusive or insensitive language, or any other manifestation of bigotry with respect to race, ethnicity, gender, religious affiliation, physical or mental ability, age, or sexual orientation are unacceptable and will not be tolerated. Any such acts will be dealt with as a serious violation of housing policy.

This policy impermissibly restricts “exclusion, abusive or insensitive language, or any other manifestation of bigotry with respect to” a number of listed personal characteristics. To begin with, the ban on “abusive and insensitive language” is almost certainly overbroad on its face. Consider the Supreme Court’s decision in *Gooding v. Wilson*, 405 U.S. 518 (1972), where it struck down a state law ban on “opprobrious words or abusive language” because those terms, as commonly understood, encompassed speech and expression protected by the First Amendment. Troy’s ban is similarly unlikely to pass constitutional muster.

The policy is also subject to a vagueness challenge, as the phrase “any other manifestation of bigotry” could encompass the expression of one’s views on any number of controversial or oft-divisive issues, such as gay marriage, immigration reform, and affirmative action. Not only are students left unsure about whether they may face punishment for engaging in such discourse, the policy discourages them from sharing with each other informed views on important social and political issues of the day. Yet the Supreme Court has counseled that “speech concerning public affairs is more than self-expression; it is the essence of self-government,” reflecting “our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’” *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Likewise, it is unclear what the university intends by its ban on “exclusion” related to the listed personal traits. As is the case with Troy’s Policy on Harassment and Discrimination and its ban on “shunning or exclusion,” this provision threatens disciplinary action simply for students’ choices of whom to associate with, even though such social decisions are far removed from actual discrimination and harassment, properly defined. Consequently, this too is an infringement upon students’ First Amendment rights.

Conclusion

Troy University’s five red light speech codes will continue to restrict student speech and expressive activity on campus as long as they are on the books. However, these policies can be easily revised to bring them in line with the requirements of the First Amendment, as

explained in FIRE's analysis. FIRE would be happy to work with Troy students and administrators to make these policy changes, and we stand by ready to help at any time.