



## Foundation for Individual Rights in Education

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October 5, 2012

President Jonathan Alger  
James Madison University  
Office of the President  
MSC 7608  
Harrisonburg, Virginia 22807

*Sent via U.S. Mail and Facsimile (540-568-2338)*

Dear President Alger:

As you can see from the list of our Directors and Board of Advisors, the Foundation for Individual Rights in Education (FIRE) unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, freedom of religion, freedom of speech, due process, and academic freedom on America's college campuses. Our website, [www.thefire.org](http://www.thefire.org), will give you a greater sense of our identity and activities.

FIRE rates universities as “red light,” “yellow light,” or “green light” institutions based on to what extent an institution's written policies restrict free speech. We publicize our ratings on our website as well as in our annual report on campus speech codes. Last year, FIRE awarded James Madison University (JMU) our most favorable green light rating, and this year we named the university one of just seven top colleges for free speech in our annual list for *The Huffington Post*.

Unfortunately, we write today about a change to policy language in JMU's Student Handbook that jeopardizes JMU's green light status. The judicial affairs “harassment” policy, which previously prohibited “harassment, intimidation, and exploitation,” has been amended to add the term “bullying.” While most conduct commonly associated with “bullying” is already prohibited by existing policies on harassment, threats, and so forth, the term is left undefined in JMU's policy and could reach a wide variety of conduct including offensive but protected speech.

While FIRE recognizes the university's desire to address “bullying” on campus, we remind JMU that it is *already* required by law to prohibit the kind of harassing behavior targeted by the new policy. Per federal laws prohibiting discrimination on the basis of race, color, national origin, sex, disability, or

age by an educational institution, JMU already bears a legal obligation to prohibit discriminatory harassment. Further, in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 652 (1999), the Supreme Court defined peer-on-peer harassment in the educational context as conduct that is “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.” That is, students engaged in truly bullying behavior can already be disciplined under the carefully tailored standard the Court announced in *Davis*, which strikes the necessary balance between a public institution’s twin obligations to protect free speech and prevent harassment. Other related behaviors—such as invasions of privacy, true threats, and stalking—are also already prohibited under existing laws and university policies. Beyond such conduct, while the university is free to *discourage* offensive speech and expression that does not rise to the level of actual harassment or threats, it may not outright prohibit constitutionally protected speech simply because it hurts the feelings of college students.

As I stated earlier, JMU currently receives FIRE’s most favorable green light rating, and we know the administration is deeply committed to students’ free speech rights. Rather than simply lower the university’s rating, therefore, we wanted to first raise our concerns with you. We realize that policies are frequently revised within an administrative department without the necessary input from a university’s general counsel and other relevant administrators, and that may well be the case here. It is our hope that this matter can be resolved quickly and directly and that we can continue to give James Madison University our most favorable free speech rating.

Thank you for your attention to this important matter. We request a response by October 19, 2012.

Sincerely,



Samantha Harris

Director of Speech Code Research

cc:

Susan Wheeler, University Counsel, James Madison University

Josh Bacon, Director of Judicial Affairs, James Madison University