



Foundation for Individual Rights in Education

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March 19, 2013

Michael A. Steinback
Chair, Board of Trustees
Appalachian State University
54 Cedar Hill Drive
Asheville, North Carolina 28803

Sent Via U.S. Mail and Facsimile (828-277-3662)

Dear Mr. Steinback:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is deeply concerned by the serious, ongoing threat to free speech, academic freedom, and due process at Appalachian State University (App State) presented by the university's sanctions against Professor Jammie Price. As I trust you are aware, Price was unjustly suspended from her teaching duties and ordered to complete a "professional development plan" for protected classroom speech and in clear violation of her academic freedom. It is now incumbent on the Board of Trustees to immediately fulfill App State's legal and moral obligations under the First Amendment by righting the wrongs committed against Professor Price.

FACTUAL BACKGROUND

While teaching section 104 of her Sociology 1000 ("Introduction to Sociology") course in late February and early March 2012, Price, who is tenured, reportedly criticized student athletes and referenced recent allegations of sexual assault at App State involving student athletes. Price also allegedly criticized App State and discussed matters relating to her personal life. Two student athletes in the class complained to App State; neither of these students put their complaints in writing. In a later class period, Price screened a documentary, titled *The Price of Pleasure: Pornography, Sexuality, and Relationships*, which critically examines pornography's popularity and its effect on popular culture and interpersonal relationships. The screening prompted two additional students to file written complaints against her. Vice Provost for Faculty Affairs Anthony Gene Carey

notified Price on March 16, 2012, that she was being placed on “administrative leave with pay” pending the completion of an investigation into these incidents. Price was also banned from the classrooms and facilities of App State’s College of Arts & Sciences and prohibited from talking about these matters with any students or colleagues.

On March 18, Price requested that she be given a due process hearing, given the disciplinary nature of her sanctions. Section 3.8.2.1 of App State’s 2011–12 *Faculty Handbook* entitles “[a] faculty member who is to be disciplined, as through discharge from employment, **suspension**, demotion in rank, diminishment in pay, **or deprivation of some other substantial interest**” (emphases added) to a hearing before the Faculty Due Process Committee (FDPC).¹ Provost and Executive Vice Chancellor Lori Stewart Gonzalez rejected Price’s request for a due process hearing on March 20, stating that the FDPC did not have the authority to hear the case since it did not involve “disciplinary” sanctions. Gonzalez cited section 4.9.3.2 of the *Handbook*, which concerns “temporary adjustments of the regularly assigned duties of faculty members” by their departmental chairs and “granting extended leaves of absence.”² Section 4.9.3.2 does not cover involuntary leaves or suspensions.

Director of Equity, Diversity and Compliance Linda Foulsham investigated the allegations against Price. Foulsham’s report concluded that there was “sufficient evidence to conclude that Dr. Price created a hostile learning environment for a significant number of her students.” On the basis of Foulsham’s report, Gonzalez informed Price on April 30, 2012, that she would be required to craft a “professional development plan” under the supervision of Associate Dean of Arts & Sciences Neva J. Specht, under which Price would be subject to a series of “corrective actions” including “[s]ensitivity training,” “[r]andom peer reviews,” and training on “[d]ealing with sensitive topics in the classroom.”

Despite not being allowed to officially hear Price’s case, the FDPC reported on May 25 that Provost Gonzalez had “improperly circumvented due process requirements and, in doing so, improperly denied the faculty member’s due process rights.” The FDPC concluded that Price’s removal from teaching constituted a “serious sanction” requiring that Price be afforded adequate due process, including a hearing. The FDPC further charged that the “administrative leave” Price was given amounted to a “new authority” unjustified by App State policy or the University of North Carolina (UNC) Code. App State Chancellor Kenneth E. Peacock rejected FDPC’s findings, reiterating App State’s position that the FDPC did not have jurisdiction to hear Price’s case and that Price’s suspension had been “non-disciplinary.”

The Faculty Grievance Hearing Committee (FGHC) agreed to hear Price’s grievance on July 17 and, after holding several hearing sessions, issued its report on October 23. The FGHC unanimously concluded that App State lacked the authority, under existing policy, to place Price on involuntary administrative leave. The FGHC report further concluded that Price’s leave deprived her of “substantial interest[s] . . . and therefore is, indeed, a serious sanction,” entitling Price to a hearing.

¹ This provision exists as section 4.10.2.1 of the 2012–13 *Faculty Handbook*.

² This provision exists as section 6.5.3.2 of the 2012–13 *Faculty Handbook*.

The FGHC found that Price’s in-class comments were protected by Price’s right to academic freedom, and in the context of the course constituted “legitimate sociology.” The FGHC further stated that the comments were “an illegitimate basis for imposition of a professional development [plan]” and violated Price’s right “to teach her subject according to the dictates of her own responsibly exercised professional judgment.” Concerning the screening of *The Price of Pleasure*, the committee unanimously found that the screening did not create a hostile classroom environment. Because the FGHC found that Price had not created a “hostile environment” with her teaching, it recommended that App State set aside the professional development plan requirement.

In response to the FGHC’s concern that any “assessment of teaching effectiveness and proposed corrective measures should emanate from the department,” Chancellor Peacock slightly altered the terms of the professional development plan, allowing Price to develop the plan in consultation with the sociology department chair and not Associate Dean Specht. Nevertheless, Peacock rejected the FGHC’s other recommendations. Price appealed to App State’s Board of Trustees on December 22, 2012, and a special committee chaired by trustee H. Martin Lancaster is currently reviewing her appeal.

ANALYSIS

As the trustees of App State should be well aware, it is settled law that the First Amendment is fully binding on public institutions like App State. See *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities”); *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted) (“[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’”).

Further, the Supreme Court of the United States has made clear that academic freedom is a “special concern of the First Amendment,” stating that “[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). App State is additionally bound by its institutional promises of academic freedom, including its statement that faculty enjoy “within the law full freedom of inquiry, discourse, teaching, research, and publication.”

FIRE wrote to Chancellor Peacock concerning Professor Price’s case on May 8, 2012; a copy of that letter is enclosed. We reiterate the concerns for Price’s academic freedom and due process rights expressed in that letter here, and we join the App State faculty committees that have expressed serious misgivings about App State’s unjustified actions following their investigations. We outline these concerns for the trustees below.

Price’s Suspension Constitutes a Serious Sanction.

Throughout its investigation and Price's grievances and appeals, App State has maintained that its sanctions against Price are non-disciplinary in nature and thus justified under existing App State policies. Writing to Price on March 20, 2012, for example, Provost Gonzalez characterized the suspension as "paid administrative leave, consistent with the University's discretion to grant leaves of absence," citing *Faculty Handbook* policy 4.9.3.2, concerning temporary reassignments and voluntary leaves of absence. As both the FDPC and FGHC have ruled, however, *this policy is entirely inapplicable to the circumstances of Price's case*. Price's leave was not only clearly involuntary, but it came under the cloud of an investigation that, following student complaints, was unquestionably disciplinary in nature. As the FGHC documented, for example, Foulsham emailed Price's students after Price had been removed from teaching, informing them "that the Provost has asked me to conduct an investigation of a complaint of inappropriate classroom behavior that has been filed by a few students against Dr. Jammie Price" and soliciting their input into the investigation. To characterize Price's punishment as simply a "leave of absence" is deceitful and inaccurate.

Further, Price was prohibited from discussing her case with students and colleagues, and was prohibited from entering certain portions of the App State campus—restrictions that would easily be understood by any faculty member and any reasonable observer as disciplinary in nature. Like both the FDPC and FGHC, FIRE must conclude that this suspension amounted to a serious sanction and a deprivation of a substantial interest per App State policy. We believe App State's refusal to allow Price a hearing before the FDPC, therefore, to be a substantial violation of her right to due process.

App State's Investigation Raises Other Serious Due Process and Shared Governance Concerns.

As both the FDPC and FGHC concluded, in placing Price on involuntary leave for the purposes of investigation—a leave that because of its allegedly non-disciplinary nature would not entitle faculty to due process hearings—App State has in effect made an addition to the *Faculty Handbook* without the input of its faculty. This ignores the voting role of App State's Faculty Senate in amending the handbook, and greatly undermines the principles of shared governance. So long as App State claims the authority to effectively amend the *Faculty Handbook*, App State can all too easily impose serious sanctions on faculty without providing the minimum due process required of such sanctions. Most importantly, this would include the opportunity for faculty to have their cases heard fully by App State's Faculty Due Process Committee.

Secondly, as FIRE noted in its May 8, 2012, letter to Chancellor Peacock, Price was not provided with copies of the initial complaints against her in writing. As the FGHC report documented, the two student athletes who submitted complaints did put their complaints about Price in writing at any point during Foulsham's investigation, and Price was only given paraphrased versions of their oral complaints. This violates section 401.2 of the *ASU Policy Manual*, which defines a "complaint" as "a report by person alleging the occurrence of harassment or retaliation" and requires that "[a]ll complaints must be reduced to writing, either initially or as part of an investigation." Further, it contradicts basic principles of fairness to leave faculty to defend themselves against hearsay accounts that are easily biased or distorted.

App State’s Hostile Environment Claim is Highly Questionable, and the Professional Development Plan Requirement Threatens Price’s Academic Freedom.

FIRE expressed serious doubts about whether Price had created a hostile environment in its May 8, 2012, letter, citing guidance provided by the Department of Education’s Office for Civil Rights (OCR), the federal agency charged with enforcing federal anti-discrimination statutes, including Title IX. Subsequent to FIRE’s letter, the FGHC rejected App State’s contention that Price created a hostile environment, concluding both that the alleged comments made before the screening of *The Price of Pleasure* did not justify the imposition of the development plan, and that the screening of the film did not create a hostile environment. Indeed, Chancellor Peacock has recognized the academic merits of the film, noting in a December 7 letter that the film “offers a negative and critical perspective on the pornography industry, a matter that is within the academic discipline of sociology and the course in question.”

Though App State has somewhat modified the terms of the professional development plan, the general concerns FIRE expressed in its previous letter regarding the plan remain. In particular, we reiterate our concern that “the development plan uniquely and greatly restricts Price’s pedagogy concerning ‘sensitive topics’ and ‘controversial materials’—even if one overlooks the impossibly vague nature of such terms.”

While App State has a legal obligation to ensure that professors do not harass their students, Price’s commentary and classroom presentation in no way constituted “hostile environment” harassment. As OCR has made clear, professors do not create a “hostile environment” simply by offending their students. In its *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (“2001 Guidance”), OCR wrote:

In cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved. Free speech rights apply in the classroom (e.g., classroom lectures and discussions) and in all other education programs and activities of public schools (e.g., public meetings and speakers on campus; campus debates, school plays and other cultural events; and student newspapers, journals, and other publications). In addition, First Amendment rights apply to the speech of students and teachers.

Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. **OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX.** In order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student’s ability to participate in or benefit from the education program.

Moreover, in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently serious as to create a hostile environment), a

school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights. [Citations omitted; emphases added.]

Academic freedom rightfully requires a high threshold for determining that a professor's classroom conduct and teaching has created a hostile environment requiring corrective action—a standard that App State has not met. Singling Price out for onerous requirements on the presentation of “sensitive” materials holds Price to an arbitrary and impermissible double standard, tacitly discouraging the use of sensitive or controversial materials and topics and chilling academic freedom. Imposed under the pretense of addressing a nonexistent “hostile environment,” App State's plan contradicts OCR's clear guidance, violates Price's rights to free speech and academic freedom under the First Amendment, and threatens such rights for all App State faculty members.

Academic Freedom at App State has been Demonstrably Chilled Due to Price's Punishment.

The harm to academic freedom wrought by App State's sanctions against Price are not limited to her case alone. The *Carolina Public Press*, for example, has documented the widespread chilling of faculty expression and academic freedom at App State—at the cost of student enrichment and lively debate. The *Press* interviewed several App State faculty members for a February 12, 2013, article, including Associate Professor Sheila Phipps, who stated that “[i]f we as faculty don't think that we have the protection of due process, then how can we challenge students?” The *Press* further reported:

Now she hesitates in class sometimes, she said.

“That might make (students) think I'm uncomfortable with the subject,” she said, “but I am uncomfortable with the fact that it might cause them to be uncomfortable and they might object[.]”

A survey on faculty morale conducted by the App State Faculty Senate's Welfare and Morale Committee suggests that in the wake of Price's unjust punishment, this fearful attitude is widespread. Of the 675 App State faculty who responded to the senate's survey, only 42 percent agreed with the statement that “the climate at ASU supports and promotes academic freedom.” The survey additionally noted that “67% of the faculty who have worked at ASU for more than 5 years stated that they felt ‘worse’ or ‘much worse’ about their morale compared to 5 years ago.” The well-publicized injustices of Price's case are surely a major contributor to the problem.

CONCLUSION

We note that Professor Price has already complied with several of the terms of the professional development plan, including making revisions to her syllabus to add required “disclaimers” regarding potentially controversial content, in order to teach during the 2012–13 academic year. Given that Appalachian State University has failed to meet its burden for proving Price created a hostile environment, FIRE asks now that the remainder of the development plan, including its most onerous provisions concerning the presentation of sensitive materials, be set aside.

FIRE further asks that the App State trustees recognize that Price's involuntary suspension constituted a serious sanction meriting adequate due process, including a hearing, per App State's *Faculty Handbook*. The trustees and administration must work with the faculty to make any necessary clarifications to App State policy to ensure that no App State faculty member is subject to the due process violations Price suffered in this case.

Thank you for your attention to this important matter. We request a response to this letter by April 9, 2013.

Sincerely,



Peter Bonilla

Associate Director, Individual Rights Defense Program

Encl.

cc:

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Bradley T. Adcock, Secretary, Board of Trustees

Kathy B. Roark, Assistant Secretary, Board of Trustees

H. Martin Lancaster, Board of Trustees

Kenneth E. Peacock, Chancellor

Lori Stewart Gonzalez, Provost and Executive Vice Chancellor

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Linda M. Foulsham, Director, Office of Equity, Diversity and Compliance

Andy Koch, Chair, Faculty Senate