



Foundation for Individual Rights in Education

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December 9, 2008

President Graham B. Spanier
Pennsylvania State University–University Park
President's Office
201 Old Main
University Park, Pennsylvania 16802

Sent via U.S. Mail and Facsimile (814-863-8583)

Dear President Spanier:

Thank you for your thoughtful response to FIRE's letter of September 30, 2008, recommending a thorough review of Penn State's policies in light of the U.S. Court of Appeals for the Third Circuit's ruling in *DeJohn v. Temple University*, which struck down Temple University's former sexual harassment policy as unconstitutional. FIRE appreciates your commitment to continual self-evaluation at Penn State.

To that end, I write today to express serious concern about the Penn State Principles, a set of behavioral guidelines requiring Penn State students to affirm that they will refrain from any behaviors that "compromise or demean the dignity" of anyone at Penn State, including "ridiculing," "insulting," or "taunting." However well-intentioned, the Principles violate both the First Amendment and Penn State's own "Policy Statement on Free Expression and Disruption," which states that Penn State "is committed to the protection and preservation of the free search for truth [and] the freedom of thought, inquiry, and speech." It is for these reasons that FIRE named the Penn State Principles our "Speech Code of the Month" for September 2008. We urge you to immediately revise the policy.

In analyzing the problems presented by the Penn State Principles, it is first important to recognize as a threshold matter that the Principles, as presented to students, are not aspirational ideals, but rather statements of policy. Indeed, the Penn State Principles are prefaced by an explicit statement that it is "understood" that students "agree to abide by the Principles." Similarly, the preface assumes that students "endors[e]" the statements, and each principle is phrased as an affirmative declaration of intent—e.g., "I will respect the dignity of all individuals within the Penn State community." It is impossible to imagine that incoming students, when considering the practical effect of the Penn State Principles on

their personal conduct, do not take the university at its word. As such, rather than a mere exhortation, the Principles are substantive, mandatory commitments to a certain code.

In relevant part, one of the principles states that “I will respect the dignity of all individuals within the Penn State community” and further provides that:

Actions motivated by hate, prejudice, or intolerance violate this principle. I will not engage in any behaviors that *compromise or demean the dignity* of individuals or groups, including intimidation, stalking, harassment, discrimination, *taunting, ridiculing, insulting*, or acts of violence. (Emphasis added.)

Again, no matter how seemingly innocuous, this principle serves as an unconstitutional civility code and violates the rights to free expression and freedom of conscience guaranteed to Penn State students under the First Amendment. The principle is constitutionally void for both overbreadth and vagueness.

First, the principle relies on impermissibly vague terms—namely, to “compromise” or “demean” the “dignity” of others, and “taunting,” “ridiculing” and “insulting”—that could, in application, mean virtually anything. 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). Students at Penn State will be forced to guess what their peers and/or the administration might deem “compromis[ing]” or “insulting,” and as a result will likely self-censor to such a degree that expression on campus will be chilled.

Moreover, even assuming that a student was able to figure out which speech is and is not “compromising” or “insulting,” the fact that a student seemingly may be punished for “demeaning the dignity” of others means that engaging in wide swaths of constitutionally protected expression may serve as grounds for punishment. Such a result is simply untenable. The U.S. Supreme Court has explicitly stated 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) (emphasis added).

The effect of Penn State’s apparent prohibition of “demean[ing],” “compromis[ing],” or “ridiculing” speech is likely profound. For example, the policy arguably bars, among other forms of protected speech, any kind of sharp-edged humor on campus. Yet, parody and satire exist precisely to challenge, to amuse, and even to offend, and these kinds of speech are unambiguously protected under the First Amendment. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Supreme Court ruled that the First Amendment protects even the most outlandishly offensive parody—in that case, a cartoon suggesting that the Reverend Jerry Falwell lost his virginity in a drunken encounter with his mother in an outhouse. This blatantly “ridiculing” speech is protected under the First Amendment, and such expression likewise must be protected at Penn State. Penn State is free to criticize such expression but is bound not to punish or prohibit it.

The chilling effect of the Penn State Principles may very well have been the university's intention in enacting the Principles. But while there may be well-intentioned reasons to prefer the calm of politically correct speech to potential conflict and dispute, such a preference runs contrary to the very principles behind our Bill of Rights. As the Supreme Court declared in the landmark case of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943): "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." The Court concluded that "the purpose of the First Amendment to our Constitution" was precisely to protect "from all official control" the domain that was "the sphere of intellect and spirit." Nowhere are these statements more applicable than on the campus of a modern American university, where young adults should have the freedom to define their own beliefs by exposure to an open marketplace of ideas.

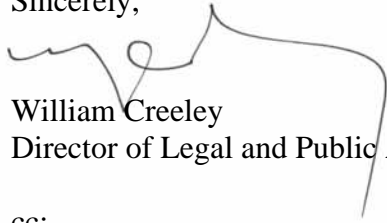
Finally, FIRE must again point out that Penn State is legally bound by the decisions of the United States Court of Appeals for the Third Circuit, a jurisdiction in which two decisions have now unequivocally established the unconstitutionality of campus speech codes. *See Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001); *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008). In *Saxe*, the Third Circuit struck down a public high school's harassment policy on First Amendment grounds because it conditioned the permissibility of speech on subjective listener reaction. The policy at issue defined harassment as "verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment." The court found the policy unconstitutional because it did not "require any threshold showing of severity or pervasiveness," and thus "it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone." The court emphasized that "it is certainly not enough that the speech is merely offensive to some listener."

Similarly, in *DeJohn*, the court also pointed out that college administrators "are granted *less leeway* in regulating student speech than elementary and high school administrators"—which means the court's earlier decision in *Saxe* is yet more important on the college campus. In light of these clear rulings from the Third Circuit, the Penn State Principles—which also condition the permissibility of student speech on listener reaction—fail to stand up to constitutional scrutiny.

We ask you to revise the Penn State Principles to be consistent with the guarantees of free expression that Penn State is obligated to uphold. If Penn State is serious about protecting the "free search for truth; the freedom of thought, inquiry, and speech," you will eliminate the school's vague and overbroad regulation of protected student speech. The fact that, as a public university, Penn State is legally obligated to do so should be of secondary importance to upholding the promises Penn State has made to its students and fulfilling the educational mission the university has set for itself. To prevent speech at Penn State from being impermissibly chilled, please clarify to students and administrators at the university that protected expression may never and will never be prohibited, investigated, or punished.

We request a response on this matter by 5:00 p.m. EST, December 30, 2008.

Sincerely,

A handwritten signature in black ink, appearing to read 'William Creeley', with a long, sweeping horizontal stroke extending to the right.

William Creeley
Director of Legal and Public Advocacy

cc:

Damon Sims, Vice President for Student Affairs, Pennsylvania State University
Philip Burlingame, Associate Vice President for Student Affairs, Pennsylvania State University
Wendell Courtney, University Counsel, Pennsylvania State University