

## MEMORANDUM

**To:** James McKibbin, President, Pitt Libertarians  
**From:** Samantha Harris, Director of Speech Code Research, FIRE  
**Re:** Speech Codes at Pitt  
**Date:** March 15, 2012

Pitt maintains three documents that FIRE considers to be “yellow light” policies—policies that could too easily be abused to punish protected expression. What follows is an analysis of those policies and suggestions for how they could be revised to best protect Pitt students’ First Amendment rights and thus secure a “green light” rating for Pitt.

### 1. [\*The Pitt Promise: A Commitment to Civility\*](#)

This policy requires students to accept an “obligation” to live by certain “common values,” and “to behave in ways that contribute to a civil campus environment.” While the stated values--civility, support for diversity, etc.-- may sound uncontroversial, a public university such as Pitt cannot, consistent with the First Amendment, require students to adopt a particular set of beliefs as a condition of membership in the university community. As the Supreme Court famously held in *West Virginia State Board of Education v. Barnette*, “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 university could easily remedy the problems with this policy by simply making clear that it is aspirational and not mandatory. Several years ago, FIRE wrote to the administration at Penn State about a similar policy (the “Penn State Principles,”) and they fixed it by adopting the following language (emphasis added):

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.

Pitt has every right to inform its students of the values it believes are important, and to encourage students to adopt those values; it simply cannot *require* them to do so. With some simple tweaks, this statement could be revised to make that distinction clear.

### 2. [\*Sexual Harassment Hypotheticals\*](#)

Pitt maintains a set of sexual harassment hypotheticals as part of guidelines for university administrators on handling sexual harassment complaints. One of the examples is as follows:

You personally observe conduct which you believe constitutes sexual harassment. For example, technicians in your lab have hung sexually explicit pictures on the wall or are having a sexually explicit discussion.

The guidelines then state that “[t]his is ‘hostile environment’ sexual harassment.” This is a clear misstatement of harassment law, and one that has a potentially chilling effect on campus speech. To constitute unprotected sexual harassment in the educational context, the U.S. Supreme Court held (in *Davis v. Monroe County Board of Education*) that the conduct in question must be so severe, pervasive, and objectively offensive that it effectively denies the victim access to an educational opportunity or benefit. (This is known as the *Davis* standard). While a sexually explicit discussion might be part of a pattern of conduct that would ultimately rise to the level of harassment, it is dramatically misleading to state that one isolated discussion constitutes harassment. This example should be revised to make clear that only conduct which rises to the level of constitutionally unprotected harassment – i.e., conduct that meets the *Davis* standard-- can be prohibited in the educational context.

### 3. [Computer Access and Use Policy](#)

This policy prohibits the use of electronic media “to display, design, copy, store, draw, print, or publish obscene language or graphics.” While true obscenity (in the sense of highly sexually graphic material that serves no artistic, etc. purpose) is not constitutionally protected, the term “obscene language” is commonly understood to include profanity, which *is* constitutionally protected. The fix here is simple—the university needs to make clear here that the policy prohibits only material that is obscene according to the legal definition.