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April 22, 2011

Susan Pearson
Co-Chair, Special Commission on the Code of Student Conduct
University of Massachusetts Amherst
Whitmore Building
Amherst, Massachusetts 01003

Sent via Electronic Mail (screport@stuaf.umass.edu)

Dear Associate Chancellor Pearson:

As you can see from the list of our Directors and Board of Advisors, the Foundation for Individual Rights in Education (FIRE) unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals from across the political and ideological spectrum on behalf of freedom of speech, freedom of assembly, legal equality, due process, freedom of conscience, and academic freedom on America's college campuses. Our website, thefire.org, will give you a greater sense of our mission and activities.

After having been contacted by several concerned members of the University of Massachusetts Amherst (UMass) community, FIRE writes today to comment on the April 15, 2011, Draft Report of the Special Commission on the Code of Student Conduct. We urge you to revise several proposed changes to UMass policy that would, if enacted, seriously infringe on UMass students' rights to freedom of expression and conscience. A public university such as UMass cannot, consistent with its constitutional obligations, punish students for engaging in expression protected by the First Amendment, nor can it require students to adopt a specific set of ideological values as a condition of membership in the university community.

I. Proposed Changes to the Introduction

The Draft Report recommends that the Code of Student Conduct ("Code") be accompanied by an introduction setting forth the university's core values—which include "non-discrimination, civility, social justice, respect, learning, dignity, equity, and individual and social responsibility"—and stating that students "are expected to maintain high standards of personal conduct and **uphold the above stated values**." (Emphasis added.)

This language violates students' rights to freedom of conscience and expression by requiring them to subscribe to an officially mandated set of ideological values in order to remain in good standing at the university. As Supreme Court Justice Robert H. Jackson wrote in the landmark case of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943):

> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> 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**. (Emphasis added.)

In *Barnette*, the Supreme Court determined that schoolchildren could not be forced to say the Pledge of Allegiance in class—even in the midst of World War II. If elementary school students cannot be forced to pledge allegiance to our nation's flag, adult university students certainly cannot be forced to pledge allegiance to the University of Massachusetts' official positions on "social justice" and "social responsibility."

Indeed, the Draft Report notes that this proposed introduction raised "concerns from University Counsel," but proposes responding to those concerns by symbolically making the introduction an accompaniment to, rather than a part of, the student code. The problem with this course of action is that students will almost certainly understand that the statement that they are "expected to … uphold the above stated values" is a requirement regardless of where the language appears. As federal magistrate judge Wayne Brazil of California wrote in finding several of San Francisco State University's speech codes unconstitutional:

> We must assess regulatory language in the real world context in which the persons being regulated will encounter that language. The persons being regulated here are college students … 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 … 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?
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> *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007).

These concerns apply with equal force here. Is a student who reads that he or she is expected to abide by certain values as a condition of enrollment in the university really going to assume that simply because of the location of that language within the broader code, the university is not actually going to enforce that seeming requirement? Or is the student more likely to believe that

he or she is in fact required to adhere to those values? As Judge Brazil wrote, "To us, this question is self-answering." *Id*.

The university is free to encourage students to share its institutional values—but, as a public university bound by the First Amendment, it categorically may not require them to do so. For an example of how a university can encourage students to share its values without infringing on their fundamental rights, I recommend the introduction to Pennsylvania State University's "Penn State Principles." That introduction reads:

> The Penn State Principles were developed to embody the values that we hope our students, faculty, staff, administration, and alumni possess. At the same time, the University is strongly committed to freedom of expression. Consequently, **these Principles do not constitute University policy** and are not intended to interfere in any way with an individual's academic or personal freedoms. **We hope, however, that individuals will voluntarily endorse these common principles**, thereby contributing to the traditions and scholarly heritage left by those who preceded them, and will thus leave Penn State a better place for those who follow. (Emphases added.)

Using this sort of aspirational language—rather than merely modifying the location of obligatory language—would make clear to students that while the university hopes they will share its conceptions of values like social justice and social responsibility, they are certainly not obligated to do so in order to matriculate at the university.

II. Proposed Changes to Section II.B of the Code

1. Bullying

The Draft Report recommends adding a prohibition on "bullying" to Section II.B of the Code, using the following definition:

> Bullying is the repeated use by one or more students of a written, verbal, or electronic expression or a physical act or gesture, or any combination thereof, directed at a person that: (i) causes physical or emotion [sic] harm to the victim or damage to the person's property; (ii) places the person in reasonable fear of harm to himself or herself or of damage to his or her property; (iii) creates a hostile education [sic] environment for the person; (iv) infringes on the rights of the person on the campus; or (v) materially and substantially disrupts the education process or the orderly operation of the campus.

Section (i) of this definition, which prohibits speech or expression that subjectively causes "emotion[al] harm" to the victim, is unconstitutionally vague and overbroad. As an initial matter, the definition's lack of any objective component—a "reasonable person" standard—means that speech and expression are punishable so long as the victim, however unreasonably sensitive, feels harmed. Courts have repeatedly struck down restrictions on student speech that, like this one, condition speech on subjective listener reaction. *See*, *e.g.*, *DeJohn v. Temple University*, 537

F.3d 301, 318 (3d Cir. 2008) (holding that because university policy failed to require that speech in question "objectively" created a hostile environment, it provided "no shelter for core protected speech"); *Bair v. Shippensburg University*, 280 F. Supp. 2d 357, 369 (M.D. Pa. 2003) (holding that "regulations that prohibit speech on the basis of listener reaction alone are unconstitutional both in the public high school and university settings").

The term "emotion[al] harm" is also extremely vague; without further definition, it could mean anything from hurt feelings to severe emotional distress of a sort that interferes with the victim's ability to receive educational benefits. The Supreme Court has held that laws must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," or else they are unconstitutionally vague. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Because "emotion[al] harm" can encompass an extremely broad spectrum of feelings, there is simply no way for a student to know if his or her speech on a controversial matter might run afoul of this regulation. In addition, the proposed policy is overbroad because most speech and expression that causes the listener to feel upset or distressed is still protected by the First Amendment. In fact, last year the Third Circuit found a public university's policy on "emotional distress" unconstitutional. The court found the policy "entirely subjective" and noted that under this vague restriction, "[e]very time a student speaks, she risks causing another student emotional distress," resulting in a "heavy weight" that does "substantial" damage to free speech on campus. *McCauley*, 618 F.3d at 250, 252.

While FIRE is sensitive to the pressure that universities are under to address instances of "bullying" on campus, the reality is that virtually all of the conduct that anti-bullying policies seek to address is already prohibited by existing university policy or, in the very rare circumstance that university prohibitions are insufficient, by state and federal law. Invasions of privacy, stalking, and actual harassment are—and should be—already banned. The addition of a broadly worded policy such as the one recommended by the Draft Report adds nothing except an unconstitutional threat to free speech on campus.

2. Relationship Violence

The Draft Report also recommends the addition to Section II.B of a paragraph prohibiting "relationship violence," which in spite of its title prohibits not only actual violence but also "emotion [sic] and psychological harassment." By prohibiting "harassment" without defining the term in any way, this policy infringes on constitutionally protected speech and expression.

Student-on-student harassment has a specific definition in the educational context, and only a policy that meets that standard is permissible at a public university. In the educational context, harassment is prohibited by Title IX of the Education Amendments of 1972 (sexual harassment) and by Title VI of the Civil Rights Act of 1964 (harassment on the basis of race, color, or national origin). Speech constituting harassment in violation of these statutes is not protected by the First Amendment, subject to an exacting legal standard. Specifically, the Supreme Court has defined student-on-student harassment as conduct "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999). By definition, this

includes only extreme and usually repetitive behavior—behavior so serious that it would prevent a reasonable person from receiving his or her education.

Harassment, properly understood and as defined by the Supreme Court, refers to conduct that is (1) unwelcome; (2) discriminatory (3) on the basis of gender or another protected status, like race; (4) directed at an individual; and (5) "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." Put simply, to be legally punishable as harassment, a student's behavior must be far more than simply rude or offensive. Rather, the student must be actively engaged in a specific type of discrimination, as defined by law.

While this letter is focused on the proposed revisions to the Code of Student Conduct, it must be noted that UMass maintains several existing policies—including the sexual harassment policy now being incorporated into the Code—that already violate students' First Amendment rights. It is these concerns that led FIRE to write the university about its existing speech codes in December 2009 and again in December 2010. While our primary objective today is to comment on the changes currently under consideration, UMass should also cure the defects in its other policies to ensure students the First Amendment freedoms that UMass, as a public university, is legally bound to protect.

Please spare University of Massachusetts Amherst the embarrassment of fighting against the Bill of Rights, by which it is legally and morally bound. UMass must revise the portions of the Draft Report that would punish students for engaging in constitutionally protected expression or would require students to accept certain values as a condition of membership in the university community. FIRE hopes to resolve this situation amicably and swiftly; we are, however, prepared to use all of our resources to see this situation through to a just and moral conclusion.

Due to the important nature of this matter, we request a response by Friday, May 6, 2011.

Sincerely,

Samantha Harris

Samantha Harris
Director of Speech Code Research

cc:
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