



November 21, 2019

Dr. James L. Gaudino
Central Washington University
Office of the President
400 East University Way
Ellensburg, Washington 98926

Sent via U.S. Mail and Electronic Mail (james.gaudino@cwu.edu)

Dear President Gaudino:

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 concerned by the threat to freedom of expression at Central Washington University (CWU) posed by the university's practice of requiring student journalists to submit interview questions for approval before allowing personnel, including faculty and student employees, to be interviewed.¹ This practice restricts not only the free expression rights of personnel, but also the free press rights of student journalists.

I. CWU has Engaged in a Pattern of Silencing the Student Press by Restricting its Access to Campus Voices

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, CWU's media relations practices are inconsistent with the university's First Amendment obligations, and the university must take action to reaffirm its commitment to free expression, including a free press.

¹ Cassandra Hays, et al., *The Observer stands for a free and unregulated press*, THE OBSERVER, Nov. 6, 2019, <https://cwuobserver.com/13998/opinion/the-observer-stands-for-a-free-and-unregulated-press/>.

A. *CWU Requires Submission of Interview Questions before Approving Interviews with Student Media*

CWU does not appear to maintain a written policy on general media relations. Despite this lack of written policy, CWU maintains onerous media relations practices—at least for student journalists—often requiring that student reporters reach out to officials for approval before a university employee may grant interviews.² Further, CWU is in the practice of requiring student journalists to submit interview questions to campus officials for prior approval before granting university employees permission to take part in an interview.³

The Observer, CWU’s flagship student newspaper, has frequently encountered these practices in recent years while reporting on campus news. For example, just last month, an *Observer* reporter requested an interview with the Wellness Center about student health.⁴ The Wellness Center responded that “[a]ll interview questions must be approved by the Associate Dean of Health and Wellness.”⁵

In April, an *Observer* reporter sought to interview Violence Prevention and Response Coordinator Kristen Perry about Rock Against Rape, a campus sexual assault awareness event. Perry responded that she would need a list of interview questions for approval before setting up an interview.⁶ When the reporter reminded Perry that standard journalistic practice prohibits sharing interview questions ahead of interviews and asked why interview questions must get prior approval,⁷ the reporter received a response from Associate Dean for Health and Wellness Shawnte Elbert. The response indicated that requiring prior approval of interview questions was a “new standard of practice . . . in partnership with Public Affairs.”⁸

Also in April, when an *Observer* reporter was covering deferred maintenance in residential halls and requested an interview with Joe Bach, Director of Housing Facilities, Bach told the reporter, “We have been instructed to route all interview through the Dean’s office.”⁹ The reporter also reached out to Executive Director for Housing and Residence Life Tricia Rabel for an interview on the same topic, and Rabel responded noting that she had “just received approval for this interview.”¹⁰

² Hays, et al., *supra* note 1.

³ *Id.*

⁴ E-mail from Amy Morris to Wellness Center (Oct. 22, 2019) (on file with author).

⁵ E-mail from Wellness Center to Amy Morris (Oct. 22, 2019) (on file with author).

⁶ E-mail from Kristen Perry to Austin Lane, Senior Sports Reporter, *The Observer* (Apr. 11, 2019) (on file with author).

⁷ E-mail from Austin Lane to Kristen Perry (Apr. 11, 2019) (on file with author).

⁸ E-mail from Shawnte Elbert to Austin Lane (Apr. 11, 2019) (on file with author).

⁹ E-mail from Joe Bach to Alexa Murdoch, Reporter, *The Observer* (Apr. 30, 2019) (errors in original) (on file with author). Tricia Rabel, Executive Director of Housing and Residence Life, reached out to the reporter later in the day approving her to interview Shane Scott, Associate for Capital Planning and Facilities Management, instead of Joe Bach, presumably after routing the request through campus officials. E-mail from Tricia Rabel to Alexa Murdoch (Apr. 30, 2019) (on file with author).

¹⁰ E-mail from Tricia Rabel to Alexa Murdoch (Apr. 30, 2019) (on file with author).

According to *Observer* online editor Mariah Valles, these practices are maintained for student media only. In other words, professional media are not required to have interview questions approved prior to an interview being granted with university personnel.

B. *CWU Athletic Communications Maintains Onerous Press Policies and Practices*

CWU Athletic Communications maintains written policies on media interviews with student athletes.¹¹ The Athletics Policies vary by team, but all require interviews be organized through Athletic Communications.¹² While none of the Athletics Policies mention interview questions, it appears Athletic Communications has, in the past, maintained a practice of requiring prior approval of interview questions before allowing student athletes to interview with reporters from student media.

For example, when a student reporter reached out to Athletic Communications for interviews with softball players in October, Assistant Director of Athletic Communications Caleb Dunlop asked that interview questions be provided an hour and a half before the interview was scheduled.¹³ When the reporter asked for clarification on this policy, Dunlop responded:

As the athletic dept., we reserve the right to request the questions in advance. Normally, the higher the magnitude of the subject matter the more we want to know going in. 1) for our informational purposes and 2) to help the athletes get a chance to give the subject matter a thorough think through prior to.¹⁴

The reporter then sought further clarification with Director of Athletic Communications William McLaughlin. McLaughlin responded by quoting and stating support for Dunlop's message and explaining that disagreement with the policy could be brought to Associate Athletic Director for External Affairs Tyler Unsicker.¹⁵ When the reporter did not provide interview questions by the stated deadline, Dunlop cancelled the interviews.¹⁶

These practices have reached beyond current Athletics team members, as Athletics Communications has also asked to review interview questions for approval before *The Observer* interviews even former CWU athletes.¹⁷

¹¹ CENTRAL WASH. UNIV., *Student-Athlete Interviews*, <https://wildcatsports.com/sports/2017/1/23/student-athlete-interviews.aspx> (last visited Nov. 19, 2019) (the "Athletics Policies").

¹² *Id.*

¹³ Text message from Caleb Dunlop to Austin Lane (Oct. 7, 2019) (on file with author).

¹⁴ Text message from Caleb Dunlop to Austin Lane (Oct. 7, 2019) (on file with author).

¹⁵ E-mail from William McLaughlin to Austin Lane (Oct. 7, 2019) (on file with author).

¹⁶ E-mail from Caleb Dunlop to Austin Lane (Oct. 8, 2019) (on file with author).

¹⁷ Hays, et al., *supra* note 1. One former athlete told an *Observer* reporter in October that she "got a phone call today saying not to answer your questions. The athletic department wants you to send them your questions before anyone answers them. . . . Once you give them your questions they will okay the players to interview with you as well as us! Sorry I really want to help you out, but gotta play by the rules on this one!" *Id.*

C. *Student Media Meets with CWU Leaders*

In an attempt to resolve these issues, student journalists met with administrators in late April.¹⁸ At that meeting, administrators and student journalists agreed that student media would provide context to interviewees prior to interviews, but not specific questions.¹⁹ However, when the new school year began, the issues with prior review of interview questions recurred.²⁰

Members of CWU student media again met with administrators and student government members on November 18 to discuss how to improve relations between the university and its student publications. Per *Observer* online editor Mariah Valles, FIRE understands that the meeting was beneficial in that it allowed officials and student editors to discuss ways to build trust and a good working relationship, and the parties discussed putting together a toolkit for CWU personnel on how to work with student media. At the meeting, CWU officials shared that it is not CWU policy to require interview questions to be reviewed before granting interviews, despite prior communication indicating existence of such a policy.²¹ Further, it is our understanding that CWU did not clearly articulate that it would instruct and train its personnel not to predicate interviews with student media upon prior review of interview questions.

After the meeting, according to Valles, officials from Athletic Communications indicated they would cease the practice of requiring student journalists to submit interview questions for prior approval.

II. CWU's Media Relations Practices are Inconsistent with its Obligations Under the First Amendment

The First Amendment is binding on public colleges like CWU. *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”). Regarding faculty expression at public universities, the Supreme Court has made clear that academic freedom “is of transcendent value to all of us and not merely to the teachers concerned” and therefore is a “special concern of the First Amendment.” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See, e.g.*, E-mail from Shawnte Elbert to Austin Lane (Apr. 11, 2019) (on file with author).

A. CWU’s Press Practices Impose an Unconstitutional Prior Restraint on Speech

By requiring that officials approve interview questions before personnel agree to interview with student media, CWU stifles not only the student press, but also the voices of its faculty and staff.

i. Faculty members and student employees retain a First Amendment right to speak to media on matters of public concern.

Under the First Amendment, government employers may not punish employees for speaking on matters of public concern in their capacity as private citizens. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). A government employer may only punish employee expression, including interviews with members of the news media, if the government employer shows, among other things, that the employee’s speech had a substantial and material negative impact. *Id.* at 568, 573. If the speech “neither [was] shown nor can be presumed to have in any way either impeded the teacher’s proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally,” then “the interest of the school administration in limiting teachers’ opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public,” and the employee’s speech is protected by the First Amendment. *Id.* Thus, CWU may not punish faculty and staff for declining to seek approval of Public Affairs or other campus officials before speaking with student journalists without demonstrating these conversations have a substantial negative impact on the educational operations of the university.

The expressive rights of faculty are even broader. In *Garcetti v. Ceballos*, the Supreme Court expressly reserved the question of whether limits on employee speech would extend to expression “related to academic scholarship or classroom instruction” voiced by faculty, because such speech “implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.” 547 U.S. 410, 425 (2006). Lower courts, including the Ninth Circuit Court of Appeals—which has jurisdiction over CWU—have recognized this reservation and declined to apply the traditional *Garcetti* analysis to faculty members’ speech.²²

²² See, e.g., *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014) (“We hold that *Garcetti* does not apply to ‘speech related to scholarship or teaching’”); *Adams v. Trs. of the Univ. of N. Carolina Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011) (“Applying *Garcetti* to the academic work of a public university faculty member . . . could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment.”).

ii. Requiring permission to speak to journalists imposes a prior restraint on student and faculty speech.

Further, CWU’s practice of requiring interview requests to be approved by campus officials after review of interview questions is not simply a punishment of employees’ speech; it is also a prior restraint on the free expression of university personnel.²³ Where a policy or practice acts as a prior restraint on government employee speech, the government employer bears an even heavier burden than in instances of *post hoc* punishment of employees’ speech. *United States v. National Treasury Employees Union (NTEU)*, 513 U.S. 454, 468 (1995). This is because, “unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens.” *Id.*

Policies and practices that bar faculty members, students, and staff from speaking to journalists, including student journalists, impose a prior restraint on speech. Prior restraints are “the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). Practices that require individuals to seek approval from officials before speaking are “offensive—not only to the values protected by the First Amendment, but to the very notion of a free society.” *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002). CWU cannot condition faculty members’ communication with members of the media, including student media, on receipt of an administrator’s prior approval. This practice impermissibly burdens the First Amendment rights of those subject to the practice.

In order to justify a prior restraint on speech by government employees, including employees of public universities, the government entity must demonstrate “reasonable ground to fear that serious evil will result if free speech is practiced[.]” that these “recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *NTEU*, 513 U.S. at 475 (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927) and *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994)). In cases considering blanket prior restraint on government employee speech, courts have consistently struck down such bans as violative of the First Amendment.²⁴

Accordingly, CWU’s practice of requiring interview requests to be approved by campus officials after review of interview questions imposes unconstitutional prior restraints on employees’ right to speak to the media.

²³ Per our mission, FIRE defends student and faculty rights. Impeding the relationship between university staff and student journalists is detrimental to the free press rights of the student media.

²⁴ See, e.g., *Harman v. City of New York*, 140 F. 3d 111, 116 (2d Cir. 1998) (striking down a policy requiring that “[a]ll contacts with the media regarding any policies or activities of the Agency” be referred to Media Relations); *Barrett v. Thomas*, 649 F.2d 1193, 1199 (5th Cir. 1981) (holding unconstitutional an overbroad employee speech policy). For further discussion of government employee ban cases, see *Protecting Sources and Whistleblowers: The First Amendment and Public Employees’ Right to Speak to the Media*, BRECHNER CENTER FOR FREEDOM OF INFORMATION, Oct. 7, 2019, <http://brechner.org/wp-content/uploads/2019/10/Public-employee-gag-orders-Brechner-issue-brief-as-published-10-7-19.pdf>.

iii. **CWU cannot prohibit student athletes from speaking with the press.**

Because student athletes are students first,²⁵ their right to free expression as private citizens is commensurate to that of other students on campus.²⁶ Similar to campus employees, while the university can restrict student athletes' interactions with the media as official team spokespeople, it cannot restrict student athletes' ability to express their views to the media as private citizens. In other words, CWU may no more impose a prior restraint on the speech of student athletes than it may impose such a restraint on its employees. We are pleased to hear from Valles that CWU Athletic Communications has begun to recognize this and agreed to no longer require submission of interview questions before granting interview requests.

B. CWU's Practices Regarding Student Media Inhibit the Student Press From Exercising its Role as a Campus Watchdog

The right of government employees to speak freely, including to speak freely to the media, finds a close corollary in the public's right to know. As the Supreme Court has observed, blanket infringements on government employees' speech "also impose[] a significant burden on the public's right to read and hear what Government employees would otherwise have written and said." *NTEU*, 513 U.S. at 470; *see also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (it is "well established" that freedom of expression "protects the right to receive information and ideas").

The press, including the student press, is an important conduit for the public's right to know. Courts have recognized that members of the press act as "surrogates for the public" in keeping a watchful eye on the operations of government. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980). Thus, obstructing journalists' access to CWU personnel and student athletes not only violates employees' and students' right to speak out, but also violates the public's right to know about CWU's operations, a process which usually occurs through the press. As members of the campus community, student journalists are an important part of the process of informing the public of the undertakings of government officials at public colleges and universities.

Further, requiring CWU student journalists to submit interview questions prior to authorization of interviews with campus personnel is functionally equivalent to prior review in that it gives university officials potentially intimate context about a story that would not otherwise be available before publication. Whereas in traditional cases of prior review, a university requires student journalists to submit content to school officials before publication, CWU's interview practices similarly allow the university to review much of the

²⁵ *Frequently Asked Questions about the NCAA*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaa.org/about/frequently-asked-questions-about-ncaa> (last visited Nov. 14, 2019).

²⁶ *See B.L v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429 (M.D. Pa. 2019); *see also Zach Greenberg, FIRE releases statement on student-athlete speech rights in wake of favorable court decision*, FIRE (Jan. 5, 2018), <https://www.thefire.org/fire-releases-statement-on-student-athlete-speech-rights-in-wake-of-favorable-court-decision/>.

content of a particular story before publication by way of allowing officials to review questions and employees' proposed answers before they are given to reporters. Because information and quotes garnered through interviews often creates much of the content of specific stories, knowing the questions that are going to be asked and the answers that will be given gives CWU officials a similar power to control the message as universities that engage in traditional prior review.

The Ninth Circuit has specifically held that prior review of student media violates the First Amendment. *Burch v. Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988); *see also Lovell v. Griffin*, 303 U.S. 444, 451 (1938) (striking down an ordinance requiring city manager review of literature before distribution). Prior review is often the first step toward prior restraint. While CWU's interview practices may not result in the university explicitly barring the student media from covering specific topics, it may result in what media law experts have referred to as "censorship by starvation," in which university officials restrain content by denying student journalists access to the information they need to responsibly report on a story.²⁷

As a direct result of CWU's practices, student journalists' ability to cover important campus issues has been burdened by their lack of access to university personnel and student athletes. Blocking journalists' access to campus employees and student athletes is not only contrary to the freedom of expression, but it is also unwise, casting into doubt the university's commitment to transparency regarding campus decisions and events, which—because CWU is a public university—affect its immediate community and the broader public.

CWU may require that official statements made on behalf of the institution itself be made only through Public Affairs, and it may offer to field requests from journalists on behalf of willing employees. It cannot, however, effect a prior restraint on employees' interactions with student journalists and other reporters without violating its obligations under the First Amendment.

i. CWU's press practices improperly discriminate against student media.

Pursuant to the First Amendment, a public entity cannot discriminate against certain press entities based on the content of or viewpoint espoused by the publication's coverage. *Consumers Union of the U.S. v. Periodical Correspondents' Ass'n*, 365 F. Supp. 18, 22–23 (D.D.C. 1973), *rev'd on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976). "[O]nce there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media[.]" *ABC v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977). Further, "the protection afforded newsgathering under the first amendment guarantee of freedom of the press requires that this access not be denied

²⁷ Frank LoMonte, *Journalists Have Help in the Fight for Access to Information*, QUILL & SCROLL, Oct. 31, 2017, <https://quillandscroll.org/5252/uncategorized/journalists-have-help-in-the-fight-for-access-to-information/>.

arbitrarily or for less than compelling reasons.” *Sherrill v. Knight*, 569 F.2d 124, 129 (2d Cir. 1977).

Here, it appears CWU maintains a practice of requiring approval of interview questions before allowing personnel and student athletes to interview with members of the student press, while not maintaining similar requirements for members of the professional press. To the extent that this differential treatment is based upon opposition to the content of or the views expressed by the student media, including *The Observer*, it is contrary to CWU’s obligations under the First Amendment. *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 806 (1985) (finding that in a nonpublic forum “the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses”).

III. Conclusion

The unique role of public universities as “peculiarly the ‘marketplace of ideas,’” *Keyishian*, 385 U.S. at 603, cannot be squared with burdens on student journalists’ right to seek information and employees’ right to share that information. CWU’s practices that restrict relationships between university personnel and the student press call into question its assertion that “the university fosters the free expression and interchange of differing views” and “protect[s] individuals in their right of free expression.”²⁸

To reaffirm its commitment to free expression, CWU must implement policies on media relations that make clear that university personnel are free to speak with the press, including the student press, in their capacity as individual citizens, without a requirement that university officials review interview questions before the interview is granted. Further, CWU must ensure that its employees are trained in practices that comply with these policies and the First Amendment. We applaud Athletic Communications for working with student editors to reverse its practice of requiring prior approval of interview questions, and we encourage the university as a whole to follow suit.

We request receipt of a response to this letter by the close of business on December 5, 2019.

Sincerely,



Lindsay Rank
Program Officer, Individual Rights Defense Program

Cc:

Kremiere Jackson, Vice President of Public Affairs (kremiere.jackson@cwu.edu)

²⁸ Central Wash. Univ., *Policies Governing the Right of Dissent*, <http://www.cwu.edu/resources-reports/cwup-1-30-020-policies-governing-right-dissent> (last visited Nov. 19, 2019).