



October 22, 2018

Chancellor Susan Sciame-Giesecke
Indiana University Kokomo
Hunt Hall, 212A
2300 S. Washington Street
Kokomo, Indiana 46902

Sent via U.S. Mail and Electronic Mail (sgieseck@iuk.edu)

Dear Chancellor Sciame-Giesecke:

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.

PEN America is a nonprofit organization standing at the intersection of literature and human rights to protect open expression in the United States and worldwide.

FIRE and PEN America are concerned for the state of freedom of expression at Indiana University Kokomo (IUK) following the university's decision to remove student artwork due to complaints. IUK must explain why it ordered the artwork's removal, restore it to its original location, and commit to protecting artistic expression.

I. Factual Background

In the summer of 2017, Associate Professor of Fine Arts Gregory Steel contacted the University's Capital Projects Office, which handles "procurement and installation of furniture and finishes, signage, and exterior public art,"¹ to request placement of several concrete pads for his students' sculptures.

According to Steel, faculty members have followed this procedure before to obtain approval for displays. Over the summer of 2018, the Capital Projects Office placed concrete pads for the sculptures in response to Steel's request. Steel's intent is to use these pads to feature artwork from his annual summer sculpture class.

¹ *Capital Projects*, IND. UNIV. KOKOMO, <http://www.indiana.edu/~uao> (last visited Oct. 18, 2018).

In July 2018, Steel worked with students in his metal sculpture class to create large-scale sculptures for display on the pads. Along with Chair of New Media, Art and Technology Minda Douglas, Steel selected two student sculptures to display on the grassy area outside of IUK's arts building. One was crafted from steel pipes and materials; the other was a neon pink structure. After the completion of the sculptures, staff from IUK's Office of Physical Facilities used a lift to install the two sculptures on the provided concrete pads around July 30.

About a week later, an IUK student informed Steel that the sculptures had been removed and placed on the landing dock outside the arts building. Steel had not been informed by IUK of their removal and had not been told that there had been any complaints about the sculptures. Steel met with IUK Executive Vice Chancellor for Academic Affairs Mark Canada to discuss the artwork's removal. Canada told Steel that the sculptures were removed in response to complaints received by Executive Vice President for Academic Affairs John Applegate, but did not provide information on the content of the complaints. Canada further suggested that the sculptures be moved away from the building to "a more appropriate location."

II. Analysis

The primacy of the First Amendment at public colleges like IUK is well established. *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) ("[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). This precedent serves as a lodestar for public universities navigating art controversies.

Works of art, including sculptures, are expressive in nature. With every form of expressive work comes the risk that viewers might be offended or aggrieved; indeed, sometimes the artist's work is intended to provoke or cause discomfort. Neither such an intent nor such a result remove the work from the protection of the First Amendment. *See, e.g., 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.").

Creating fora for expressive works requires that the sponsoring institution have the wherewithal to weather the possibility that viewers may find the message or the medium offensive. The Supreme Court has repeatedly held that expression like the student sculptures discussed here may not be punished merely because those who witness it may be offended. *See, e.g., 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."). This is no less true on a public university campus. *Papish v. Board of Curators of the University of Missouri*, 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.’”).

That viewers of expression are offended cannot be the basis for its punishment or censorship. *Cohen v. California*, 403 U.S. 15 (1971) (reversing conviction of man wearing a jacket bearing the anti-draft slogan “Fuck the Draft” in a courthouse because the message was protected under First Amendment). If passersby were offended by either of the sculptures, an easy solution is available to them: They are free to look away, just as the occupants of the Los Angeles Superior Court were free to avert their eyes from Paul Robert Cohen’s jacket and its colorful language.

Although IUK failed to provide Steel with copies of the complaint(s) or with an explanation of their content, it is not unreasonable to suspect that one of the sculptures’ likeness to female genitalia prompted the opposition. To the extent that IUK’s administration may have worried that artwork seemingly depicting genitalia may be “obscene,” that assessment is inconsistent with the narrow definition of proscribable obscenity established by decades of Supreme Court jurisprudence. Speech that is “obscene” and therefore unprotected by the First Amendment must meet the exacting test announced by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), which outlined three questions that must be asked and answered to determine if particular material is obscene:

- Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest (an inordinate interest in sex);
- Whether the work depicts or describes, in a patently offensive way, sexual conduct; and
- Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The sculpture discussed in this case clearly does not meet this test. It does not appeal to the prurient interest and does not depict sexual conduct. It therefore clearly does not come close to meeting the standards necessary to be declared legally obscene. If it were, famous works of art such as Michelangelo’s *David* or Georgia O’Keeffe’s flower paintings—which are regularly perceived as depictions of vulvas—would also have to be declared legally obscene.

IUK’s infringement on Steel’s ability to determine which artwork to display also raises serious concerns about academic freedom at the university. By providing Steel a platform to display student-created artwork, the university must respect his ability to best determine what works are best suited to that space, and abide by the commitments it has made to faculty members’ academic freedom, in keeping with IUK’s claim that, “[f]or more than seventy years, we’ve

been an educational stronghold for north central Indiana, have established ourselves as a pacesetter for academic freedom, tolerance, and academic exchange, locally and globally.”²

The circumstances of the artwork’s removal, and a public university’s unique role as a venue where views may be expressed without censorship, demand transparency from IUK. The university’s apparent removal of student-created and faculty-chosen artwork following complaints raises an unacceptable possibility: that the university has defaulted on its moral and legal obligation to protect and honor the freedom of expression of its community members. If IUK is to allow the most sensitive members of campus to determine the experience of their peers, the entire community will suffer. *See Cohen*, 403 U.S. at 25 (“Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us . . . [I]t is nevertheless often true that one man’s vulgarity is another’s lyric.”).

No public institution—nor any institution that claims to take seriously the free speech rights of students and faculty—should censor or otherwise punish artwork because it caused offense.

Accordingly, the university must account for its removal of the artwork, explaining who decided to remove it, when that decision was made, why that decision was made, and the nature of any and all complaints received by the university concerning the artwork.³ Further, the university must reverse its illiberal decision, restore the censored artwork, and publicly commit to defending the artistic freedom of the entire campus community moving forward.

We request a response to this letter by November 5, 2018.

Sincerely,



Sarah McLaughlin
Senior Program Officer, Legal and Public Advocacy, FIRE



Jonathan Friedman
Project Director, Campus Free Speech, PEN America

cc:

John Applegate, Executive Vice President for Academic Affairs
Mark Canada, Executive Vice Chancellor for Academic Affairs

² *Office for University Advancement*, IND. UNIV. KOKOMO
<http://www.iuk.edu/advancement/development/index.php> (last visited Oct. 18, 2018).

³ In furtherance of that transparency, FIRE submitted a public records request seeking records of the complaints concerning the installations on October 22, 2018, via the Indiana University public records form, located at <https://vpqc.iu.edu/forms/open-record.html>.