



May 16, 2019

President Dr. Seamus Carey
Office of the President
Transylvania University
200 Old Morrison
300 North Broadway
Lexington, Kentucky 40508

Sent via U.S. Mail and Electronic Mail (president@transy.edu)

Dear President Carey:

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 writes you today out of concern for the threat to freedom of expression at Transylvania University posed by the institution's illiberal policy governing expressive activities on campus and a report that this policy is selectively enforced. Transylvania has promised freedom of expression to all students, without regard to viewpoint. It must fulfill that commitment.

I. Statement of Facts

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. However, if the facts here are substantially accurate, Transylvania must revise its policies to ensure that all students may freely engage in peaceful expression on campus without undue administrative regulation, regardless of their viewpoint.

On May 1, 2019, the Transylvania University chapter of Young Democratic Socialists of America (YDSA) set up a table outside of Alumni Plaza, the university's "designated area on campus" for "peaceful activism and orderly demonstrations by members of the University community."¹ Per student and Transylvania University chapter of Young Americans for Freedom (TU-YAF) chairman Alexander Drury, the YDSA students engaged with members of

¹ TRANSYLVANIA UNIV., STUDENT HANDBOOK: FREE SPEECH, PROTESTS AND DEMONSTRATION POLICY (2018), <http://www.transy.edu/sites/default/files/pictures/Transy-Student-handbook-2018.pdf>.

the campus community from approximately 11:00 a.m. to 12:30 p.m. without interference from passing Transylvania faculty or administrators. When asked by Drury about their ability to table outside of Alumni Plaza, the student members of YDSA told Drury that Transylvania administrators had informed them they were free to table anywhere on campus without prior approval.²

On May 2, members of TU-YAF attempted to engage in the same form of peaceful expression. Joined by fellow student Jacob Burnam and a friend who does not attend Transylvania, Drury set up a table outside of Alumni Plaza in the same area used by YDSA. Drury and Burnam intended to ask students to sign a petition urging Transylvania to adopt a free speech statement akin to the University of Chicago's "Report of the Committee on Freedom of Expression" (commonly known as the "Chicago Statement.")³ They were equipped with a clipboard to gather student signatures and a whiteboard upon which they intended to invite passersby to write a message of their choice.

Almost immediately upon their arrival, the group was approached by Holly Sheilley, Vice President for Enrollment and Student Life. Sheilley informed the group that they were violating university policy and were not permitted to table in that location.⁴ After a short conversation, Sheilley left. Roughly fifteen minutes later, Dean of Students Michael Covert approached the group with the same message, informing them that they were not allowed to engage in expressive activity outside of Alumni Plaza without prior university permission. Covert warned Drury and Burnam that failure to adhere to university policy might result in greater speech restrictions in the future, and then asked the group to move to Alumni Plaza.⁵

II. Transylvania's Policies and Practices Fail to Fulfill its Promise of Freedom of Expression

Transylvania's policy of limiting peaceful student expressive activity to one designated area of campus, its requirement that students obtain prior approval before engaging in expressive activity, and its apparently selective enforcement of this policy are incompatible with its stated promises to students of freedom of expression.

² Per an audio recording of Drury's conversation with a YDSA member obtained by a conservative campus news website: "I emailed the first time I tabled and I was like, 'hey do I need to fill out any forms or anything' and they're like, 'no, just grab a table and set up,'" one of the YDSA students who tabled Wednesday told Drury, according to an audio recording obtained by Campus Reform. 'And then this time, I didn't even email anyone. I just found a table and set up.'" Jon Street, *EXCLUSIVE: Students say administrators shut down free speech petition table*, CAMPUS REFORM, May 3, 2019, <https://www.campusreform.org/?ID=12187>.

³ UNIV. OF CHICAGO, REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION, <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>.

⁴ Per an audio recording of the conversation obtained by *Campus Reform*, Sheilley told the students she had been unaware of YDSA's tabling in the same area without permission the previous day. Street, *supra* note 3.

⁵ *Id.*

A. *Transylvania promises expressive rights to students.*

While not bound by the First Amendment, Transylvania nevertheless makes laudable commitments to freedom of expression. The Student Handbook’s “Rights of Students” section “recognize[s] that free speech is essential in a democratic society” and accordingly declares that “[s]tudents have the right to free and open discourse without being censored on the basis of the content of their message.”⁶ Acknowledging that “[o]ne of the primary functions of a university is to discover and disseminate knowledge by means of research and teaching,” the university’s “Free Speech, Protests and Demonstration Policy” explicitly “endorses free speech and [the] sharing of ideas” and proclaims free expression as “vital to our shared goal of the pursuit of knowledge.”⁷ The policy acknowledges the importance of viewpoint neutrality by noting that freedom of expression “comes with a responsibility to welcome and promote this freedom for all, even in disagreement or opposition.” Indeed, the policy states that Transylvania “encourages a balanced approach in all communications and the inclusion of contrary points of view.”

Having made students this explicit promise of freedom of expression, Transylvania has a legal and moral obligation to honor it.

The Kentucky Supreme Court has made clear that “[t]he relationship between a private college and its students can be characterized as contractual in nature.” *Centre College v. Trzop*, 127 S.W. 3d 562, 568 (Ky. 2003). “The rights and obligations of the parties as contained in the University’s bulletins, circulars and regulations made available to the student become a part of the implied contract.” *Suhail v. Univ. of the Cumberlands*, 107 F. Supp. 3d 748, 755 (E.D. Ky. 2015) (internal quotation and citation omitted). Both Transylvania’s “Rights of Students” policy and its “Free Speech, Protests and Demonstration Policy” form a contract between the university and its students, offering prospective and current students an unambiguous description of their right to freedom of expression on campus.

The United States Court of Appeals for the Sixth Circuit has held that in interpreting the contractual relationship between student and university, courts should apply the “deferential standard of reasonable expectation—what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.” *Doherty v. S. Coll. of Optometry*, 862 F.2d 570, 577 (6th Cir. 1988) (internal quotation and citation omitted). In addition to the clear language regarding expressive rights contained in the university’s Student Handbook, decades of First Amendment jurisprudence and the common recognition of the First Amendment’s requirement of viewpoint neutrality necessarily inform students’ reasonable expectations of Transylvania’s promise of expressive freedom. Student expectations will likewise be informed by the recent passage of the Campus Free Speech

⁶ TRANSYLVANIA UNIV., STUDENT HANDBOOK: RIGHTS OF STUDENTS, <http://www.transy.edu/sites/default/files/pictures/Transy-Student-handbook-2018.pdf>.

⁷ FREE SPEECH, PROTESTS AND DEMONSTRATION POLICY, *supra* note 1.

Protection Act, state legislation that prohibits Kentucky’s public institutions from quarantining student expression to designated “free speech zones” on campus.⁸

B. Limiting expressive activity to one area of campus is an illiberal restriction on student speech.

Transylvania’s “Free Speech, Protests and Demonstration Policy” states that “[t]he right of freedom of expression at the University includes peaceful activism and orderly demonstrations by members of the University community in designated areas. The designated area on campus for Transylvania community members is Alumni Plaza or an approved alternate space.”⁹ Restricting student speech to one area of Transylvania’s campus is unreasonable and at odds with both the institution’s promise of free expression and the First Amendment principles that inform student expectations of that promise.

Under the First Amendment (and, after June 27, state law), Kentucky’s public institutions may enact only reasonable “time, place, and manner” restrictions on expressive activity. Such regulations must be content-neutral and “narrowly tailored” in furtherance of a “significant” institutional interest, and they must “leave open ample alternative channels for communication.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). This well-established standard strikes a sensible balance between facilitating the orderly operation of a university campus and providing students with the freedom they need to speak their minds, debate the issues of the day, and continue forward in the pursuit of knowledge.

In contrast, Transylvania’s policy is unduly restrictive and unreasonable. As Drury and Burnam learned, Transylvania students wishing to engage their fellow students in peaceful political discussion are restricted to just one area of campus. In video commentary published on YouTube, Burnam describes the area as “small” and “intentionally obstructed by tables and chairs placed there by the administration.”¹⁰ Quarantining student expressive activity to one small, reportedly “obstructed” area is at odds with Transylvania’s stated promise of free expression and explicit recognition of its importance for students obtaining a liberal education.

C. Requiring prior approval for student expression is an illiberal and unreasonable restriction on student speech.

In the video, Burnam further notes that prior approval is required not only for expressive activity outside of the Alumni Hall area, but also for expression within the “free speech zone” itself. Unfortunately for Burnam, Drury, and all of their fellow Transylvania students, Burnam’s description of the university policy is entirely accurate. Indeed, the Free Speech,

⁸ Campus Free Speech Protection Act, KRS § 164.348(2)(j) (effective June 27, 2019) (“The generally accessible, open, outdoor areas of the campus be maintained as traditional public forums for students and faculty to express their views, so that the free expression of students and faculty is not limited to particular areas of the campus often described as ‘free speech zones.’”).

⁹ FREE SPEECH, PROTESTS AND DEMONSTRATION POLICY, *supra* note 1.

¹⁰ CampusReform, *Transylvania University conservative students’ response*, YOUTUBE (May 3, 2019), <https://www.youtube.com/watch?v=2GGe80eANWU>.

Protests and Demonstration Policy requires students to both personally meet with university administrators and complete a reservation form before “stag[ing] a demonstration, display, rally, speaker, or engag[ing] in other forms of student activism”:

Students wishing to stage a demonstration, display, rally, speaker, or engage in other forms of student activism will contact and arrange a meeting with the Dean of Students (or designee) to discuss the policy, demonstration-specific regulations, and safety issues. This includes consideration for the following:

- Nature of the event
- Security needs of the event
- Time of the event
- Any other necessary accommodations

After speaking with Dean of Students (or designee), a recap of what was discussed will go to the student, Communications office, and to the appropriate space manager. It is the student’s responsibility to complete the space reservation process following the meeting. The space reservation system can be found on Inside Transy under Facilities - Reserving Space on Campus.

Requiring students to fulfill these onerous requirements simply to speak their minds and engage their fellow students is patently unreasonable.

Administrative procedures requiring a speaker to obtain a license or permit, or to register before engaging in expression, are highly disfavored under long-established law and difficult to justify. *See N.Y. Times v. United States*, 403 U.S. 713, 714 (1971) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”) (internal quotation marks omitted). As the Supreme Court has observed, “[i]t is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.” *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002).

These problems are only exacerbated by the vague guidelines governing the process by which students may obtain approval to engage in expressive activity. Courts have consistently struck down permitting requirements that fail to contain “narrow, objective, and definite standards to guide the licensing authority.” *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969); *see also City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 770 (1988) (holding that permit requirements must have clearly delineated standards). Transylvania’s policy fails to include any such guidelines. Indeed, by requiring students to discuss the “nature of the event” with administrators, the policy all but invites viewpoint discrimination based on the subjective whims of the Transylvania administrators involved in the approval process.

D. *Selective enforcement allows for viewpoint-based discrimination at odds with Transylvania’s promise of freedom of expression.*

Per Burnam and Drury, YDSA members were allowed to table outside of the free speech zone without prior approval or administrative interference. But Burnam and Drury’s experience was markedly different; when engaged in the same expressive activity the very next day, they were quickly met by two senior administrators who told them they were violating university policy.

This disparate treatment suggests that Transylvania administrators may react differently to speech based on the viewpoints expressed—an unacceptable result. Any coherent conception of freedom of expression prohibits viewpoint-based discrimination. When authorities “target[] not subject matter but particular views taken by speakers on a subject,” it is a “blatant” violation of the speaker’s freedom of expression. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). To be of any value, freedom of expression must include the freedom to express viewpoints unpopular with the general public or authority figures. This freedom is particularly important at a college dedicated to freedom of expression in pursuit of truth. *Id.* at 836 (“For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”). If Transylvania’s policy is only occasionally enforced, its continued maintenance creates an unacceptable risk of censorship of particular viewpoints through selective enforcement.

Transylvania’s apparently uneven enforcement of its own approval requirements further demonstrates that its broadly restrictive policy is not only illiberal, but unnecessary. YDSA’s tabling did not disrupt campus operations; rather, it fostered the kind of student engagement and interaction that is a hallmark of a true liberal arts education. Likewise, no risk was presented by Drury and Burnam’s attempt to peacefully express themselves in conversation with their peers. Transylvania’s rush to prevent them from speaking to other students reveals the institution’s depressingly meager estimation of the capabilities of its own students to learn from one another in dialogue.

Transylvania should trust its students to learn from one another and to teach them how best to do so. Selective adherence to an unnecessary and illiberal policy squanders this opportunity and instead teaches Transylvania’s students that speech is to be feared and regulated, not celebrated and encouraged. This is precisely the wrong lesson for students to learn in our vibrant liberal democracy, where dialogue across difference is of ever-increasing importance.

III. Conclusion

On a college campus, there is hardly a more fundamental exercise of a student’s expressive rights than engaging fellow students in dialogue, as Drury and Burnam intended. By maintaining a policy that requires students to obtain prior permission to engage fellow students in conversation, Transylvania has imposed an illiberal and unreasonable burden on its students’ rights of speech and association. Requiring that students gain prior approval

before expressing themselves forces students to obtain official blessing before engaging in expressive activity and effectively prohibits spontaneous or anonymous speech. Failing to provide clear guidelines as to how approval will be granted leaves open the danger that administrators will abuse their unbridled discretion to decide who may speak on campus on the basis of their viewpoint.

To address these problems, Transylvania should revise its policy to ensure that students may engage in peaceful expressive activity without prior approval in the open, generally accessible areas of campus. FIRE would be pleased to assist Transylvania in reforming its policies to better protect student expressive rights in accordance with the institution's promise to do so. In addition to these reforms, we ask that Transylvania communicate to all students that freedom of expression is embraced on its campus in both policy and practice, and that peaceful expression will never be silenced on the basis of the viewpoint expressed.

We request receipt of a response to this letter by May 30, 2019.

Sincerely,

A handwritten signature in black ink, appearing to be 'Will Creeley', with a long, sweeping underline that extends to the right.

Will Creeley
Senior Vice President of Legal and Public Advocacy

cc: William T. Young, Chairman, Transylvania University Board of Trustees