FIRE
Foundation for Individual Rights in Education

October 2, 2020

The Honorable Robert L. King
Assistant Secretary
Office of Postsecondary Education
United States Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Sent via Electronic Mail (robert.king@ed.gov)

Dear Assistant Secretary King:

FIRE[1] is concerned by, and writes to draw the Department's attention to, the actions of Duquesne University, a private institution that represents to students and faculty, to the public, to its accreditor, and to the Department that it protects the freedom of expression of its students and faculty. Relevant excerpts of these commitments are enclosed.

These are substantial misrepresentations of the nature of Duquesne's educational program. Duquesne's departure from promises of freedom of expression is most recently illustrated by its unjustifiable punishment of faculty member Gary Shank, who has relied on Duquesne's promises of free expression and academic freedom throughout his 23-year teaching career at the university. Duquesne removed Shank from the classroom after he used a racial slur in a pedagogically-relevant context while teaching, and it is now poised to terminate his employment. A copy of FIRE's letter to Duquesne—which the university chose not to answer—is enclosed for your reference. The American Association of University Professors also wrote to Duquesne with its objections.[2]

This is not the first time Duquesne has imperiled its constituents' expressive rights. This time last year, FIRE reminded Duquesne of its free speech promises after it tried to censor a

[1] As you may recall from prior correspondence, 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.
[2] Bill Schackner, *AAUP asks Duquesne to reinstate professor removed from teaching over use of a racial slur*, PITTSBURGH POST-GAZETTE, Sept. 28, 2020, https://www.post-gazette.com/news/education/2020/09/28/Duquesne-University-Gary-Shank-Gormley-AAUP-academic-freedom-race-slur-speech-discrimination/stories/202009280063.

student group's use of the term "gender neutral" in its annual Gender Neutral Fashion Show.[3] After a backlash, Duquesne relented and called the incident a "miscommunication."[4]

FIRE has reminded Duquesne that its censorship of students and faculty is not only inconsistent with its representations to prospective and current students, faculty, and the general public but also violates its promises to its accreditor. The Middle States Commission on Higher Education's standards, a copy of which is enclosed, require that an institution:

- Both "possesses and demonstrates . . . a commitment to . . . freedom of expression";
- In "all activities, whether internal or external, . . . honor[s] its contracts and commitments" and "adhere[s] to its policies"; and
- Both "possesses and demonstrates . . . the avoidance of conflict of interest or the appearance of such conflict in all activities and among all constituents."

FIRE submits that Duquesne's refusal to correct these issues renders its representations a substantial misrepresentation in violation of 20 U.S.C. § 1094(c)(3) and 34 CFR 668.71(c).[5] Accordingly, FIRE requests that the Department initiate an investigation to determine whether monetary penalties or other measures are appropriate, pursuant to its authority under 20 U.S.C. § 1094(c)(3) and 34 CFR 668.71(a).

Sincerely,

Alexandria Morey
Program Officer, Individual Rights Defense Program

Encl.

Appendix A: Excerpts of Relevant Duquesne University Policies
Appendix B: Middle States Commission on Higher Education Standards for Accreditation and Requirements of Affiliation, Standard II
Appendix C: Correspondence Between FIRE and Duquesne University

[3] Lindsie Rank, *Duquesne walks back censorship of campus fashion show*, FIRE, Oct. 9, 2019, https://www.thefire.org/duquesne-walks-back-censorship-of-campus-fashion-show.
[4] Ollie Gratzinger, *"Gender neutral" allowed in fashion show title after backlash*, DUQUESNE DUKE, Oct. 3, 2019, http://www.duqsm.com/gender-neutral-allowed-in-fashion-show-title-after-backlash.
[5] U.S. Dep't of Educ., Notice of Proposed Rulemaking, 85 Fed. Reg. 3190, 3213 n.137 (Jan. 17, 2020) ("The Department notes that public and private institutions also may be held accountable to the Department for any substantial misrepresentation under the Department's borrower defense to repayment regulations.").

Appendix A:

Excerpts of Relevant Duquesne University Policies

I. Duquesne University's Faculty Handbook

Duquesne University's Faculty Handbook provides, in pertinent part:[6]

> 2.0 Broad Statements of Policy
>
> 2.1 Academic Freedom and Responsibility
>
> Essential to the purpose of the University is the free and unhampered pursuit and communication of truth and knowledge. To exercise their essential role in the educational mission of the University, faculty members require certain freedoms, both as citizens and as members of an academic community engaged in teaching, scholarship, clinical activities, and service to the University and society.
>
> [. . .]
>
> 2.1.2 Freedom and Responsibility in Teaching
>
> Academic freedom is essential to teaching and to discussing the material that one teaches. However, faculty members shall not, when teaching, persistently intrude unsubstantiated opinion or material with no relevance to the subject being taught.

II. Duquesne University's Student Handbook

Duquesne University's Student Handbook provides, in pertinent part:[7]

> Discussion and expression of all views are permitted within the University subject to requirements for the maintenance of order.

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[6] DUQUESNE UNIV., FACULTY HANDBOOK (July 2018), https://www.duq.edu/assets/Documents/academic-affairs/_pdf/Policies%20and%20Procedures/Faculty%20handbook%20effective%20July%201,%202018.pdf.

[7] *Student Handbook, Statements on Campus Expression and Classroom Expression*, DUQUESNE UNIV., https://www.duq.edu/assets/Documents/student-conduct/_pdf/StudentHandbook.pdf (last visited Sept. 29 2020).

III. Duquesne University's Commitment to Viewpoint Diversity

Duquesne also promotes itself as celebrating viewpoint diversity, stating:[8]

> We are a community in which human diversity is valued.
>
> Diversity is important at Duquesne. It is the foundation for our rich and vital community of learners—academically talented and motivated students from a variety of backgrounds...
>
> This mix of viewpoints and perspectives makes our campus a unique, vibrant learning community, and a Duquesne education a distinctive and transformational experience that lasts a lifetime.
>
> - We promote and encourage diversity throughout the community, in all of its forms . . . .

IV. Duquesne University President's Public Statement on Free Expression

Duquesne President Ken Gormley has also suggested that Duquesne's free speech promises may be tantamount to First Amendment guarantees. In 2018, Duquesne hosted a First Amendment conference on its campus and a controversy arose surrounding the inclusion of conservative political activist James O'Keefe. Speaking to the campus community, Gormley was quoted by a local news outlet:[9]

> "While we may not always agree on the issues of the day, one of the pillars of the First Amendment is that we all have the right to express our views," says Gormley. "This conference continues the University's commitment to civil discourse and discussing complex and challenging issues in a respectful manner."

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[8] DUQUESNE UNIV., CELEBRATING DIVERSITY, https://www.duq.edu/about/facts-and-rankings/celebrating-diversity (last visited Sept. 29, 2020).

[9] Ryan Deto, *Project Veritas CEO James O'Keefe inclusion at Pittsburgh journalism conference draws criticism,* PITTSBURGH CITY PAPER, Oct. 19, 2018, https://www.pghcitypaper.com/pittsburgh/project-veritas-%20ceo-james-okeefe-inclusion-at-pittsburgh-journalism-conference-draws-criticism/Content?oid=11436301.

Appendix B:

Middle States Commission on Higher Education Standards for Accreditation and Requirements of Affiliation: Standard II

The Middle States Commission on Higher Education's Standards for Accreditation and Requirements of Affiliation provide, in pertinent part:[10]

Standard II – Ethics and Integrity

Ethics and integrity are central, indispensable, and defining hallmarks of effective higher education institutions. in all activities, whether internal or external, an institution must be faithful to its mission, honor its contracts and commitments, adhere to its policies, and represent itself truthfully.

Criteria

An accredited institution possesses and demonstrates the following attributes or activities:

1. a commitment to academic freedom, intellectual freedom, freedom of expression, and respect for intellectual property rights;

2. a climate that fosters respect among students, faculty, staff, and administration from a range of diverse backgrounds, ideas, and perspectives;

3. a grievance policy that is documented and disseminated to address complaints or grievances raised by students, faculty, or staff. The institution's policies and procedures are fair and impartial, and assure that grievances are addressed promptly, appropriately, and equitably;

4. the avoidance of conflict of interest or the appearance of such conflict in all activities and among all constituents;

5. fair and impartial practices in the hiring, evaluation, promotion, discipline, and separation of employees;

[10] MIDDLE STATES COMM'N ON HIGHER ED., STANDARDS FOR ACCREDITATION AND REQUIREMENTS OF AFFILIATION, https://www.msche.org/standards (last visited July 8, 2020).

6. honesty and truthfulness in public relations announcements, advertisements, recruiting and admissions materials and practices, as well as in internal communications;

7. as appropriate to its mission, services or programs in place:

    a. to promote affordability and accessibility;
    b. to enable students to understand funding sources and options, value received for cost, and methods to make informed decisions about incurring debt;

8. compliance with all applicable federal, state, and Commission reporting policies, regulations, and requirements to include reporting regarding:

    a. the full disclosure of information on institution-wide assessments, graduation, retention, certification and licensure or licensing board pass rates;

    b. the institution's compliance with the Commission's Requirements of Affiliation;

    c. substantive changes affecting institutional mission, goals, programs, operations, sites, and other material issues which must be disclosed in a timely and accurate fashion;

    d. the institution's compliance with the Commission's policies; and

9. periodic assessment of ethics and integrity as evidenced in institutional policies, processes, practices, and the manner in which these are implemented.

Appendix C:

Correspondence Between FIRE and Duquesne University

Correspondence with Duquesne University, as follows, is attached:

- September 16, 2020: Letter from FIRE to Ken Gormley, President, Duquesne University

FIRE
Foundation for Individual Rights in Education

September 16, 2020

Ken Gormley
Duquesne University
Office of the President
Fifth Floor, Old Main
600 Forbes Avenue
Pittsburgh, Pennsylvania 15282

URGENT

Sent via Electronic Mail (gormley@duq.edu)

Dear President Gormley:

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 gravely concerned for the state of academic freedom and freedom of expression at Duquesne University in light of the suspension of professor Gary Shank for using racially offensive language in a class discussion about race.

While we appreciate the university's interest in confronting the painful legacy of racism, it cannot do so by dictating, through censorship, how its faculty members and students grapple with that legacy in the classroom. The university is certainly free to criticize the manner in which faculty members confront racism, but Duquesne's suspension of Shank is a clear erosion of the academic freedom to which the university is committed. Accordingly, we call on Duquesne to immediately reinstate Shank and publicly reaffirm that its faculty retain the broad rights of free expression and academic freedom that Duquesne promises.

I. Duquesne Suspends Shank After Student Posts Video of Classroom Discussion

A brief summary of the facts based on publicly-available information follows. We appreciate that you may have additional information and invite you to share it with us.

Gary Shank is a professor in Duquesne's School of Education, where he teaches a variety of Educational Psychology courses. On September 11, a Duquesne student shared a video on

Twitter showing footage from an online meeting of Professor Shank's Educational Psychology I class on Child & Adolescent Development, along with the caption:

> PLEASE LISTEN !! A Professor at Duquesne University giving permission for students to use the N word in class[1]

In the video, Shank says he would allow students to use the word "nigger" in a "pedagogical sense" during class discussions of race. During this discussion, Shank uses the word to explain that it is now inappropriate to use in modern vernacular:

> "What's the one word about race that we're not allowed to use? I'll give you a hint. It starts with 'n.' It's even hard to say. I'll say the word and, again, I'm not using it in any way other than to demonstrate a point. Fair enough?"
>
> "And that word is 'nigger'."
>
> "You know what Brazil nuts are, right? When I was a kid, people called them 'nigger toes.' Could we do that nowadays? Absolutely not."[2]

Shortly thereafter, Duquesne School of Education Dean Gretchen Generett sent a letter[3] to students in Shank's class, writing that the incident was "being taken very seriously by School of Education leadership."

The following day, you sent an email to the university community acknowledging that "the professor may have had pedagogical intentions" in his discussion, but that they "went awry."[4] This was echoed by a student in the class, who told the *Duquesne Duke* that Shank "wasn't saying the things he did to hurt anyone or target anyone," but that she felt he went "too far" in "a point he was trying to make[.]"[5]

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[1] Marc Jr™ (@_marcjr), TWITTER (Sept. 11, 2020, 1:27 PM), https://twitter.com/_marcjr/status/1304486695744819200.

[2] *Id.*

[3] Jeffery Martin, *University Puts White Professor on Paid Leave for Using N-Word in Class*, NEWSWEEK, Sept. 11, 2020, https://www.newsweek.com/university-puts-white-professor-paid-leave-using-n-word-class-1531458.

[4] Email from Ken Gormley, President, Duquesne Univ., to Duquesne Univ. community (Sept. 12, 2020, 2:07 PM) (on file with author).

[5] Kellen Stepler, *Duquesne professor on paid leave after using racial slur in lecture*, DUQUESNE DUKE, Sept. 13, 2020, http://www.duqsm.com/duquesne-professor-on-paid-leave-after-using-racial-slur-in-lecture.

On September 13, Duquesne placed Shank on paid administrative leave while the university continues to investigate.[6] Your email, sent the preceding day, said that Shank "will face very strong disciplinary action pursuant to the procedures set forth in our Faculty Handbook."[7]

II. Shank's Classroom Discussion Was Clearly Protected by Academic Freedom

An institution which pledges to respect academic freedom—as does Duquesne University—commits itself to refraining from punishing faculty members for discussing ideas, topics, and material that, however deeply uncomfortable or offensive to others, is pedagogically-relevant to the course. Academic freedom at its core means providing the breathing room for faculty members to engage in difficult material without fear of formal discipline, provided they do not harass their students. If others believe a faculty member's approach to be mistaken or "awry," they are free to criticize it, but censorship is a cancer on the academic enterprise.

A. Duquesne's Policies Protect Expressive Rights, Academic Freedom

Duquesne University makes strong guarantees to its community members that they will enjoy free expression and academic freedom as members of the community. Having made these commitments, Duquesne is morally and legally bound by them and may not punish community members who exercise the very rights Duquesne guarantees to them.

For example, Duquesne's Faculty Handbook—which you assert controls the university's response to Shank—provides a robust commitment to academic freedom:

> Essential to the purpose of the University is the free and unhampered pursuit and communication of truth and knowledge. To exercise their essential role in the educational mission of the University, faculty members require certain freedoms, both as citizens and as members of an academic community engaged in teaching, scholarship, clinical activities, and service to the University and society.
>
> [...]
>
> Academic freedom is essential to teaching and to discussing the material that one teaches.

That policy recognizes that the right does not extend to "persistently" introducing irrelevant material or opinion and that the right does not authorize harassment or discrimination. The policy makes no exception for offensive content.

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[6] *Id.*

[7] Email from Gormley, *supra* note 4.

Students are also apprised that Duquesne protects expressive freedom and they are likewise granted robust expressive rights. For example, Duquesne promises in its student handbook that "[d]iscussion and expression of all views are permitted within the University subject to requirements for the maintenance of order[.]"[8] Duquesne also promotes itself as celebrating viewpoint diversity, stating that the "mix of viewpoints and perspectives makes [the] campus a unique, vibrant learning community."

B. Academic Freedom Encompasses the Right to Discuss and Present Pedagogically-Relevant Material

Academic freedom is critical to the academic experiment, as "teachers must always remain free to inquire, to study and to evaluate, to gain new maturity and understand; otherwise our civilization will stagnate and die."[9] The future of our nation "depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[10] As the Supreme Court explained in overturning legal barriers to faculty with "seditious" views:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[11]

Academic discussions require that faculty members and students alike have the freedom to discuss, reference, and view materials that may shock or offend others, including materials and literature reflecting and illustrating our nation's long struggle with racism.

Accordingly, the use of racial slurs in a pedagogical context is not uncommon. Princeton University, for example, defended a professor who uttered the same racial slur in an anthropology course to discuss cultural and linguistic taboos.[12] Law professors use it to teach the "fighting words" doctrine[13] and to discuss how courts during the Civil Rights struggle

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[8] *Student Handbook, Statements on Campus Expression and Classroom Expression*, DUQUESNE UNIV., (Last visited Sept. 15 2020), https://www.duq.edu/assets/Documents/student-conduct/_pdf/StudentHandbook.pdf

[9] *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

[10] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (quoting, in part, *U.S. v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

[11] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

[12] Colleen Flaherty, *The N-Word in the Classroom*, INSIDE HIGHER ED., Feb. 12, 2018, https://www.insidehighered.com/news/2018/02/12/two-professors-different-campuses-used-n-word-last-week-one-was-suspended-and-one.

[13] Frank Yan, *Free Speech Professor Takes Heat for Using Racial Epithets in Lecture at Brown*, CHICAGO MAROON, Feb. 9, 2017, https://www.chicagomaroon.com/article/2017/2/10/free-speech-professor-takes-heat-using-racial-epit.

whitewashed evidence of racist rhetoric,[14] journalism professors discuss how to tell stories that involve it,[15] and sociology professors study the impact of the term in defining who is welcomed in various spaces.[16] Faculty and students cannot honestly study American history—or the First Amendment—without confronting manifestations of the word and other unsettling material.

Faculty members also often utilize offensive language as a vehicle to discuss *why* language is offensive and how once-common language vanishes from use as social norms evolve. For example, in *Hardy v. Jefferson Community College*, a white adjunct lecturer teaching "Introduction to Interpersonal Communication" lectured community college students about "language and social constructivism," discussing how "language is used to marginalize minorities and other oppressed groups in society."[17] Students, solicited by the instructor for examples, suggested the words "lady," "girl," "faggot," "nigger," and "bitch," and the instructor repeated some of these words.[18] The United States Court of Appeals for the Sixth Circuit held that the instructor's use of those words as "illustrations of highly offensive, powerful language" was "clearly" relevant to his lecture exploring the "social and political impact of certain words," and was not used "in an abusive manner."[19] The court reasoned that in-class discussion, "however repugnant," that is "germane to the classroom subject matter" is speech on "matters of overwhelming public concern—race, gender, and power conflicts in our society" and, consequently, was protected against administrative censorship.[20]

Others certainly will object to the choices faculty members make in approaching difficult material. But the question of where to draw the line is answered by the faculty member employed for the purpose of teaching that material in the classroom, not the administrator, donor, politician, or government official outside of it.

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[14] Adam Steinbaugh, *Emory Law Professor faces termination hearing for using 'n-word' in discussion of civil rights case, discussion with student*, FIRE, Aug. 30, 2019, https://www.thefire.org/emory-law-professor-faces-termination-hearing-for-using-n-word-in-discussion-of-civil-rights-case-discussion-with-student. Note that Prof. Zwier was ultimately reinstated after Emory University weathered a year of criticism for departing from its commitment to academic freedom. *See, e.g.,* Alex Morey, *Emory prof's reinstatement a bittersweet victory after year-long 'N-word' investigation*, FIRE, Mar. 11, 2020, https://www.thefire.org/emory-profs-reinstatement-a-bittersweet-victory-after-year-long-n-word-investigation.

[15] Frank Harris III, *Without Context, N-Word Goes Best Unsaid*, HARTFORD COURANT, Feb. 13, 2018, https://www.courant.com/opinion/hc-op-harris-ct-teadcher-uses-n-word-20180209-story.html.

[16] *See, e.g.*, Elijah Anderson, *The White Space*, SOCIOLOGY OF RACE & ETHNICITY, 2015 Vol. I pp. 10–21, *available at* https://sociology.yale.edu/sites/default/files/pages_from_sre-11_rev5_printer_files.pdf.

[17] *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 674 (6th Cir. 2001).

[18] *Id.* at 675.

[19] *Id.* at 675, 679.

[20] *Id.* at 683.

C. Expressive Rights May Not Be Curtailed on the Basis that the Expression is Offensive to Others

A foundational tenet of expressive freedom is that expression may not be limited only on the basis that it is offensive, however deeply, to others. This is why the authorities cannot ban the burning of the American flag,[21] prohibit the wearing of a jacket emblazoned with the words "Fuck the Draft,"[22] penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,[23] or disperse civil rights marchers out of fear that "muttering" and "grumbling" white onlookers might lead to violence.[24] In ruling that expressive freedoms protect protesters holding signs outside of soldiers' funerals (including signs that read "Thank God for Dead Soldiers," "Thank God for IEDs," and "Fags Doom Nations"), the Court reiterated this fundamental principle, remarking that "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[25] This is because the authorities "cannot make principled distinctions" between what speech is sufficiently inoffensive to remain protected.[26]

This principle applies with particular strength to public universities, where students and faculty engage in debate and discussion about the issues of the day in pursuit of advanced knowledge and understanding. This dialogue may encompass speech that offends some, many, or even most. For example, the Supreme Court unanimously upheld as protected speech a student newspaper's front-page use of a vulgar headline ("Motherfucker Acquitted") and a "political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice."[27] These images were no doubt deeply offensive to many at a time of political polarization and civil unrest, yet "the mere dissemination of ideas—no matter how offensive to good taste—on a [college] campus may not be shut off in the name alone of 'conventions of decency.'"[28]

D. Duquesne's Commitments Are Legally Binding

As a private institution, Duquesne is free to commit itself to any ideals it wishes without violating the First Amendment. However, having committed itself to free expression and academic freedom, it cannot abandon those promises when, in the face of controversy and public anger, it is convenient for the institution to do so. These commitments are not only

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[21] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the "bedrock principle underlying" the holding being that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

[22] *Cohen v. California*, 403 U.S. 15, 25 (1971).

[23] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

[24] *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

[25] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

[26] *Cohen v. California*, 403 U.S. 15, 25 (1971).

[27] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

[28] *Id.*

moral obligations, but impose legal obligations on the part of the university to its faculty members, the Department of Education, and its accreditor.

i. Duquesne's move to punish Shank violates its legal obligations to faculty members to protect academic freedom.

Duquesne is morally and legally obligated to adhere to the promises it has made. That includes its commitments to academic freedom, which it describes as a "right" in the Faculty Handbook distributed to its faculty. Courts have regularly held that private institutions' commitments to free expression and academic freedom represent not only moral obligations but legal duties.[29] If Duquesne promises its students and faculty expressive rights but abandons those promises when such rights are exercised, that departure will not only chill expressive rights at an institution of higher education, but raises doubts about whether other promises made by the institution will be kept only so long as is convenient.

ii. Duquesne's move to punish Shank exposes Duquesne to action by the U.S. Department of Education for unlawful misrepresentations.

Duquesne's suspension of Shank also exposes the university to liability under federal regulations.

Last month, the U.S. Department of Education opened an investigation[30] into Fordham University's investigation and punishment of a student who posted a pro-democracy Instagram post commemorating the Tiananmen Square massacre. The Department alleged Fordham, which makes similarly strong promises of free speech and academic freedom as Duquesne, violated its promises when it punished the student.

The Department has undertaken similar investigations at public institutions bound by the First Amendment, including at the University of California, Los Angeles (UCLA), arising from a lecturer's reading of Martin Luther King, Jr.'s "Letter from a Birmingham Jail," in which King recounted the slurs that had been directed toward him and his family.[31] After the lecturer did not censor himself in reading from the letter, despite students' request that he do so, and exhibited a documentary containing graphic discussions of lynching, the university reportedly initiated an investigation.[32]

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[29] *McAdams v. Marquette Univ.*, 2018 WI 88, ¶84 (2018) (private Catholic university breached its contract with a professor over a personal blog post because, by virtue of its adoption of a statement on academic freedom, the blog post was "a contractually disqualified basis for discipline").

[30] Adam Goldstein, *Analysis: Department of Education investigates Fordham over broken speech promises in Austin Tong case*, FIRE, Aug. 25, 2020, https://www.thefire.org/analysis-department-of-education-investigates-fordham-over-broken-speech-promises-in-austin-tong-case.

[31] Peter Bonilla, *FIRE again calls on UCLA to defend academic freedom — this time for professor under fire from reading from MLK*, FIRE, July 7, 2020, https://www.thefire.org/fire-again-calls-on-ucla-to-defend-academic-freedom-this-time-for-professor-under-fire-for-reading-from-mlk.

[32] *Id.*

The Department has alleged that in investigating the lecturer, UCLA's public commitments to academic freedom have been rendered substantial misrepresentations about the nature of its academic program, violating 20 U.S.C. § 1094(c)(3) and 34 CFR 668.71(c).[33] The Department has requested that UCLA—which faces civil penalties and the loss of its eligibility for federal funding[34]—produce documents and make its senior leadership available for transcribed interviews.[35]

Duquesne has already gone farther than UCLA. If the matter is brought to the attention of the Department of Education, Duquesne will expose itself to a protracted investigation, a loss of access to federal grant funding, and liability to the Department for up to $58,328 per violation. Duquesne should be confident that the Department of Education will take notice of its wanton disregard for the academic freedom rights of its faculty if it persists in its current trajectory.

iii. Duquesne's abridgment of academic freedom violates the requirements of its accreditation.

Duquesne's conduct is not only at odds with its commitments to its faculty members and the Department of Education, but to its accreditor. The university is accredited by the Middle States Commission on Higher Education, which requires that each institution, as a precondition for accreditation, "possess[] *and* demonstrate[] . . . a commitment to academic freedom, intellectual freedom, [and] freedom of expression."[36] This is a laudable commitment to defend, rather than abrogate, the expressive rights of students and faculty. Yet, in brushing aside these commitments, Duquesne's administration risks jeopardizing its accreditation.[37]

E. Shank's Discussion Did Not Amount to Harassment

Academic freedom does not extend to faculty members a right to engage in discriminatory conduct or harassment. However, the discussion of ideas, materials, or words that others find deeply offensive cannot alone amount to unprotected harassment or discriminatory conduct. The discussion here, as the university's leadership and students in the class have acknowledged, was not conduct directed in an insulting manner at any particular student, nor does it amount to discriminatory conduct. Moreover, legal evaluations of hostile environment

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[33] Letter from Robert L. King, Asst. Sec., Office of Postsecondary Ed. U.S. Dep't. of Educ., to Gene Block, Chancellor, Univ. of Cal., Los Angeles (June 23, 2020), *available at* https://thefire.org/doe-letter-to-ucla-june-23-2020; U.S. Dep't of Educ., Notice of Proposed Rulemaking, 85 Fed. Reg. 3190, 3213 n.137 (Jan. 17, 2020) (noting that "public and private institutions also may be held accountable . . . for any substantial misrepresentation under the Department's borrower defense to repayment regulations").

[34] 20 U.S.C. § 1094(c)(3).

[35] Letter from King, *supra* note 33.

[36] MIDDLE STATES COMM'N ON HIGHER EDUC., STANDARDS FOR ACCREDITATION AND REQUIREMENTS OF AFFILIATION, https://www.msche.org/standards (emphasis added).

[37] *See, e.g.*, Adam Steinbaugh, *Mount St. Mary's University President Simon Newman Resigns After Accreditor Questions Commitment to Freedom of Expression*, FIRE, Mar. 1, 2016, https://www.thefire.org/mount-st-marys-university-president-simon-newman-resigns-after-accreditor-questions-commitment-to-freedom-of-expression.

harassment account for the breathing room afforded to academic freedom in order to avoid chilling pedagogically-relevant discussion.

Properly defined, discriminatory harassment is not protected by the First Amendment nor basic tenets of academic freedom, as Duquesne's academic freedom policy properly recognizes. But as the AAUP has noted, "[o]verly broad interpretations of what constitutes a 'hostile environment' are increasingly undermining academic freedom."[38] Arguing that "[a]dministrations often view academic freedom as an obstacle to policies that have already been promulgated instead of as a foundational tenet of higher education that should shape institutional policy," the AAUP has instead urged universities to promulgate harassment policies that "distinguish speech that fits the definition of a hostile environment from speech that individuals may find hurtful or offensive but is protected by academic freedom."[39]

"Learning is best advanced by encouraging discussion of controversial issues," the AAUP has concluded, "not by using punitive administrative and legal fiat to prevent such discussions from happening."[40]

Courts have likewise rejected the application of harassment policies against faculty members for classroom expression protected by academic freedom. *Silva v. University of New Hampshire,* for example, concerned a public university's discipline of a faculty member who had used subjectively offensive analogies while teaching his technical writing class.[41] On review, a federal district court found that the University of New Hampshire's application of the sexual harassment policy to the professor's "classroom statements violate[d] the First Amendment."[42] While noting that the university's policy "address[ed] the legitimate pedagogical concern of providing a congenial academic environment," the court based its holding on several factors: The complaining students were exclusively adults, "presumed to have possessed the sophistication of adults"; the professor's in-class speech "advanced his valid educational objective of conveying certain principles related to the subject matter of his course"; and the statements "were made in a professionally appropriate manner as part of a college class lecture."[43] The court concluded that the university had found the professor's "classroom speech was subject to discipline simply because six adult students found his choice of words to be outrageous"—and pointed out that "outrageousness" is inherently subjective.[44] Accordingly, the court found that the policy could not be applied to the professor's speech

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[38] *The History, Uses, and Abuses of Title IX,* AAUP (June 2016), https://www.aaup.org/file/TitleIXreport.pdf.
[39] *Id.*
[40] *Id.*
[41] *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994).
[42] *Id.* at 314.
[43] *Id.* at 313.
[44] *Id.*

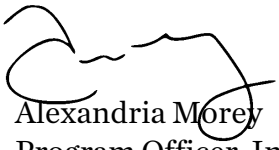
because "it employ[ed] an impermissibly subjective standard that fail[ed] to take into account the nation's interest in academic freedom."[45]

III. Conclusion

Under any basic conception of academic freedom, the choice of whether and how to confront upsetting material in a pedagogically-relevant context is left to faculty members, not administrators. Duquesne promises this right to its faculty and must not violate those promises. Doing so casts an unacceptable chill over the rights of Duquesne faculty who have relied on the institution's promises and exposes the university to considerable legal liability.

Given the urgent nature of this situation, we request receipt of a response to this letter no later than the close of business on Wednesday, September 23, 2020, confirming that the university has abandoned any investigation into or punishment of Shank.

Sincerely,



Alexandria Morey
Program Officer, Individual Rights Defense Program

Cc: Madelyn Reilly, Vice President for Legal Affairs and General Counsel
Gretchen Generett, School of Education Interim Dean
Sean Weaver, Director, Anti-Discrimination Compliance

[45] *Id.*