



January 19, 2021

Dr. Ronald Graham
Haskell Indian Nations University
Office of the President
Navarre Hall
155 Indian Ave
Lawrence, Kansas 66046-4800

Sent via Electronic Mail (ronald.graham@bie.edu)

Dear President Graham:

On January 14, FIRE,¹ NAJA,² and the SPLC³ received an email from Jennifer Wiginton of the Bureau of Indian Education (BIE) notifying us that your directive of October 16, 2020, was rescinded and attaching a letter from you, addressed to Jared Nally, to that effect. While Wiginton asserted that you had intended to send this letter on November 20, the letter was itself undated, and the letter's metadata reveals that it was last edited after that date. It would appear that this letter was only belatedly sent to us and to Nally last week as a result of the BIE's investigation into your directive.

Rescission of your unconstitutional directive of October 16, 2020—which barred Jared Nally, editor-in-chief of *The Indian Leader*, from engaging in basic newsgathering and expressive activities protected by the First Amendment—was appropriate. While it is important that *The Indian Leader* may now do its work without the chill of censorship hanging over it, your

¹ 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 The Native American Journalists Association (NAJA) serves and empowers Native journalists through programs and actions designed to enrich journalism and promote Native cultures. NAJA recognizes Native Americans as distinct peoples based on tradition and culture. In this spirit, NAJA educates and unifies its membership through journalism programs that promote diversity and defends challenges to free press, speech, and expression. NAJA is committed to increasing the representation of Native journalists in mainstream media. NAJA encourages both mainstream and tribal media to attain the highest standards of professionalism, ethics and responsibility.

³ Founded in 1974, the Student Press Law Center (SPLC) is the nation's only legal assistance agency devoted exclusively to supporting, defending, and educating high school and college journalists about the rights and responsibilities embodied in the First Amendment and supporting the student news media in covering important issues free from censorship. The SPLC is a nonpartisan, nonprofit organization.

administration's inexcusable and unexplained delay evidences continuing negligence in protecting your students' First Amendment rights. As a result, serious concerns remain about the state of freedom of speech and of the press at Haskell Indian Nations University (HINU). To that end, we request that HINU take further actions to revise its student code of conduct to comport with the First Amendment and notify students of these changes.

Three organizations concerned with students' rights wrote a letter to you on October 26, 2020, seeking your urgent attention and calling for an "immediate" rescission of a patently unconstitutional directive to a student journalist. At best, your intended response—accepting as true the BIE's representations that your undated letter was intended to be sent on November 20—would have come some thirty-five days after your October 16 order that Nally cease exercising his First Amendment rights. As it stands, that rescission was not communicated to Nally until eighty-nine days after the October 16 order.

It is absolutely inappropriate and inexcusable that it took HINU three months to rescind a directive that was unconstitutional from day one, regardless of the reason for the delay. For three months, your directive caused Nally and *The Leader* uncertainty as to their fundamental First Amendment rights, causing serious injury to their constitutional rights. This violated both the First Amendment and *The Leader's* 1989 settlement agreement with the university.⁴ While we appreciate that you and your leadership team have taken some belated steps to countermand your directive, further action must be taken to make these students—and all students at HINU—whole.

This is especially true given that, in addition to being a flagrant violation of the First Amendment, your directive also represented a departure from HINU's usual student conduct process.⁵ Despite the process for adjudicating student conduct violations laid out in HINU's student handbook,⁶ Nally did not receive fair notice that he was being accused of violating university policy, nor did he receive a hearing or other opportunity to be heard. Instead, Nally was subject to only a unilateral—and unconstitutional—diktat, imposing penalties on Nally and *The Leader* for three months without any due process.

Unfortunately, this complete disregard for Nally's rights appears consistent with HINU's worrying lack of concern for student rights in general. This is further evidenced by HINU's Student Rights Office web page, which continues to read, "Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed diam nonummy nibh euismod tincidunt ut laoreet dolore magna aliquam erat volutpat"—three months after FIRE, NAJA, and SPLC first alerted you of this oversight in our letter of October 26, 2020. Additionally, HINU does not make any

⁴ Settlement Agreement between HINU Indian Junior College of the Bureau of Indian Affairs and the Indian Leader Association (Sept. 19, 1989) (on file with author).

⁵ See Haskell Indian Nations University Student Handbook Code of Conduct at 23–35, *available at* <https://haskell.edu/wp-content/uploads/2017/01/Haskell-CSC-Table-of-Contents-7-22-16.pdf> (last visited Jan. 15, 2021).

⁶ *Id.*

student handbook available on its website, leaving students in the dark as to their rights and responsibilities.⁷

Of particular concern are HINU's "CIRCLE" values, which restrict student expression rights at HINU.⁸ CIRCLE, an acronym ("Communication, Integrity, Respect, Collaboration, Leadership, and Excellence"),⁹ presents laudable goals, but HINU cannot mandate these goals without departing from its obligations under the First Amendment.

For example, a government entity cannot mandate that individuals be respectful or demonstrate integrity in their expression. This is because the First Amendment, distilled to its most fundamental concepts, is intended to protect expression when it is controversial or upsetting to others, might be seen as disrespectful, or even might be seen to fully lack integrity. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted merely because some, many, or even most find it to be offensive or rude. This core First Amendment principle is why the authorities cannot ban the burning of the American flag,¹⁰ prohibit the wearing of a jacket emblazoned with the words "Fuck the Draft,"¹¹ penalize satirical advertisements describing a pastor losing his virginity to his mother in an outhouse,¹² or disperse civil rights marchers out of fear that "muttering" and "grumbling" white onlookers might lead to violence.¹³ In ruling that the First Amendment protects 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."¹⁴

This principle does not lose its salience in the context of the public university. To the contrary, a commitment to expressive rights must be robust and uncompromising if students and faculty are to be free to engage in debate and discussion about the issues of the day in pursuit of advanced knowledge and understanding. This dialogue may encompass speech that shows disrespect or offends. For example, the Supreme Court upheld as protected speech a student newspaper's use of a vulgar headline ("Motherfucker Acquitted") and a front-page "political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice."¹⁵

⁷ Only by using Google to search for "Haskell Indian Nations Handbook" can one find outdated codes of conduct from 2012, 2015, and 2016. Because it is the most recent student handbook either FIRE or Nally could locate, this letter will reference HINU's 2016 Student Handbook and Code of Conduct.

⁸ "Discussion and expression of all views is permitted, consistent with Haskell's CIRCLE values . . ." Handbook, *supra* note 5, at 11.

⁹ *Id.* at 6-7.

¹⁰ *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").

¹¹ *Cohen v. California*, 403 U.S. 15, 25 (1971).

¹² *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

¹³ *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

¹⁴ *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

¹⁵ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667-68 (1973).

There is no doubt that many found these images deeply disrespectful at a time of political polarization and civil unrest, yet “the 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.’”¹⁶

Further, your directive indicated that you believe criticism of government officials—such as HINU administrators—to be disrespectful, and thus in contravention of HINU’s CIRCLE policy. However, again, the Supreme Court has specifically held that constitutionally-protected public debate “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁷

In an effort to remedy its callous disregard for the rights of its students, including Nally and *The Leader*, HINU must take substantial steps to ensure that its policies and practices protect the rights of its students. To this end, we ask HINU to do the following:

1. Revise its CIRCLE values to make clear that these are aspirational, not mandatory.
2. Amend its Classroom Expression¹⁸ and Campus Expression¹⁹ policies to make clear that the right to free expression is not contingent upon compliance with the CIRCLE values. Further, the policy should be amended to clarify that student press and speech may be regulated by the university only if the expression falls into a category unprotected by the First Amendment, such as true threats, harassment, or incitement.
3. Distribute a revised student handbook to all HINU students, and ensure that the updated handbook is easily found and publicly available on HINU’s website.
4. Ensure that all outdated versions of HINU’s policies are removed from the website or marked clearly to indicate they are no longer in effect.

Making these revisions to the student handbook and ensuring that students are aware of these changes will begin to make amends for the hostile free expression climate HINU has created.

We also understand that *The Leader*’s new Plan of Operations—including the newspaper’s right to nominate and have confirmed a faculty adviser of its own choice, and its right to request that its faculty adviser be removed—will be approved.²⁰

As we ensure that HINU does, in fact, intend to repair its relationship with Nally and *The Leader*, please also see the attached request for records pursuant to the Freedom of Information Act (5 U.S.C. § 552), which was also filed using the online portal on FOIA.gov.

In addition, HINU must preserve all documents and electronically stored information as defined by Rule 34 of the Federal Rules of Civil Procedure, that are relevant to this dispute.

¹⁶ *Id.*

¹⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

¹⁸ Handbook, *supra* note 5, at 10.

¹⁹ *Id.* at 11.

²⁰ Please see our letter of October 26, 2020 for a discussion of the constitutional pitfalls of preventing student journalists from being able to direct the leadership of their own publications.

This includes any electronically stored information located on the “haskell.edu” email server. This includes without limitation electronic data within HINU’s custody and control that is relevant to this dispute, including without limitation emails, instant messages, and other information contained on HINU’s computer systems and any electronic storage systems. This also includes electronic data contained in computers, cellular phones, and other devices used by HINU administrators. As such, HINU must ensure that all HINU administrators involved in this dispute have preserved all electronic data relating to Nally and *The Leader* on their personal devices.

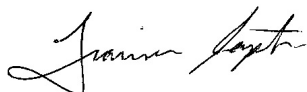
No procedures should be implemented to alter any active, deleted, or fragmented data. Moreover, no electronic data should have been disposed of or destroyed. We trust that HINU will continue to preserve such documents and electronically stored information.

Your directive to Nally represented a brazen departure from your First Amendment obligations, and it came as part of a pattern of unconstitutional actions at HINU.²¹ In order to move forward, HINU must take clear actions to demonstrate that it will now take its First Amendment obligations seriously. We request receipt of a response to this letter no later than the close of business on January 26, 2021.

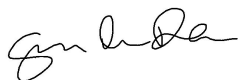
Sincerely,



Lindsay Rank
Program Officer, Individual Rights Defense Program
Foundation for Individual Rights in Education



Francine Compton
President
Native American Journalists Association



Sommer Ingram Dean
Staff Attorney
Student Press Law Center

Cc: Jennifer Segal Wiginton, Bureau of Indian Education Team Lead
Division of Indian Affairs, Office of the Solicitor

Encl.

²¹ See, e.g., Haskell Indian Nations University: Denial of Hearing After Student Kicked Out of Campus Housing, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., (Apr. 29, 2020), <https://www.thefire.org/kansas-student-forced-to-sleep-in-car-after-university-kicks-him-out-of-housing-during-stay-at-home-order>.

Preview Request

The Freedom of Information Act (FOIA) is a federal law that gives the public the right to make requests for federal agency records. Agencies may withhold information according to nine exemptions contained in the statute. The FOIA applies only to federal agencies. It does not apply to records held by Congress, the courts, or by state or local government agencies. Each state has its own public access laws that should be consulted for access to state and local records.

★ indicates a required field.

Agency Selection

Agency	U.S. Department of the Interior
Sub Agency	Bureau of Indian Education
Sub Agency	Bureau of Indian Education (General)

Please note that the complexity of your request will affect the order in which your request is processed. For more information on multitrack processing and how it affects your request, please see section 2.15 of our regulations

Fields marked with an asterisk (*) are required. In addition, you should indicate in the Description field your fee category (that is, whether you are a commercial-use requester, news media, educational or noncommercial scientific institution, or other requester as described in sections 2.38 and 2.39 of our regulations).

The FOIA offices in the bureaus/offices of the Department of the Interior are continuing to process FOIA requests to the best of their ability during the COVID-19 pandemic. To keep employees healthy and safe, the Department is maximizing telework flexibility and employing social distancing protocols. As a result of these precautions, most employees are working remotely and unable to collect hard copy records located in government facilities at this time. If your request is for hard copy records, the response to your request will very likely be delayed. In addition, employees may not receive FOIA requests that are sent by U.S. mail, overnight mail services, or facsimile in a timely manner.

You will receive an email shortly after this form has been submitted. This email confirms that your request was submitted successfully and that the selected FOIA office can begin review of your request. If you do not receive a confirmation email and would like to confirm your submission, please contact the bureau FOIA office through the information located on our [Contact](#) page.

The Office of Inspector General is not accepting FOIA requests through FOIAonline. You may file a request with the Office of Inspector General at: <https://www.doi.ig.gov/complaints/FOIA/how-to-submit-a-foia-request>.

The Department's expedited processing requirements correspond with 43 C.F.R. § 2.10 and § 2.20. A request for expedited processing must set forth the reasons why the request should be expedited. You must certify that the reasons given for seeking expedited processing of this request are true and correct to the best of your knowledge and belief.

The Department's fee waiver requirements correspond with 43 C.F.R. Part 2, Subpart G. Please be advised that by making a FOIA request, it shall be considered an agreement by you to pay all fees unless you have been granted a fee waiver or specify your willingness to pay fees up to a particular amount. Please note that a default amount of \$200 *will be prepopulated* to your request, but can be modified by you to be less or more. Additionally, the amount of fees you will be charged (or not charged) will be affected by your fee category. We will confirm this agreement in our acknowledgement letter.

If the bureau processing your request finds that the actual cost will exceed the amount you specify, the bureau will stop processing the request and consult with you (see 43 C.F.R. 2.49(d)). If you are seeking a fee waiver, it is your responsibility to provide detailed information to support your request by addressing all the criteria outlined in 43 C.F.R. 2.48. If you do not submit sufficient justification, your fee waiver request will be denied (see 43 C.F.R. 2.45). Please note the fact you may have received a fee waiver in the past is not determinative of whether you will receive one for this request--you still must submit sufficient justification.

Request Type

Request Type	FOIA
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Contact Information

Salutation	Miss
First Name	Katlyn
Middle Initial	
Last Name	Patton
Email Address	katlyn.patton@thefire.org
Organization	Foundation for Individual Rights in Education
Phone Number	2157173473
Fax Number	
Mailing Address Location	United States/US Territories
Address Line 1	510 Walnut Street
Address Line 2	Suite 1250
City	Philadelphia
State/Province	Pennsylvania
Zip Code/Postal Code	19106

Processing Fees

Will Pay Up To	\$10.00
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Description

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(1) Any emails (including attachments), memoranda, text messages, or social media messages sent or received by Dr. Ronald Graham to or from any employee or agent of Haskell Indian Nations University, from October 26, 2020 through the present date, which contain the terms "Indian Leader," "newspaper," "free expression," "free speech," "free press," "Jared," or "Nally."

(2) Any emails (including attachments), memoranda, text messages, or social media messages sent or received by Dr. Ronald Graham to or from any employee or agent of Haskell Indian Nations University, from October 26, 2020 through the present date, which reference the letter from Lindsie Rank, Foundation for Individual Rights in Education, to Dr. Ronald Graham, dated October 26, 2020.

(3) Any document (including emails, attachments to emails, memoranda, text messages, or social media messages) which reflect, pertain to, or substantiate Dr. Graham's statement in an undated letter to Jared Nally that Dr. Graham had "instructed my staff to review the status of the Leader's annual recognition process to ensure continued access by the Leader to its Student Bank account and Haskell resources." Privacy waiver: Please find enclosed with this request a privacy waiver executed by Jared Nally. Request for Privilege Log: If any otherwise responsive documents are withheld on the basis that they are privileged or fall within a statutory exemption, please provide a privilege log setting forth (1) the subject matter of the document; (2) the person(s) who sent and received the document; (3) the date the document was created or sent; and (4) the basis on which the Bureau of Indian Education contends it is entitled to withhold the document from production.

Request Expedited Processing

Make Request?

Yes

Justification

Request for expedited processing: Pursuant to 5 U.S.C. § 552(a)(6)(E) and 43 C.F.R. § 2.20, I request expedited processing of this request because there is a compelling need for the records and an "urgency to inform the public about an actual or alleged Federal Government activity." The Foundation for Individual Rights in Education is primarily engaged in disseminating information to inform the public about government affairs, and regularly publishes on its website news and information concerning matters relating to civil liberties in higher education. Each of the substantive requests included herein involve an actual or alleged Federal Government activity, namely the actions of an institution under the authority of the Bureau of Indian Education which violated students' First Amendment rights, and that institution's current purported efforts to correct that violation. (See the enclosed letters of October 26, 2020 and of today's date from Lindsie Rank, Foundation for Individual Rights in Education.) I request a response to this request for expedited processing within 10 calendar days under 43 C.F.R. § 2.20(e). I certify that the statements contained in this letter regarding the alleged activity and public concern are true and correct to the best of my knowledge.

Request a Fee Waiver

Make Request?

Yes

Justification

Fee waiver request: Pursuant to 5 U.S.C. § 552(a)(6)(E) and 43 C.F.R. § 2.45(a). The Foundation for Individual Rights in Education, Inc. (FIRE) is a 501(c)(3) non-profit, non-partisan organization dedicated to defending, preserving, and extending civil liberties on campus. The records sought herein are not sought for a commercial purpose and are, instead, requested by a non-profit organization to facilitate the public's understanding of government activities. The subject of the request specifically concerns identifiable operations or activities of the government, and the disclosable portions of the requested information will be meaningfully informative in relation to the subject matter of the request. The public interest would be well-served by granting a fee waiver. The disclosure will contribute to the public understanding of government operations, and the public's understanding will be significantly enhanced by the disclosure, as FIRE has expertise in the subject matter of the request and the intention and demonstrated ability to disseminate the information to the public. FIRE regularly shares information with other media outlets and maintains a blog regularly publishing information concerning similar matters. See, for example, <https://www.thefire.org/santa-clara-university-protects-student-free-speech-with-one-hand-censors-with-the-other>. Because the subject of this request pertains to an ongoing controversy, it is important that records be produced in an expedited manner in order to facilitate the public's interest in understanding, and being able to respond to, decisions by government officials. If a fee waiver is not granted, please apprise me if the estimated costs will exceed \$10.

Additional Information

Relevant park or refuge or site or other location N/A

Attach Supporting Files

Attached File Name	Size (MB)	File Type
Jared Nally FERPA waiver & request.pdf	0.1932	Adobe PDF document

✓ I Agree.

I have read the Privacy and Security Notice and agree to the terms set forth.

✓ I Agree.

Affirmation. Pursuant to 28 USC § 1746, I declare and affirm that under penalty of perjury under the laws of the United States of America that all of the foregoing information, statements, and signatures submitted in connection with this request and in any supporting documents are true and correct to the best of my knowledge.

Request Confirmation

Request Information

Tracking Number	DOI-BIE-2021-001931
Requester Name	Under Agency Review
Submitted Date	01/19/2021
Request Phase	Submitted
Description	Under Agency Review