FIRE
Foundation for Individual Rights and Expression

September 8, 2023

Sandra L. Kurtinitis
Office of the President
Community College of Baltimore County
7201 Rossville Boulevard
Baltimore, Maryland 21237-3899

Sent via U.S. Mail and Electronic Mail (skurtinitis@ccbcmd.edu)

Dear President Kurtinitis:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by Community College of Baltimore County's policies related to preferred names and communications with the press, as they violate the expressive rights of faculty and students.[2] As a public college bound by the First Amendment,[3] CCBC must eliminate or revise these policies in order to align with the college's binding First Amendment obligations.[4]

First, CCBC's Preferred Name policy asserts that students and faculty are "expected to facilitate the use of the preferred name and corresponding pronouns[,]" "in the course of college education and internal communication."[5] Given the word "expected," faculty and students will reasonably interpret this policy as compelling use of chosen first names and pronouns in communications, raising significant constitutional concerns.

The policy violates the First Amendment by compelling speech. The "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," except in a few "well-defined and narrowly tailored limited classes of speech," such as incitement or

[1] For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

[2] The recitation of facts here reflects our understanding of the pertinent information. We appreciate that you may have additional information to offer and invite you to share it with us.

[3] *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.").

[4] *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182–84 (6th Cir. 1995).

[5] *College Handbook*, Basics, Preferred Name, COMM. COLL. OF BALT. CNTY., 12, (revised Feb. 2022) (on file with author).

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defamation.[6] While refusal to use an individual's chosen name or pronouns may cause offense or discomfort, that alone is insufficient to remove First Amendment protection.[7]

Additionally, compelled speech is anathema to the First Amendment, which protects "both the right to speak freely and the right to refrain from speaking at all."[8] The policy "potentially compel[s] speech on a matter of public concern," since the use of titles and pronouns relates to "core religious and philosophical beliefs"[9] and carries an ideological message with which faculty and students may disagree.[10] A college can no more bar faculty and students from ever using an individual's legal first name or non-preferred pronouns than it could forbid them from referring to administrators as "Big Brother."

In certain circumstances, persistent and unwelcome use of a person's legal first name or non-preferred pronouns in speech targeted at that individual could be part of a pattern of conduct amounting to actionable harassment or discrimination. Such conduct would need to meet a strict legal standard that requires speech to be unwelcome, discriminatory on the basis of gender or another protected status, and "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[11] However, merely refusing to use an individual's preferred name or pronouns, without more, cannot give rise to a claim of discrimination or harassment. CCBS's policy is thus far from narrowly tailored to prohibit speech meeting this stringent legal standard, and CCBC's legitimate interest in preventing harassment does not allow it "to discipline professors, students, and staff any time their speech might cause offense."[12]

If not eliminated in full, FIRE urges CCBC to revise the language in the handbook to "encourages" or "recommends" to make clear that faculty and students remain free to choose whether to use preferred names and pronouns.

Second, CCBC's Media Relation Policy states, "[a]ll contact with the news or radio media must be referred to the College Communications Department."[13] Barring employees from speaking directly to media violates the First Amendment by limiting both the free press rights of journalists—including student journalists—and the expressive rights of employees

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[6] *United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

[7] *See Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011) (holding the First Amendment protects protesters holding insulting signs outside of soldiers' funerals that read "God hates fags"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973) ("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'").

[8] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

[9] *Meriwether v. Hartop,* 992 F.3d 492, 509–10 (6th Cir. 2021).

[10] *Id.* at 498–501, 507 (reinstating a professor's First Amendment lawsuit against a public university that had punished him for refusing to use a student's preferred pronouns).

[11] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

[12] *Meriwether,* 430 U.S at 510.

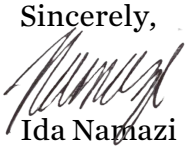
[13] *College Handbook*, Basics, Media Relations, COMM. COLL. OF BALT. CNTY., 16, (revised Feb. 2022) (on file with author).

themselves,[14] by imposing an unconstitutional prior restraint[15] that violates an employee's right to speak as a private citizen on matters of public concern.[16]

Of course, CCBC may restrict employees from speaking *on behalf of* the institution without prior approval. But when a policy restricts the employee's speech as a private citizen, government employers bear a heavy burden to demonstrate "reasonable ground to fear that serious evil will result if free speech is practiced."[17] These fears must reflect "'real, not merely conjectural [harms],'" and CCBC must be able to show "'the regulation will in fact alleviate these harms in a direct and material way.'"[18] This high bar is rarely met, and courts consistently invalidate policies that restrain government employees' speech in their personal capacities.[19] CCBC must revise this policy to make clear employees are free to speak with the press in their capacities as individual citizens.

FIRE would be pleased to work with CCBC to ensure its policies do not unconstitutionally compel or restrict faculty or student speech. We request a substantive response to this letter no later than the close of business on September 22, 2023.

Sincerely,



Ida Namazi
Program Officer, Campus Rights Advocacy

CC: Tracy E. Ashby, General Counsel
Melissa Hopp, Vice President of Administrative Services

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[14] Accordingly, a government employer cannot penalize an employee for speaking as a private citizen on a matter of public concern unless the employer demonstrates that its interests "as an employer, in promoting the efficiency of the public services it performs through its employees" outweighs the interest of the employee, "as a citizen, in commenting upon matters of public concern[.]" *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). *See also Stanley v. Georgia,* 394 U.S. 557, 564 (1969) (it is "well established" that freedom of expression "protects the right to receive information and ideas").

[15] *See Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002) (requiring approval from officials before speaking is "offensive—not only to the values protected by the First Amendment, but to the very notion of a free society."); *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (a prior restraint is "the most serious and least tolerable infringement on First Amendment rights.").

[16] *See Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006); *United States v. Nat'l Treas. Emps. Union*, 513 U.S. 454, 468 (1995); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[17] *Nat'l Treasury Emps. Union*, 513 U.S. at 468, 475.

[18] *Id.* at 475.

[19] *See, e.g.*, *Harman v. City of New York*, 140 F. 3d 111, 116 (2d Cir. 1998) (striking down a policy requiring that "[a]ll contacts with the media regarding any policies or activities of the Agency" be referred to Media Relations); *Barrett v. Thomas*, 649 F.2d 1193, 1199 (5th Cir. 1981) (holding overbroad employee speech policy unconstitutional). For further discussion of government employee ban cases, *see Protecting Sources and Whistleblowers: The First Amendment and Public Employees' Right to Speak to the Media*, BRECHNER CENTER FOR FREEDOM OF INFORMATION, Oct. 7, 2019, http://brechner.org/wp-content/uploads/2019/10/Public-employee-gag-orders-Brechner-issue-brief-as-published-10-7-19.pdf [https://perma.cc/7G5W-PRSP].