FIRE

Foundation for Individual Rights in Education

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President John Hennessy
Office of the President
Building 10
Stanford University
Stanford, California 94305-2061

Sent via U.S. Mail and Facsimile (650-725-6847)

Dear President Hennessy:

The Foundation for Individual Rights in Education (FIRE; thefire.org) is disappointed to write Stanford University again about the matter of student [redacted], who was recently found responsible for violating the university's Fundamental Standard as defined in Administrative Guide memoranda 23.2 (sexual harassment) and 23.3 (sexual assault).

FIRE has already informed you via a May 4, 2011, email (attached) of our objections to Stanford's decision to change the standard of evidence required for a finding of responsibility in sexual misconduct cases. Our objection is particularly pronounced with regard to [redacted]'s case, wherein the evidentiary standard was changed after proceedings had already begun. As we explained in that email, American jurists as far back as 1798 recognized as unjust exactly this kind of *ex post facto* change in the rules of a hearing in progress. Indeed, the Constitution prohibits the government and its agencies from passing *ex post facto* laws and regulations. While we understand that the federal Department of Education's Office for Civil Rights recently mandated that a preponderance of the evidence standard must be used to adjudicate sexual misconduct cases, Stanford could have changed the standard for future hearings without affecting the presumably small number of hearings already in progress, avoiding this manifest injustice.

Unfortunately, this *ex post facto* change to the standard of evidence is not the only due process abuse to which [redacted] has been subjected. The definition of "consent" pursuant to which he was found responsible for sexual assault is also fatally flawed, and the panel which found him responsible has been trained not to believe the word of the accused. Those flaws have not only led [redacted] to be improperly found responsible for one of society's most heinous crimes, but could also result in future Stanford students, both male and female, being unjustly punished as well.

Stanford promulgates the following definition of sexual assault in Administrative Guide Memo 23.3:

> Sexual assault can occur either forcibly and/or against a person's will, or when a person is incapable of giving consent. A person is legally incapable of giving consent if under 18 years of age; if intoxicated by drugs and/or alcohol; if developmentally disabled; or if temporarily or permanently mentally or physically unable to do so.

The part of this definition applied by the Dean's Alternative Review Process (DARP) in [redacted]'s case was Stanford's assertion that "A person is legally incapable of giving consent … if intoxicated by drugs and/or alcohol." In pertinent part, the Findings of Fact in his case read:

> The panel finds the Responding Student responsible for violating Stanford's Sexual Assault policy, which states "sexual assault is the commission of an unwanted sexual act […] that occurs without indication of consent of both individuals." The Administrative Guide Memo 23.3 specifies that "A person is legally incapable of giving consent […] if intoxicated by drugs or alcohol." The panel finds that the impacted party was intoxicated by alcohol, per her own report as well as the reports of reliable witnesses who testified to signs of her visible intoxication including slurred speech.

Unfortunately, Stanford's Sexual Assault policy misstates state law and is unjustly overbroad in practice.

California law does not support the assertion that a person is legally incapable of consent simply because he or she is intoxicated to any degree. As stated in the 2000 California Courts of Appeal case of *People v. Giardino*, "In deciding whether the level of the victim's intoxication deprived the victim of legal capacity, the jury shall consider all the circumstances, including the victim's age and maturity. It is not enough that the victim was intoxicated to some degree, or that the intoxication reduced the victim's sexual inhibitions." 82 Cal. App. 4th 454, 466 (internal citations omitted).

Stanford's policy, in contrast, makes the overbroad, blanket statement that any level of intoxication renders a person legally unable to consent to sexual activity. It does not define intoxication in any way, let alone inform the DARP panel that intoxication "to some degree" is not enough. This omission results in the effective prohibition of routine behavior that, as Stanford must acknowledge, likely occurs on campus every day of every week. It also resulted in a finding of responsibility for [redacted], since the panel simply determined to its satisfaction that his accuser was "intoxicated" and thus found him responsible for sexual assault solely on that basis. There is no sign in the findings of fact that indicates that the panel either considered the degree of intoxication or the actual presence or lack of consent. These omissions serve as a damning indictment of Stanford's policy.

Like it or not, sexual activity and consumption of alcohol are extremely common on a college campus. While Stanford administrators may take the attitude that this aspect of collegiate culture

is unfortunate, it is a fact of life on the vast majority of American college campuses. Participating in this culture may be considered by some to be immoral or unwise, but it is not a criminal act. Yet under Stanford's rules, there are most likely hundreds of what the college deems "sexual assaults"—sexual acts taking place in which one or more parties are intoxicated—occurring every week, with the vast majority of students having no idea that such an "assault" took place or that they were involved in it, effectively rendering students *and their partners* unwitting rapists. Deeming both parties in a sexual encounter to be guilty of assaulting one another cannot be reconciled with reason or logic (except in the most bizarre cases). Yet under Stanford's rules, even married students engaging in consensual sexual intercourse while intoxicated are guilty of sexually assaulting one another.

While clearly intended to guard against predatory sexual behavior, Stanford's policy instead dangerously trivializes sexual assault by equating any intoxicated sex with rape. Because it prohibits common behavior, the policy is unacceptably susceptible to arbitrary enforcement by the university. Unless Stanford plans to prosecute every single instance of sex while intoxicated, the policy will necessarily be applied arbitrarily and at the sole discretion of administrators—a recipe for severe injustice.

Were Stanford to revoke its current defective policy and replace it with a reasonable, common-sense policy, it would follow the commendable example set by Duke University. In 2009, Duke enacted a Sexual Misconduct policy that defined consent, in pertinent part, as follows:

> Conduct will be considered "without consent" if no clear consent, verbal or nonverbal, is given. **It should be noted that in some situations an individual's ability to freely consent is taken away by another person or circumstance. Examples include, but are not limited to, when an individual is intoxicated, "high,"** scared, physically or psychologically pressured or forced, passed out, intimidated, coerced, mentally or physically impaired, beaten, threatened, isolated, or confined. [Emphasis added.]

The bolded language above is functionally equivalent to Stanford's policy stating that "[a] person is legally incapable of giving consent … if intoxicated by drugs and/or alcohol." FIRE wrote to Duke pointing out this and other problems with its Sexual Misconduct policy. Some months later, Duke changed its policy to accord with reason and common sense. It now reads:

> Conduct will be considered "without consent" if no clear consent, verbal or nonverbal, is given. It should be noted that in some situations an individual's ability to freely consent is taken away by another person or circumstance. Examples include, but are not limited to, when an individual **is incapacitated due to alcohol or other drugs**, scared, physically forced, passed out, intimidated, coerced, mentally or physically impaired, beaten, threatened, isolated, or confined. [Emphasis added.]

While not a major change in wording, the change to the meaning is enormous. Duke students who were intoxicated during sexual activity are no longer rendered unwitting rapists of one another. A similar change would have the same beneficial effect for Stanford students.

The problem with Stanford's sexual assault policy is compounded by the fact that Stanford has chosen to use materials to train its DARP panelists that suggest that men accused in sexual assault cases are not to be trusted or believed, and that panelists who maintain neutrality in adjudicating such disputes are effectively siding with men accused of assault or abuse. (FIRE uses the word "men" rather than simply "accused" here because Stanford's training materials emphasize that it is specifically men who are to be treated with great distrust and suspicion when considering claims of abuse.) FIRE is in possession of these materials, an accurate analysis of which published as an op-ed by Stanford alumni and attorneys Mike Armstrong and Daniel Barton in the April 29, 2011, issue of the *Stanford Daily* newspaper (available at http://www.stanforddaily.com/2011/04/29/op-ed-a-thumb-on-the-scale-of-justice/).

As Armstrong and Barton point out, the section of the book *Why Does He Do That?* by Lundy Bancroft that is provided to DARP panelists for "training" purposes is hardly conducive to ensuring a fair trial for men accused of sexual misconduct. Assertions emphasized as "Key Points To Remember" include the following (these are direct quotes):

- Everyone should be very, very cautious in accepting a man's claim that he has been wrongly accused of abuse or violence. The great majority of allegations of abuse—though not all—are substantially accurate. And an abuser almost never "seems like the type."
- When people take a neutral stand between you and your abusive partner, they are in effect supporting him and abandoning you, no matter how much they may claim otherwise.

These key points are not only found in the provided section of Lundy's book but are reemphasized in another document that appears to inform panelists what they are to have learned from the article.

Another document provided to DARP panelists, authored by the "Center for Relationship Abuse Awareness" states that one of the "indicators of an abuser" is that he or she will "Act persuasive and logical."

Overall, the training materials provided to DARP panelists make it abundantly clear that the mission of panelists should not simply be to find the truth or falsity of an accusation in a neutral manner, but rather to strike a blow against a perceived ongoing sexual exploitation of women by men.

While FIRE does not take a position for or against this proposition as a matter of philosophy, it certainly cannot be considered an appropriate baseline for judgment in a student judicial hearing, where both parties are relying on the neutral fact finders on the panel to determine to the best of their ability what happened and whether it violated university policy. No court in the United States would ever consider such material suitable to inform a jury or any other panel of fact finders of their duties. By providing such "training" to its own DARP panelists, Stanford has effectively eliminated any possibility of a fair hearing for any accused male student, making a

mockery of justice and fairness. In light of these materials, how can any male Stanford student ever believe that he could receive a fair hearing?

Just as it is morally incumbent upon Stanford to change its unjust policies and practices, Stanford has an equal responsibility to grant a rehearing or appeal to [redacted] and to any other student who has been found responsible for sexual assault merely because it was determined that his or her alleged victim was intoxicated to some degree and who requests a rehearing or appeal. Since Stanford's own findings of fact makes it clear that intoxication was the only concern of the DARP panel, and since his finding of responsibility came only because of a policy that is manifestly unjust, [redacted] must be granted a rehearing under a corrected rule, or his finding of responsibility must be overturned on appeal.

Stanford's current sexual assault policies and practices trivialize the serious crime of sexual assault. Just because Stanford asserts in its policies that a sexual act is "assault" because the parties to it were intoxicated does not make it so, and Stanford's failure to recognize this fact will not inspire its students to take its rules on sexual assault seriously. Further, Stanford's concerted effort through the DARP panel training to eliminate any chance of a fair hearing for male students accused of sexual misconduct can only make it clear to Stanford students that findings in sexual assault cases will be based on politics and ideology rather than on fairness and justice. These poorly thought-out policies are a serious disservice to Stanford's students, who deserve better from their university.

[redacted] informs us that he will be appealing the decision against him. FIRE asks that Stanford remedy the injustice done to [redacted] by its finding of "responsibility" and the injustice done to the rest of Stanford's student body by its ill-informed and unjust policies and practices. We request a response on this matter by July 8, 2011. We have also enclosed a signed FERPA waiver from [redacted], allowing Stanford to freely discuss his case with FIRE.

Sincerely,

Robert L. Shibley

Robert L. Shibley
Senior Vice President

Enclosures

cc:
Chris Griffith, Associate Vice Provost and Dean of Student Life, Stanford University
Jamie Pontius-Hogan, Judicial Officer, Stanford University