



May 9, 2017

Interim Dean Annette C. Reboli, MD
Cooper Medical School of Rowan University
401 South Broadway
Camden, New Jersey 08103

Sent via U.S. Mail and Electronic Mail (Reboli@rowan.edu)

Dear Dean Reboli:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is deeply concerned about the state of freedom of expression at the Cooper Medical School of Rowan University (CMSRU) following the filing of a "Professionalism Intervention Report" against student [REDACTED] in response to comments [REDACTED] made prior to matriculating at CMSRU and photos posted to her personal Instagram account.

I. FACTS

The following is our understanding of the facts; please inform us if you believe we are in error.

On July 12, 2016, CMSRU Associate Dean for Diversity and Community Affairs Jocelyn Mitchell-Williams spoke over the phone with student [REDACTED] to address complaints concerning [REDACTED] social media use. After the meeting, Mitchell-Williams warned [REDACTED] in an email that "once students matriculate at CMSRU the policy below is in effect," referring to CMSRU's "Social Networking" policy. [REDACTED] replied seeking clarification about the policy but Mitchell-Williams failed to respond.

On January 6, 2017, [REDACTED] met with Chief Student Affairs Officer Marion Lombardi and Assistant Dean for Student Affairs Erin Pukenas. In that meeting, Lombardi

provided [REDACTED] with a “Professionalism Intervention Report” concerning a “collage” of “sexually explicit photos.” The report reads, in relevant part:

It has come to the attention of the Office of Student Affairs and Admissions that [REDACTED] CMSRU MI student, has violated the CMSRU Social Media policy, by posting sexually explicit photos on the social media forum, Instagram.

In one specific photo, [REDACTED] is wearing the CMSRU White Coat, in front of the MEB CMSRU backdrop, representing CMSRU. Commentary associated with the photo, has been determined as leading and inappropriate. The CMSRU photo is associated in a posting collage of other sexually explicit photos posted to this forum. The posting of any explicit photos of a sexual nature associated with a CMSRU medical student on a social media forum, such as Instagram, has been deemed by the Office of Student Affairs and Admissions as unprofessional conduct of a non-academic nature, according to the tenets of the CMSRU Social Media policy and Professional Conduct (Non-Academic policy). This infraction serves as the foundation for this Intervention Report.

This is not the first incident of unprofessional behavior regarding social media for which Ms. [REDACTED] has been counseled by CMSRU administration. CMSRU administration was contacted by an outside source regarding [REDACTED] commentary on social media posted in the summer of 2016, prior to her matriculation. CMSRU administration, including former Dean Katz, were made aware of this commentary. In July 2016, Dr. Jocelyn Williams communicated with [REDACTED] regarding CMSRU’s policies on social media and professionalism, expressing her social media commentary was interpreted as inflammatory and would not align with the CMSRU’s Social Media policy and the professional standards of the institution.

In their meeting with [REDACTED] Lombardi and Pukenas explained that two photos were most concerning to CMSRU. The first was a photo of [REDACTED] in her CMSRU White Coat; the second, a topless photo of [REDACTED] taken at a beach in [REDACTED] Spain. [REDACTED] digitally blurred her nipples in the second photo in order to comply with Instagram’s policies, and the photo was accompanied by “#freethenipple,” a reference to an online campaign to end perceived bias against the display of women’s nipples. Although the image was blurred, Lombardi stated that “what is explicit sexually or promiscuous to someone is maybe not to the next person,” but “when the collage of photos centers around you being in your white coat, representing CMSRU essentially . . . that puts a grave mark on the reputation of the school.”

Because Williams had previously told ██████ that the policy is only applicable to students' conduct after matriculation, ██████ expressed concerns that comments she had made online prior to matriculation were included in the report. Lombardi replied, "But they still exist." ██████ also contested the notion that frontal nudity is sexual in nature, and argued that CMSRU's social media policy should clearly state nudity is not permitted if the university intends to punish it.

Lombardi then called attention to comments posted by other Instagram users to ██████ photos, arguing that these third-party comments could lead viewers to see ██████ post as "condoning sexual promiscuity." Specifically, Lombardi referenced one user who responded to one of ██████ photos with "hottest doc," and another who wrote "[W]e would get in trouble to have you, to be in a clinic at your house." Lombardi conceded that ██████ hadn't written these remarks, but "that's still up for people to see. That's a leading, inflammatory comment." Lombardi suggested ██████ review her account and take down any photos that a "reasonable person" could perceive as "sexually explicit" and then instructed her to remove the photograph of the white coat.

Lombardi and Pukenas also explained that the "Professionalism Intervention Report" could affect ██████ future, as it will now remain in ██████ "file." They explained to ██████ that if multiple reports are accrued, they "could make it actually into [██████] dean's letter when [she is] applying for residency."

Later during the meeting, while attempting to address ██████ frustration that CMSRU's policy limited her ability to express herself on Instagram, Pukenas reiterated that CMSRU-related posts must be taken down, and described the social media policy as "kind of broad." Lombardi interjected, adding that the policy has to be "more vague in general" so the university doesn't have to get "in the weeds." Pukenas then replied, "Right. Obviously, that's how most policies are, right? So if you're familiar with how policies are written, even for the government, there tends to be some room there, right? Because you can't get into every specific." Pukenas then reminded ██████ that if her posts were found to be in violation of CMSRU's social media policy, even after she removed the CMSRU-related post, she would be "still at risk."

On January 25, ██████ attended a follow-up meeting about the Instagram posts with Director of Professionalism Carolyn Bekes. Bekes began the meeting by asking ██████ "What made you do this?" ██████ explained that she had been struggling with body image issues after gaining weight so her therapist suggested she utilize social media to engage in public displays of appreciation for her body as a way to counter the negative feelings she experienced. ██████ also explained that, as a former personal trainer, she used the account to promote fitness and healthy lifestyles.

Referencing the "hottest doc" comment that a third-party user had posted in response to ██████ photo, Bekes expressed concern that the comment associated

the picture with CMSRU. ██████ explained that she deleted the comment when it had been brought to her attention by CMSRU. Soon after, Bekes pulled up a photo from ██████ Instagram, pointed out that she found it “pretty innocuous,” and then asked, “How did it provoke some of these comments?,” referring again to comments other Instagram users left on ██████ pictures. ██████ replied, “That’s just the way men in our society are to women.”

Near the end of the meeting, Bekes made a “suggestion” that ██████ “stop posting.” Bekes then recommended that ██████ ask her fiancé for a “second opinion” before posting or that she speak to someone who is “more middle of the road” or “more conservative” to help keep ██████ “out of trouble” by helping her “censor it.” As punishment for the infraction, Bekes assigned ██████ a brief PowerPoint presentation on social media and professionalism in medicine.

On March 1, Bekes sent an email reminding ██████ of the PowerPoint assignment and extending the deadline to March 6, and restating her suggestion that ██████ “ask advice from a third person to help [her] censor what [she] post[s].” ██████ replied asking for assurance that, by sending the PowerPoint presentation, she was not offering “any admission of guilt” and that “these PowerPoints will ‘close’ the files in a way that they will never be used against [her] in the future.” Bekes replied, “It is my understanding that this will not affect your future at CMSRU. I personally think that there is more risk that things will continue if this doesn’t end with me but that is just my opinion.” ██████ then submitted her presentation.

II. ANALYSIS

By punishing ██████ for her photos and the commentary they generated from other users, CMSRU violated ██████ First Amendment rights and chilled the expressive rights of all CMSRU students. CMSRU must immediately remove the “Professionalism Intervention Report” from ██████ file and revise the unconstitutional portions of its social media policy.

It has long been settled law that the First Amendment is binding on public institutions of higher education such as CMSRU. *See Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”).

i. **CMSRU’s “Social Networking” policy is unconstitutional and must be revised**

The “Social Networking” policy under which ██████ was charged states, in pertinent part:¹

All students must observe the following rules when accessing or posting to social network sites:

- Post respectfully. Avoid posting comments or materials that may be seen as demeaning, threatening, or abusive.

[...]

The following actions are strictly forbidden:

[...]

- Display of vulgar language or potentially offensive language is not permitted.
- Display of language or photographs that imply disrespect for any individual or group because of age, race, gender, ethnicity, or sexual orientation is not permitted.
- Posting personal photographs or photographs of others that may reasonably be interpreted as condoning irresponsible use of alcohol, substance abuse, or sexual promiscuity is prohibited.
- Posting of potentially inflammatory or unflattering material on another individual’s website, e.g. on the “wall” of that individual’s Facebook site is prohibited.

[...]

Note: The assistant dean for student affairs or the associate dean for medical education can place a student on immediate leave for an issue related to professional behavior. A breach of this policy will be considered such an issue. Such a breach will be reviewed by the Hearing Body for Student Rights.

When discussing the policy with ██████ Lombardi and Pukenas stated that it was “kind of broad” and “more vague in general” and claimed that government policies

¹ *Student Handbook*, COOPER MEDICAL SCHOOL OF ROWAN UNIVERSITY, <http://www.rowan.edu/coopermed/students/files/handbook.pdf> (last visited Apr. 30, 2017).

should be broad. These assertions are at odds with the most basic principles of First Amendment precedent, which makes clear that broad and vague policies do not comport with the First Amendment. 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 without administrators *admitting* that CMSRU’s “Social Networking” policy is *intentionally* overbroad, the policy’s plain language impermissibly prohibits a wide swath of constitutionally protected speech, rendering the policy overbroad on its face.

The First Amendment “generally prevents government from proscribing speech . . . or even expressive conduct,” *R.A. V. v. St. Paul*, 505 U.S. 377, 382 (1992), unless it falls within certain well-defined categories, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, *see United States v. Stevens*, 559 U.S. 460, 468–69 (2010). Outside of these categories, “[c]ontent-based regulations are presumptively invalid.” *R.A. V.*, 505 U.S. at 382. Under these rulings and other long-established precedent, CMSRU’s policy threatens a great deal of protected speech—including social and political commentary that lies at the core of the First Amendment—that a student or administrator could deem to be “abusive,” “demeaning,” “vulgar,” “offensive,” “inflammatory,” “disrespect[ful], or “condoning irresponsible use of alcohol, substance abuse, or sexual promiscuity.” Under CMSRU’s policy, students may be punished for expressing views on important political and social issues such as affirmative action, religion, abortion, marijuana legalization, and much more, simply because their speech offended others. This result is at odds with the Supreme Court’s recognition 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) (internal quotations omitted).

The Supreme Court has unequivocally held that speech cannot be restricted because it is profane, vulgar, or offensive. *See, e.g., Cohen v. California*, 403 U.S. 15 (1971) (overturning a conviction premised upon the use of “vulgar, profane, or indecent language” in wearing a jacket emblazoned with the words “Fuck the Draft” in a courthouse hallway, and observing that “one man’s vulgarity is another’s lyric”); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit . . . expression . . . simply because” it is “offensive or disagreeable.”). In *Papish v. Board of Curators of the University of Missouri*, the Supreme Court made plain that speech “on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” 410 U.S. 667, 670 (1973). For this reason, CMSRU’s broad prohibition of “vulgar” or “unflattering” speech necessarily fails First Amendment scrutiny. FIRE would be happy to work with CMSRU to revise this policy.

ii. ██████████ Instagram post was protected political speech

CMSRU’s policy prohibiting “condoning . . . sexual promiscuity” is not just unconstitutional; it is also inapplicable to ██████████ Instagram post. The post in question contains an image of ██████████ topless (nipples blurred, as Instagram does not allow display of women’s nipples) on a beach in ██████████ Spain (Attachment A). The post includes the caption:

Me: “is it ok if I swim like this?” Diving instructor: “honey, we’re in ██████████ you can take off the bottoms too if you want!” Nipples are welcome in ██████████ but not Instagram, hence the edits . . . #freethenipple . . . #fit #fitness #fitspo #active . . .

As she explained in her meeting with Bekes, ██████████ at the advice of her therapist—used her personal Instagram account as a vehicle to express appreciation for her body and bolster her self-confidence. This intent is evidenced in ██████████ caption, which included hashtags celebrating her body and an active lifestyle. ██████████ does not endorse “promiscuity,” let alone discuss sexual activity at all, anywhere in the post.

Additionally, ██████████ support of the movement to “free the nipple” constitutes protected political speech. The debate over gender equality and women’s right to freely display their breasts is hotly contested.² CMSRU cannot hinder students’ ability to engage in important discussions—like those surrounding women’s rights—by claiming that they are “condoning sexual promiscuity” in doing so. In fact, CMSRU’s response to the photo illustrates exactly what ██████████ and others are advocating: women’s ability to engage in public activities topless without the act being perceived as sexual. Medical school administrators should understand that female nudity is not necessarily an allusion to sexual activity.

iii. ██████████ did not create a “collage” of explicit photos surrounding her CMSRU White Coat photo

The Professionalism Intervention Report states that “[i]n one specific photo, ██████████ is wearing the CMSRU White Coat, in front of the MEB CMSRU backdrop, representing CMSRU. . . . The CMSRU photo is associated in a posting collage of other sexually explicit photos posted to this forum.” CMSRU’s description implies that ██████████ created a “collage” of “sexually explicit photos” and the photo of ██████████ in her CMSRU White Coat. This charge is demonstrably false.

² See, e.g., Mark Joseph Stern, *Federal Judge Rules for Free the Nipple, Holds Topless Ban May Violate U.S. Constitution*, SLATE (Oct. 24, 2016, 3:27 PM), http://www.slate.com/blogs/xx_factor/2016/10/24/federal_judge_rules_for_free_the_nipple_in_fort_collins_topless_case.html (discussing court ruling in favor of “advocacy group that opposes sex-specific breast-exposure laws”).

██████ did not create a “collage.” She posted a number of photos to her Instagram account, including the CMSRU White Coat photo and photographs of ██████ posing in bathing suits or in front of mirrors. These photos are displayed together as thumbnails when ██████ account’s home page is viewed (Attachment B). In other words, what CMSRU describes as a “collage” is in fact the aggregation of thumbnails of posts that Instagram automatically generates to serve as the “home page” of each Instagram user. CMSRU’s report falsely implies that ██████ herself *created* a collage which intentionally associated allegedly explicit photos with CMSRU. This misrepresentation betrays a fundamental misunderstanding of how Instagram works. Further, as applied here, CMSRU’s misunderstanding means that any time a CMSRU student posts a photo that might identify them as a student, any *other* photos posted on the same account will be mistakenly considered to be part of a “collage.” Describing the photos as a “collage” implies that ██████ specifically selected an explicit photo and intentionally placed it alongside a CMSRU photo. This phrasing is misleading, at best, and cannot be included in ██████ record, nor in the letters CMSRU will send to potential residency programs.

iv. ██████ cannot be punished for comments made by others

The Professionalism Intervention Report also states, in reference to the White Coat photo, “[c]ommentary associated with the photo[] has been determined as leading and inappropriate.” This statement is misleading in its implication that these “inappropriate” comments were made by ██████. Statements made by Bekes and Lombardi during their meetings with ██████ made clear that the “commentary” at issue was posted by her Instagram followers. If ██████ is to be held responsible for these comments, it can only be because she failed to delete language contributed by third parties or because the university believes that she should be held responsible for receiving such commentary. The former is barred by federal law and the latter is morally reprehensible. CMSRU must rescind this statement from the report.

Section 230 of the Communications Decency Act (CDA) generally prevents the government from holding a person or company liable for content submitted by third parties. The law provides that “[n]o provider *or user* of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230 (emphasis added). In other words, a content provider or internet user who creates or maintains a forum where others can provide content has absolute discretion on whether to moderate, delete, or post content submitted by third parties. In “selectively choosing which messages to delete and which to leave posted,” for example, an internet user was shielded by the CDA because he engaged in “nothing more than the exercise of a publisher’s traditional editorial functions, namely, whether to publish, withdraw, postpone or alter content provided by others.” *Donato v. Moldow*, 865 A. 2d 711, 725–26 (N.J. Super. App. Div. 2005); *see also Milgram v. Orbitz Worldwide*, 419 N.J. Super. 305, 318 (Super. Ct. 2010) (finding “persuasive” the Ninth Circuit’s observation that the CDA

covers “any activity that can be boiled down to deciding whether to exclude material third parties seek to post online”). CMSRU cannot penalize ██████ for the words of others, nor for declining to delete those words.

Leaving aside whether CMSRU administrators are aware of the CDA, let alone its application here, it is alarming that a public university would seek to hold a student accountable for the words of others. Administrators should not be interrogating students to explain why what they themselves characterize as a “pretty innocuous” photograph “provoke[d] some of these comments.” Public universities cannot—especially during disciplinary meetings—ask students to answer for others’ speech. Most, if not all, CMSRU students participate in social media. Requiring students to police and answer for the online words of others is an impossible charge. It grants administrators the unfettered authority to decide not only whether a student is “unprofessional,” but whether their friends, or even total strangers who contact them on social media, are sufficiently polite in non-professional settings.

Moreover, it is appalling that a public university would think it appropriate to discipline a student for being the subject of sexual commentary, welcome or unwelcome. Does CMSRU believe it should be able to call any student into a meeting and ask them to explain why other internet users made crude replies to their photographs, or any “inappropriate” comments on any of their postings? To do so would be unthinkable, and it is unthinkable in ██████ case as well. CMSRU must abandon this practice and eliminate from ██████ file any misleading claims about “[c]ommentary associated” with her photos.

v. CMSRU cannot punish ██████ for posts made prior to matriculation

Finally, the Professionalism Intervention Report lists a “series of red flags” as the impetus for the report, noting:

This is not the first incident of unprofessional behavior regarding social media for which Ms. ██████ has been counseled by CMSRU administration. CMSRU administration was contacted by an outside source regarding ██████ commentary on social media posted in the summer of 2016, prior to her matriculation.

CMSRU cannot rely on speech prior to matriculation as a justification to reprimand its students. “A fundamental principle in our legal system is that laws . . . must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). In other words, people must be able to “know what is required of them so they may act accordingly[.]” *Id.* CMSRU cannot, consistent with these basic principles, penalize ██████ for comments made before she was a student, pursuant to a policy that did not apply to her at the time. A university that places reports in students’ files—reports that may impede their careers—partially on the

basis of comments they made prior to matriculation has abandoned meaningful respect for due process. Put simply: CMSRU cannot retroactively punish, nor list as part of a series of behavior that can be punished, speech made by students *prior* to matriculation and before policies governing their behavior were in effect.

III. CONCLUSION

CMSRU's punishment of [REDACTED] [REDACTED] violates core First Amendment principles and poses a severe threat to CMSRU students' freedom of expression. CMSRU must immediately remove the "Professionalism Intervention Report" from [REDACTED] file and revise its social media policy so students no longer face punishment for speech protected by the First Amendment.

FIRE is committed to using all of the resources at its disposal to see this matter through to a just conclusion. We have enclosed with this letter a signed FERPA waiver from [REDACTED] [REDACTED] permitting you to fully discuss this case with FIRE.

We request a response to this letter by May 23, 2017.

Sincerely,



Sarah McLaughlin
Senior Program Officer, Individual Rights Defense Program

Encls.

cc:

Carolyn Bekes, Director of Professionalism
Marion Lombardi, Chief Student Affairs Officer
Erin Pukenas, Assistant Dean for Student Affairs