



September 12, 2017

John Bardo
Wichita State University
Office of the President
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URGENT

Sent via U.S. Mail and Electronic Mail (john.bardo@wichita.edu)

Dear President Bardo:

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

FIRE is concerned by the threat to freedom of expression at Wichita State University (WSU) presented by the university's investigation of the Phi Delta Theta fraternity on the basis of a banner hung from the fraternity house. WSU's assertion that the banner constituted sexual harassment and its resulting investigation of Phi Delta Theta and/or its members violate WSU students' First Amendment rights, which WSU is legally and morally bound to uphold, and must be rescinded immediately.

I. FACTS

The following is our understanding of the facts; please inform us if you believe we are in error.

On Friday, September 8, 2017, two members of Phi Delta Theta hung a banner on the side of the fraternity house reading "New Members Free House Tours!" According to WSU Director of Student Involvement Nancy Loosle, the banner only remained visible for approximately five minutes.¹

¹ Andrew Linnabary, *2 Phi Delta Theta members suspended by fraternity for 'Free House Tours' banner*, THE SUNFLOWER, Sept. 11, 2017, <https://thesunflower.com/19837/news/2-phi-delta-theta-members-suspended-by-fraternity-for-free-house-tours-banner>.

The same day, a student reported the banner to WSU's Division of Student Affairs.² On September 9, the Division of Student Affairs issued a statement on Twitter reading: "WSU does not condone sexual harassment in any form. The inappropriate banner at Phi Delt was addressed & sent on for further investigation."³ In an email to a reporter, WSU Vice President for Student Affairs Teri Hall explained that WSU believed the banner was "inappropriate" because it was hung in a location where students participating in sorority recruitment could see it, which allegedly implied that those women should visit the fraternity house.⁴ Hall further elaborated on the incident to WSU student newspaper *The Sunflower*, which reported her remarks that the banner brought "a chilly climate to campus" and that WSU's investigation was in part brought on by recent announcements from Secretary of Education Betsy DeVos regarding Title IX enforcement.⁵ According to *The Sunflower*, Hall stated "I think we're all a little more sensitive because of the statements Betsy DeVos made."⁶

According to Mandy Hambleton, WSU's deputy Title IX coordinator for students, WSU is investigating the incident as both a potential conduct violation as well as a violation of Title IX.⁷

II. ANALYSIS

It has long been settled law that the First Amendment is binding on public institutions of higher education such as Wichita State University. *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").

WSU's belief that the banner amounts to actionable sexual harassment is unsupported by fact or law.

In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Supreme Court set forth the definition of student-on-student (or peer) harassment. In order for student conduct (including expression) to constitute actionable harassment, it must be (1)

² *Id.*

³ @WichitaStateSA, TWITTER (Sept. 9, 2017, 11:17 AM), <https://twitter.com/WichitaStateSA/status/906552052100333568>.

⁴ Greg Piper, *Wichita State might punish fraternity because of Betsy DeVos' speech on Title IX*, THE COLLEGE FIX, Sept. 12, 2017, <http://www.thecollegefix.com/post/36618>.

⁵ Andrew Linnabary, *2 Phi Delta Theta members suspended by fraternity for 'Free House Tours' banner*, THE SUNFLOWER, Sept. 11, 2017, <https://thesunflower.com/19837/news/2-phi-delta-theta-members-suspended-by-fraternity-for-free-house-tours-banner>.

⁶ *Id.*

⁷ *Id.*

unwelcome, (2) discriminatory on the basis of gender or another protected status, and (3) “so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school.” *Id.* at 650. By definition, this includes only extreme and typically repetitive behavior—conduct so serious that it would prevent a reasonable person from receiving his or her education.

In a July 28, 2003, “Dear Colleague” letter sent to the presidents of public and private universities nationwide, former assistant secretary of the Department of Education’s Office for Civil Rights (OCR) Gerald A. Reynolds made clear to colleges that “in addressing harassment allegations, OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR.” Reynolds further cautioned:⁸

Some colleges and universities have interpreted OCR’s prohibition of “harassment” as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR’s jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR’s standard, the conduct must also be considered sufficiently serious to deny or limit a student’s ability to participate in or benefit from the educational program.

On April 29, 2014, OCR Assistant Secretary Catherine E. Lhamon issued guidance again clarifying that “the laws and regulations [OCR] enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution,” and stating that “when a school works to prevent and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.”⁹

Similarly, WSU’s “University Policy Prohibiting Sexual Harassment” provides:¹⁰

To the extent that individuals are protected from a “hostile environment” it must be understood that the University cannot protect its constituents from verbal conduct which is upsetting, rude, or uncivil. A hostile environment complaint under this policy requires that a reasonable person in the complainant’s circumstances experiences conduct which is severe and/or pervasive enough that the conditions of such person’s work or educational environment are altered.¹¹

⁸ U.S. Dep’t of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec’y for Civil Rights (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

⁹ U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, 43–44 (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

¹⁰ *University Policy Prohibiting Sexual Harassment*, WICHITA STATE UNIV., <http://webs.wichita.edu/?u=facultysenate&p=/policiesforms/sexualharassment> (last visited Sept. 12, 2017).

¹¹ While this language appears in a policy pertaining to faculty and visitors, the policy is explicitly referenced in WSU’s Student Code of Conduct. *See Student Code of Conduct*, WICHITA STATE UNIV., http://webs.wichita.edu/inaudit/ch8_05.pdf.

The banner hung on the Phi Delta Theta house does not meet this definition of sexual harassment.

Even assuming that the banner was in fact intended to be sexual in nature, it would still not constitute sexual harassment, as it was not so “severe, pervasive, and objectively offensive” that it deprived any WSU students of access to an educational opportunity or benefit. Indeed, according to WSU itself, the banner was only visible for five minutes. Such a fleeting occurrence, combined with the fact that the banner’s relation to sex was tenuous at best, simply cannot reasonably be said to have impacted any student’s ability to fully participate in campus life. Equally troubling and unacceptable is Hall’s comment in relation to this incident that the campus community is more sensitive because of perceptions about Betsy DeVos’ Title IX enforcement plans. To be clear: such subjective heightened sensitivity is not a license to violate established law.

Yet the banner’s text cannot sustain a finding that it is objectively offensive. The text is not itself sexually explicit. At most, it amounts to a crude invitation designed to attract the attention of members of the opposite sex. While some WSU students and administrators may subjectively interpret the banner as being sexually suggestive, the lack of overt language or innuendo militates against, if not prohibits, any finding that the banner’s language is objectively offensive. Were subjective offense taken to a brief, crude joke sufficient to amount to actionable sexual harassment, a vast array of constitutionally protected student speech would be swept into the regulatory purview of university administrators and police officers. The law does not permit such a result.

Hall’s statement about the influence of Secretary DeVos’s recent speech on WSU’s reaction to the banner also suggests that that reaction is being driven in part by viewpoint discrimination. To the extent that WSU is investigating Phi Delta Theta or its members because others were offended by the banner, FIRE reminds you that the principles of freedom of expression are not limited to uncontroversial speech.

The Supreme Court has repeatedly held that expression may not be punished merely because some or even many find it to be offensive or disrespectful. *See 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 the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Papish v. Board of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government 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.”). Indeed, it seems likely that the students being

investigated are being subjected to viewpoint discrimination not simply because of *their* expression, but because of the utterly unrelated expression of the Secretary of Education several days prior.

We also remind WSU that an investigation of constitutionally protected speech can itself violate the First Amendment. “Generally speaking, government action which chills constitutionally protected speech or expression contravenes the First Amendment.” *Bruner v. Baker*, 506 F.3d 1021, 1029 (10th Cir. 2007) (citing *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996)). Accordingly, several appellate courts have held that government investigations into protected expression violate the First Amendment. *See White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (holding that a government investigation into clearly protected expression chilled speech and therefore violated the First Amendment); *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992) (upholding a trial court’s finding that a university president’s creation of a committee to investigate protected speech by a professor unconstitutionally chilled protected expression because it implied the possibility of disciplinary action); *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988) (“an investigation conducted in retaliation for comments protected by the first amendment could be actionable”). WSU’s investigation sends a message to all students that if their expression offends others, they will be subject to disciplinary investigation. As a result, students will likely refrain from speaking rather than risk discipline. Such a result is the very definition of the impermissible “chilling” of speech.

III. CONCLUSION

The banner hung at Phi Delta Theta is clearly protected by the First Amendment, and does not constitute sexual harassment. Wichita State University’s investigation of the fraternity and its members is therefore unconstitutional. We urge WSU to immediately halt its investigation and make clear to the campus community that sexual harassment policies will not be used to punish constitutionally protected expression.

FIRE is committed to using all of the resources at its disposal to see this matter through to a just conclusion. Due to the immediate and continuing impact on students’ First Amendment rights, we request a response to this letter by September 19, 2017.

Sincerely,



Ari Z. Cohn

Director, Individual Rights Defense Program

cc:

Teri Hall, Vice President for Student Affairs

Mandy Hambleton, Assistant Vice President for Student Advocacy, Intervention
and Accountability

Natasha M. Stephens, Title IX Coordinator

Nancy Loosle, Director of Student Involvement

David H. Moses, General Counsel

Stacia Boden, Assistant General Counsel