



April 6, 2017

President Mark W. Huddleston
Office of the President
University of New Hampshire
Thompson Hall
105 Main Street
Durham, New Hampshire 03824

Sent via Electronic Mail (presidents.office@unh.edu)

Dear President Huddleston:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is deeply concerned about the threat to freedom of expression at the University of New Hampshire (UNH) posed by the university's removal of a student-created exhibit displaying the text of unsolicited sexual remarks UNH students had reported receiving.

I. FACTS

The following is our understanding of the facts, based on public reports. Please inform us if you believe we are in error.

Jordyn Haime is a freshman at UNH who seeks to raise awareness of "street harassment," defined by the nonprofit advocacy organization Stop Street Harassment as "unwanted comments, gestures, and actions forced on a stranger in a public place without their consent and . . . directed at them because of their actual or perceived sex, gender, gender expression, or sexual orientation."¹ With the assistance of UNH's Sexual Harassment and Rape Prevention Program (SHARPP), Haime created a survey to gather statistics and anecdotes from UNH students about their experiences with street harassment.²

¹ STOP STREET HARASSMENT, *What Is Street Harassment?*, <http://www.stopstreetharassment.org/about/what-is-street-harassment/> (last visited April 4, 2017).

² Jocelyn Van Saun, *SHARPP street harassment wall dismantled*, THE NEW HAMPSHIRE, Mar. 27, 2017, <http://tnhdigital.com/9317/news/sharpp-street-harassment-wall-dismantled/>.

Haime used the results of the survey to create a display, with the assistance of SHARPP, highlighting her findings and displaying, in text, examples of street harassment submitted by UNH students.³

Haime selected the following quotes for display:⁴

- “You should be glad I’m doing this”
- “Get in my car”
- “Keep running, good looking”
- “Damn girl!”
- “Show me your junk”
- “Nice ass”
- “Wanna F***?”⁵
- “Hey ladies you up for a good time?”
- “You DTF?”
- “Can I be the dog on your leash?”
- “Be careful sweetheart”
- “From 1-10 you’re a 6”
- “Why don’t you smile?”
- “Wow you’re lucky to have such a fine piece of ass”
- “Hey, can I have your number?”
- “Dump ‘em out...!”
- “Hey sissy”
- “Why won’t you give me your number?”
- “How much? :)”
- “I really love your t**s in that dress!”
- “Hey sexy”
- “Don’t be so uptight about it”
- “I could turn you straight”
- “Sup pretty thing?”
- “Are you looking for a good time?”
- “You should take that as a compliment”
- “You looking for a sugar daddy?”
- “Hey baby, you gotta boyfriend?”
- “Flash your boobs”
- “That’s not lady like”
- “I’ll buy you a drink, if you suck me off.”
- “You look like sluts”
- “Put some pants on”
- “Hey baby, where are you going? Come back here”
- “I’ll give you a nickle [*sic*] if you tickle my pickle.”

³ *Id.*

⁴ *Id.*

⁵ Asterisks are in the original.

On March 17, Haime’s display was installed in UNH Memorial Union Building (MUB),⁶ which UNH describes as the “heart of campus.”⁷ UNH allows students, through registered organizations or campus departments, to reserve “showcases” on short- and long-term bases, with no identified limitations on the purpose for which students may use the showcases.⁸ The only apparent limitation on the content of showcases—as stated in Section 8.03 of the MUB’s Policy Manual, and of which Haime was not informed—is a prohibition on displays “with ‘hate speech’ as defined in the Student Rights, Rules and Responsibilities” or “profane/vulgar language[.]”⁹ The referenced definition of “hate speech” cannot be located in UNH’s Student Rights, Rules, and Responsibilities.

Haime’s work was to be displayed throughout April, which is Sexual Assault Awareness Month, and was to coincide with International Anti-Street Harassment Week, which takes place between April 2 and 8.

On March 17—the same day that the display was installed—Haime’s display was removed at the direction of UNH Dean of Students Ted Kirkpatrick.¹⁰ The exhibit was replaced by a display “highlighting student accomplishments.”¹¹

On March 24, a report broadcast by WMUR-TV, the ABC affiliate in Manchester, included a statement by UNH spokeswoman Erika Mantz, asserting that the display was removed because “it did not adhere to established standards for material posted on the walls of common spaces where profane/vulgar language is prohibited.”¹²

On March 27, *The New Hampshire* reported on the removal of the display. Kirkpatrick is cited as asserting that the display’s removal was motivated by “strong negative reactions” from members of the UNH community, a desire to shield “young children” or those with “strong personal convictions that may originate from religious, spiritual or ethnic roots” from offensive language, and an apparent concern that the data may not be sufficient.¹³ Kirkpatrick also cited “open house season,”¹⁴ and Haime says she was told that, “the administration was

⁶ Van Saun, *supra* note 2.

⁷ UNIV. OF N.H. MEMORIAL UNION & STUDENT ACTIVITIES, *About Us*, <http://unhmub.com/about-us> (last visited Apr. 4, 2017).

⁸ UNIV. OF N.H. MEMORIAL UNION BUILDING, *Policy Manual*, Art. VIII, § 8.02(d), *available at* <http://www.unhmub.com/sites/default/files/attachments/PolicyManualFY17.pdf>.

⁹ *Id.* at § 8.03. This regulation also applies to “all signs, flyers, banners, showcases or other similar forms of communication and promotion in the [MUB]” whether posted in a “regulated” area or a “free posting zone.”

¹⁰ Van Saun, *supra* note 2.

¹¹ Stephanie Morales, *UNH harassment display removed*, SEACOASTONLINE.COM, Mar. 31, 2017, <http://www.seacoastonline.com/news/20170331/unh-harassment-display-removed>.

¹² Jean Mackin, *Sexual Harassment Project Causes Controversy at UNH* (WMUR-TV television broadcast Mar. 24, 2017), *available at* <http://www.wmur.com/article/sexual-harassment-project-causes-controversy-at-unh/9184135>.

¹³ Van Saun, *supra* note 2.

¹⁴ *Id.* Kirkpatrick may have been referring to one of the many Accepted Student Visit Days occurring throughout the month of April. UNIV. OF N.H., *Admitted Student Visit Days*, <https://admissions.unh.edu/visit-days> (last visited Apr. 5, 2017).

worried about tour groups seeing the display and changing their decision.”¹⁵ Nevertheless, Kirkpatrick asserted that UNH “does not shrink from its loyalty to the principle of free speech” when it “ask[s] members of its community to respect a sense of decorum and civility[.]”¹⁶

On March 31, UNH agreed to allow a modified version of the exhibit to “eventually” return to its original location inside the MUB, but only after Kirkpatrick “circled comments [on a photo of the display] that could be included in the revised version.”¹⁷ Haime is reportedly dissatisfied with this result, which still results in an administrator’s censorship of her work.

II. ANALYSIS

Contra Kirkpatrick, the University of New Hampshire’s censorship of a student-created display that administrators believe will offend prospective students and their families is the epitome of shrinking from the principles and letter of the First Amendment. UNH’s prohibition of student displays of “hate speech” and “profane/vulgar” language is unconstitutional and the policy’s application to Haime’s display is indefensible.

It has long been settled law that the First Amendment is binding on public institutions of higher education such as the University of New Hampshire. *See 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. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”).

i. *The Posting Policy is Unconstitutional, and Speech May Not Be Suppressed On the Basis That It May Cause Offense*

The First Amendment “generally prevents government from proscribing speech . . . or even expressive conduct,” *R.A. V. v. St. Paul*, 505 U.S. 377, 382 (1992), unless it falls within certain well-defined categories, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *United States v. Stevens*, 559 U.S. 460, 468–69 (2010). Outside of these categories, “[c]ontent-based regulations are presumptively invalid.” *R.A. V.*, 505 U.S. at 382. In the rare circumstance that content- or viewpoint-discriminatory regulations are permissible, they must be supported by a compelling government interest and narrowly-drawn. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001) (questioning, but not

¹⁵ Haime, *supra* note 18.

¹⁶ *Id.*

¹⁷ Morales, *supra* note 11.

deciding, whether the Establishment Clause would provide a compelling reason for viewpoint discrimination); *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981) (applying strict scrutiny to a content-based exclusion from a limited public forum).

That speech is considered offensive or hateful by some or even many does not strip it of First Amendment protection. The Supreme Court has unequivocally held that speech cannot be restricted because it is profane, vulgar, or offensive. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011) (“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain . . . we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”); *R.A. V.*, 505 U.S. 377, 391 (holding unconstitutional an ordinance prohibiting certain expression that “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit . . . expression . . . simply because” it is “offensive or disagreeable”); *Cohen v. Cal.*, 403 U.S. 15, 16–17 (1971) (overturning a conviction premised upon the use of “vulgar, profane, or indecent language” in wearing a jacket emblazoned with the words “Fuck the Draft” in a courthouse hallway, and observing that “one man’s vulgarity is another’s lyric”).

These holdings are fully applicable in assessing restrictions on student speech imposed by public institutions like the University of New Hampshire. In *Papish v. Board of Curators of the University of Missouri*, a case involving the speech rights of a public university student expelled for distributing a newspaper containing a cartoon depiction of the Statue of Liberty being raped by police officers, the Supreme Court held that speech “on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” 410 U.S. 667, 670 (1973). Accordingly, any policy whose application turns on whether expression causes offense—including prohibitions on “hate speech” or “profane/vulgar language”—fails First Amendment scrutiny.

Indeed, the First Amendment’s purpose in significant part is to protect speech that may cause offense or upset the existing order. As the Supreme Court observed in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949):

[A] function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment[.]

In crafting her display, Haime herself sought to harness this precise aspect of free expression's power. Her op-ed, published in *The New Hampshire*, aptly makes a similar point as the *Terminiello* Court did more than half a century ago:¹⁸

I would say that offense is the appropriate response to the quotes on the wall. Our display contained real things that had been said to students on this campus, and yes, they were horrible. *That fact should upset people and cause them to want to take action on the issue, like we did.*

UNH's assertion of an interest in protecting "young children" is similarly insufficient to justify its speech restrictions.

Courts have consistently noted that college students are not minors, and they enjoy the First Amendment rights afforded adult citizens. *See Healy*, 408 U.S. at 197 (Douglas, J., concurring) ("[s]tudents—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community"); *see also Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001) (holding that the Supreme Court's decision in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), did not apply to the college setting because college students are "young adults"); *Bystrom v. Fridley High Sch.*, 822 F.2d 747, 750 (8th Cir. 1987) ("few college students are minors, and colleges are traditionally places of virtually unlimited free expression"); *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979) ("[c]ollege students today are no longer minors; they are now regarded as adults in almost every phase of community life").

Furthermore, while the Supreme Court has—in certain limited circumstances—permitted government actors to impose narrowly targeted content-based restrictions in the interest of preventing children from viewing indecent or patently offensive sexual programming, that interest does not extend to a "free-floating power to restrict the ideas to which children may be exposed." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 794 (2011). Specifically, the Court has held that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. Jacksonville*, 422 U.S. 205, 213–14 (1975). "[T]he government may not 'reduce the adult population . . . to reading only what is fit for children.'" *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73–74 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). On a public university campus, adults sharing views with one another cannot constitutionally be required to childproof their expression, including artistic or scholarly expression, simply because a passing child might happen upon it.

¹⁸ Jordyn Haime, *In defense of an 'inappropriate' awareness campaign*, THE NEW HAMPSHIRE, Mar. 27, 2017, <http://tnhdigital.com/9342/opinions/in-defense-of-an-inappropriate-awareness-campaign> (emphasis added).

ii. *UNH's Removal of Haime's Display is Unacceptable Viewpoint Discrimination with Chilling Implications for Academic Freedom at UNH*

Kirkpatrick's public statements raise serious concerns that the university's motivations included the intent to stifle expression embarrassing to the university. UNH's enforcement of policy 8.03 is "a façade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 811 (1985). Even were the policy constitutionally permissible, applying it in order to suppress a particular viewpoint would not survive judicial scrutiny. *Id.*

In discussing the removal of Haime's work, Kirkpatrick cited the importance of "strong research design when attempting to measure the true incidence and prevalence of any human behavior" and said that he would "find a study to be useful in determining the extent to which our students report such unwelcome attention in their everyday lives on campus."¹⁹

Kirkpatrick's comments suggest that he believes that Haime's work may cast the university in a poor light. If Kirkpatrick was motivated by subjective doubts about the quality of Haime's research, then his conduct amounts to an administrator's suppression of academic speech.²⁰ If he instead believed the research to be strong, or that viewers might perceive Haime's research as suggesting that instances of unwelcome conduct were prevalent at UNH, then it becomes still more clear that UNH acted to suppress expression that could be embarrassing to the university.

Further, the university's statements and actions indicate that the display was removed because it found the display to be negative or embarrassing, and that the university mistakenly believes potential offense taken by prospective students or their families justifies censorship of Haime's display. For example, Kirkpatrick reportedly cited "open house season,"²¹ and Haime was reportedly told that "the administration was worried about tour groups seeing the display and changing their decision."²² UNH replaced Haime's exhibit with a display promoting students the university touts as success stories.²³ Taken together, these facts strongly indicate that the university permits student expression in the HUB when it promotes the university, but will quickly censor speech which might be perceived as critical of or embarrassing to the university. Such viewpoint-based suppression of speech cannot stand at a public university morally and legally bound to uphold the First Amendment. *See Perry Ed.*

¹⁹ Van Saun, *supra* note 2.

²⁰ On April 3, the American Association of University Professors at UNH and the UNH Lecturers United-AAUP issued a statement condemning the removal of the exhibit on the basis that the removal threatened academic freedom at UNH. American Association of University Professors at the University of New Hampshire & UNH Lecturers United, *AAUP-UNH and UNH LU-AAUP statement on UNH censorship of SHARPP exhibit*, THE NEW HAMPSHIRE, Apr. 3, 2017, <http://tnhdigital.com/9565/opinions/aaup-unh-and-unh-lu-aaup-statement-on-unh-censorship-of-sharpp-exhibit>. For the reasons described herein, FIRE echoes these concerns and joins in their condemnation.

²¹ Van Saun, *supra* note 2. Kirkpatrick may have been referring to one of the many Accepted Student Visit Days occurring throughout the month of April. UNIV. OF N.H., *Admitted Student Visit Days*, <https://admissions.unh.edu/visit-days> (last visited Apr. 5, 2017).

²² Haime, *supra* note 18.

²³ Morales, *supra* note 11.

Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting) (noting that “[v]iewpoint discrimination is censorship in its purest form”).

III. CONCLUSION

The University of New Hampshire’s removal of Haime’s exhibit, undertaken with the stated purpose of avoiding offending others and the naked objective of avoiding perceived criticism of the university, is an egregious violation of the First Amendment, and is conduct unbecoming of a university of any caliber. UNH must reverse its unconstitutional and unwise decision and restore Haime’s display without modification, and clarify to the UNH community that it will not unconstitutionally restrict student speech in the future.

Because Haime’s display was intended to coincide with Sexual Assault Awareness Month, which concludes at the end of April, its continued absence exacerbates the damage done by UNH’s conduct. Accordingly, we request a response to this letter no later than April 10, 2017.

Sincerely,



Adam B. Steinbaugh
Senior Program Officer, Individual Rights Defense Program