



January 28, 2021

Rachel Aho  
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University of Utah  
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Salt Lake City, Utah 84112

*Sent via Electronic Mail (raho@housing.utah.edu)*

Dear Ms. Aho:

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 state of freedom of expression at the University of Utah ("UoU") in light of its Housing & Residential Education ("HRE") Press/Media Policy (the "Policy"), which unduly restrains the right of student-employees to speak to journalists. Because the Policy chills student expression on pressing public issues, we urge UoU to revise the Policy so that it unambiguously respects student-employees' First Amendment right to speak as citizens on matters of public concern.

Under the guise of preventing HRE staff from speaking on behalf of the department or university, the Policy forbids staff, including students serving as Resident Advisors and Social Justice Advocates, from identifying themselves as HRE or UoU employees in their communications with the media.<sup>1</sup> The Policy further prohibits staff from "discussing policies, procedures, investigation details, or anything else that would associate the individual as an employee of the HRE department or campus."<sup>2</sup> Under the Policy, "[i]f a staff member chooses to engage in a conversation with any media agency, journalist, or news anchor- it is requested that the individual please consider how to disassociate comments from work as an HRE and U

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<sup>1</sup> *HRE Press/Media Policy*, HOUSING & RESIDENTIAL EDUC., UNIV. OF UTAH (on file with author).

<sup>2</sup> *Id.*

of U employee.”<sup>3</sup> Because of the Policy, several RAs have anonymously expressed fear of being fired for speaking to the media about the university’s practices concerning COVID-19.<sup>4</sup>

It has long been settled law that the First Amendment is binding on public universities like UoU.<sup>5</sup> Accordingly, the decisions and actions of a public university—including the maintenance of policies implicating student and faculty expression<sup>6</sup>—must be consistent with the First Amendment. This includes the policies and practices applicable to student employees, who do not “relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.”<sup>7</sup> Instead, they retain a right to speak as citizens on matters of public concern.<sup>8</sup>

The Policy inappropriately burdens student expression. First, by requiring student-employees to conceal their status as HRE staff when speaking to the media and to refrain from discussing HRE policies and activities, the Policy infringes on students’ fundamental right to speak as citizens on matters of profound public concern—that is, any subject which “can be fairly considered as relating to any matter of political, social, or other concern to the community[.]”<sup>9</sup> While the university doubtlessly has an interest in preventing student employees from revealing confidential information or purporting to speak on behalf of the university, the Policy goes beyond these reasonable concerns and prohibits student-employees from even identifying themselves as staff. This relationship is a fact that would surely be relevant to a student’s public remarks about university policies or actions as they relate to issues of public importance. Despite HRE’s concerns that staff might speak on behalf of HRE or UoU, a speaker’s mere mention of his employment does not automatically mean he is speaking in his capacity as an employee. “[T]he mere fact that a citizen’s speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. . . .”<sup>10</sup> UoU’s interest in controlling speech made on its behalf cannot justify this strict, overbroad restriction on student expression.

Second, because the scope of the policy limits students’ expression concerning their employer, it necessarily inhibits their ability to talk about matters of public concern. The COVID-19 pandemic is of critical public concern, particularly to students arriving on campus for the

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<sup>3</sup> *Id.*

<sup>4</sup> Courtney Tanner, *Dorm RAs threaten to strike over University of Utah’s handling of COVID-19 in campus housing*, THE SALT LAKE TRIBUNE (Aug. 25, 2020), <https://www.sltrib.com/news/education/2020/08/25/ras-say-theyre-not-being>.

<sup>5</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>6</sup> *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

<sup>7</sup> *Connick v. Myers*, 461 U.S. 138, 140 (1983).

<sup>8</sup> *Modica v. Taylor*, 465 F.3d 174, 180 (5th Cir. 2006).

<sup>9</sup> *Snyder v. Phelps*, 562 U.S. 453 (2011).

<sup>10</sup> *Lane v. Franks*, 573 U.S. 228, 240 (2014). Notably, the principal decision of the Supreme Court of the United States concerning the First Amendment rights of employees involved precisely this question, addressing a letter to the editor from a public school teacher who identified and criticized his employer. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571-73, 576-78 (1968) (First Amendment protected a teacher’s letter to the editor, identifying himself as a teacher at a public high school, criticizing his employer’s policies.).

spring semester during the deadliest month of the pandemic to date.<sup>11</sup> It is also understandably important to the RAs and Social Justice Advocates concerned about the safety of a campus that is not only their workplace, but their home. Even if a government employee speaks about her employer and identifies herself as an employee, her speech may be protected so long as it addresses matters of public concern.<sup>12</sup> Consequently, students have a First Amendment right to comment on UoU's response to COVID-19, as well as its handling of other issues affecting the public,<sup>13</sup> regardless of whether the comments reveal their status as university employees.

Moreover, the Policy expansively and unreasonably defines “[s]peaking on behalf of HRE” to include speech that discusses “policies, procedures, investigation details, or anything else that would associate the individual as an employee of the HRE department or campus.” These similarly overbroad restrictions conflate speech *on behalf* of HRE with speech *about* HRE. As demonstrated by the RAs who criticized the university's handling of the COVID-19 pandemic, it is entirely possible for student-employees to mention their positions with HRE, and to comment publicly on HRE or campus policies and procedures, without purporting to represent the official views of HRE or UoU. The Policy appears to prohibit such speech even if the student does not hold herself out as a spokesperson for HRE or UoU.

The Policy will not advance UoU's interests. It has already resulted in at least one news story quoting anonymous RAs, who feared that they would be fired for speaking out.<sup>14</sup> Given the language of the Policy, their fears are justified. If left in place, the Policy will lead to more stories quoting anonymous students, causing anxiety among students and parents about the university's transparency and safety.

Accordingly, we ask that UoU immediately rescind or modify the HRE Press/Media Policy to make clear that Resident Advisors, Social Justice Advocates, and other student-employees will not be punished for speaking as citizens on matters of public concern, irrespective of whether that speech reveals their status as university employees or addresses HRE or UoU policies or actions, provided that the students do not reveal information made confidential by law or purport to speak on behalf of the university.

We respectfully request receipt of a response to this letter by Thursday, February 11, 2021.

Sincerely,



Aaron Terr

Program Officer, Individual Rights Defense Program and Public Records

<sup>11</sup> Will Feuer & Nate Rattner, *U.S. reports record number of Covid deaths in January as new strains threaten progress*, CNBC (Jan. 27, 2021), <https://www.cnbc.com/2021/01/27/us-reports-record-number-of-covid-deaths-in-january.html>.

<sup>12</sup> *Pickering*, 391 U.S. at 571-73, 576-78.

<sup>13</sup> As a public, tax-supported institution, almost everything UoU does is a legitimate matter of public interest.

<sup>14</sup> Tanner, *supra* note 4.