



October 7, 2021

President Samuel Hoi
Maryland Institute College of Art
1300 W Mount Royal Ave
Baltimore, Maryland 21217

Sent via U.S. Mail and Electronic Mail (shoi@mica.edu)

Dear President Hoi:

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 disciplinary warning issued to faculty member Saul Myers. That warning, threatening future disciplinary action, arose from comments Myers made at a faculty meeting and to a colleague. Although the institution determined—correctly—that Myers' speech violated no Maryland Institute College of Art (MICA) policies, he has been warned not to repeat speech administrators believe to be insufficiently "respectful." Left in place, the warning will chill faculty speech protected by MICA's promises of free expression and academic freedom.

FIRE calls on MICA to rescind the warning and affirm that no faculty member will be punished for protected speech, even if others find it offensive or uncivil.

I. MICA Investigates Myers for Comments About Free Expression and Open Debate

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. To these ends, please find enclosed an executed privacy waiver authorizing you to share information about this matter.

Saul Myers is a faculty member in the Department of Humanistic Studies (HMST) at MICA.¹ At a Faculty Assembly meeting on October 14, 2020, Myers introduced a letter on academic freedom and freedom of expression on behalf of his department.² The letter expressed

¹ *Saul Myers*, MD. INST. COLL. OF ART, <https://www.mica.edu/undergraduate-majors-minors/humanistic-studies-major/saul-myers> (last visited Sept. 16, 2021).

² Minutes of Faculty Assembly Meeting (Oct. 14, 2020) (on file with author). The letter was drafted by several members of the HMST department, including Myers, and adopted through a vote of department faculty.

concern “about recent incidents at MICA in which instructors have been essentially silenced because their offered curriculum or teaching style were deemed offensive,” and it urged the administration and the MICA community to adhere to principles of academic freedom and free expression.³ Myers made comments in support of the letter, citing an atmosphere of fear among faculty of speaking on or teaching controversial subjects because of what he viewed as a litigious and accusatory culture on campus.⁴ He did not mention any faculty member by name. Later in the meeting, faculty member Mina Cheon said Myers’ comments made her feel “unsafe” and that it was bad timing for a discussion on academic freedom because the MICA Student Voice Association had just written an open letter calling on faculty to be sensitive to student concerns.⁵

After the next Faculty Assembly meeting in November, Myers emailed Jeanette Gerrity Gómez, head of the Faculty Executive Committee (FEC), to express concerns about her apology to faculty for the “harm” caused at the October meeting, which Myers understood to refer to his remarks in support of academic freedom.⁶ Myers wrote, “It is wrong to assume that just because a group of people feels that some uttered idea has caused them harm (caused them to feel unsafe, has ‘triggered’ them, etc.) that that ends the matter and the idea that supposedly caused the harm should be specially restricted in its expression or should be somehow prohibited.”⁷

Months later, at an online HMST department meeting on March 31, 2021, Cheon “made comments supporting other colleagues who have expressed concerns about the environment in the HMST department.”⁸ Another faculty member then complained of a lack of unity in the department. Myers also spoke. MICA claims that Myers’ comments were “passionately directed” at Cheon and that he made his “points about academic freedom and freedom of speech persistently” while ignoring her “physical and verbal expressions of emotional distress.”⁹

That same day, after the meeting, Myers emailed Cheon to share the November 2020 email he had sent to Gerrity Gómez, saying he “thought you should have a copy of what I wrote to Jeanette about this,” if she hadn’t seen it already, as he had “asked that the letter be passed on to the FEC[.]”¹⁰ Myers noted that nobody, “after these many months (since November) responded to it.”¹¹ Cheon responded, “I am directing this email to some of the FEC copied

³ Md. Inst. Coll. of Art Dep’t of Humanistic Studies, Letter on Academic Freedom, Freedom of Expression (on file with author).

⁴ Minutes of Faculty Assembly Meeting, *supra* note 2.

⁵ *Id.* The minutes do not elaborate on the nature of these concerns.

⁶ Email from Saul Myers to Jeanette Gerrity Gómez (Nov. 18, 2020, 2:07 AM) (on file with author).

⁷ *Id.*

⁸ Letter from David Bogen, Ph.D., Vice President for Academic Affairs and Provost, Md. Inst. Coll. of Art, to Myers (June 30, 2021) (on file with author).

⁹ *Id.* Myers disputes this characterization and asserts that, in comments directed not at Cheon but at the department as a whole, he said they should not be surprised by a lack of unity when the standard of unity is adherence to narrow political criteria, and that they had to learn how to better deal with dissent and disagreement.

¹⁰ Email from Saul Myers to Mina Cheon (Mar. 31, 2021, 2:14 PM) (on file with author).

¹¹ *Id.*

here,”¹² and Myers replied to thank her.¹³ The following day, Myers emailed Cheon a “clarification,” noting that he had in fact received a response from Gerrity Gómez, but that it “did not engage the general arguments I gave against ‘safety-ism.’”¹⁴

On April 6, Human Resources sent a letter to Myers notifying him of a complaint, filed by Cheon, alleging that Myers had engaged in conduct that violated MICA’s “Discriminatory or Bias Related Harassment” policy prohibiting “unwelcomed conduct based on an individual’s actual or perceived membership in a protected class.”¹⁵ The complaint alleged that during the March 31 meeting, Myers “attempted to engage her in what [he] called a debate about academic freedom, freedom of speech, and ‘safety-ism,’” which Cheon described as a “public attack,” following a similar “attack” at the October Faculty Assembly meeting.¹⁶ The complaint also alleged that Myers’ two subsequent emails to Cheon constituted harassment.¹⁷

Then-Provost and Vice President for Academic Affairs David Bogen notified Myers of the results of the investigation in a June 30, 2021, letter.¹⁸ The investigator concluded that Myers’ speech did not rise to the level of harassment.

Despite finding Myers had violated no institutional policies, Bogen’s letter went on to warn:¹⁹

Saul, freedom of speech is not an absolute right without restrictions. MICA has the right to require respectful interactions among members of its community. You insisted on continuing the debate after Mina communicated her unwillingness to engage with you.^[20] Individuals have the right to choose whether they engage or not in these discussions and debates, and at some point

¹² Email from Cheon to Myers (Mar. 31, 2021, 7:58 PM) (on file with author).

¹³ Email from Myers to Cheon (Mar. 31, 2021, 10:40 PM) (on file with author).

¹⁴ Email from Myers to Cheon (Apr. 1, 2021, 10:43 AM) (on file with author).

¹⁵ Letter from Charlene Hayes, HR Transition Leader, Md. Inst. Coll. of Art, to Myers (Apr. 6, 2021) (on file with author). The letter said Myers could find more information at <http://www.mica.edu/policies>, where MICA posts its “Equal Opportunity, Harassment, and Nondiscrimination Policy,” including its “Policy on Discriminatory Harassment.” That policy defines discriminatory harassment as “unwelcome conduct by any member or group of the community on the basis of actual or perceived membership in a class protected by policy or law.” MD. INST. COLL. OF ART, EQUAL OPPORTUNITY, HARASSMENT, AND NONDISCRIMINATION POLICY § 17 (June 2020), https://assets.mica.edu/files/resources/atixa_mica_title_ix_policy-kh-mp-edits-clean-1013-2.pdf (“EQUAL OPPORTUNITY, HARASSMENT, AND NONDISCRIMINATION POLICY”). An identically titled policy also is cross-referenced in the faculty handbook. MD. INST. COLL. OF ART, FACULTY HANDBOOK § 4.1 (Aug. 1, 2020), <https://bit.ly/3oedon4> (“FACULTY HANDBOOK”). However, it appears that this policy may have been superseded, as the www.mica.edu/policies page now leads to a different institutional policy on harassment and discrimination called the “Nondiscrimination and Anti-Harassment Policy.” See MD. INST. COLL. OF ART, NONDISCRIMINATION AND ANTI-HARASSMENT POLICY, <https://assets.mica.edu/files/resources/nondiscrimination-and-anti-harassment-policy.pdf>.

¹⁶ Letter from Bogen to Myers, *supra* note 8.

¹⁷ *Id.*

¹⁸ While Bogen’s letter appeared to rely on an HR report documenting the results of its investigation, Bogen did not provide any such document to Myers, instead summarizing HR’s findings.

¹⁹ *Id.*

²⁰ Neither the charging letter nor Bogen’s letter specifically describe how Mina communicated her unwillingness to engage with Myers.

persistent behaviors that contradict an individual's choice to not engage become harassment. That is unacceptable behavior at MICA.

This investigation is now closed, but additional incidents showing such disrespect for legitimate boundaries of engagement set by Mina or any other community member may result in discipline or corrective action. MICA takes its anti-harassment policy seriously and must protect the rights of all employees to enjoy a community in which they are treated with “dignity, fairness and respect” and an environment in which they can work and learn free of harassment.

Bogen concluded by stating the letter “will be submitted to [Myers’] faculty file in Academic Affairs as a record of this incident and of the warning contained herein.”²¹

II. Myers’ Speech Is Protected by MICA’s Promises of Free Expression

MICA correctly found that Myers’ speech did not amount to a violation of MICA policy. Nor could it, as Myers’ speech is squarely protected by the college’s promises of free expression and academic freedom. MICA’s decisions to nevertheless issue a formal warning—a form of disciplinary action—and to threaten Myers with discipline for similar speech in the future are contrary to those commitments.

A. *MICA makes institutional commitments to freedom of expression.*

Although private institutions like MICA are not bound by the First Amendment, MICA has adopted clear policies protecting faculty members’ freedom of expression. These firm commitments to uphold faculty members’ expressive rights represent not only a moral obligation but a contractually binding legal duty on the part of the college.²²

MICA’s Faculty Handbook guarantees faculty the “right to express differing opinions, and the fostering and defense of intellectual honesty, freedom of inquiry and instruction, and free expression.”²³ The Faculty Handbook acknowledges that academic freedom is protected by the First Amendment, and states the college “is a marketplace of ideas, and it cannot fulfill its purposes, in serving the common good, of giving impetus to creative activity in art and design, and transmitting, evaluating, and extending knowledge if it requires conformity with any orthodoxy of content or method.”²⁴

²¹ *Id.*

²² See *Mayberry v. Dees*, 663 F.2d 502, 520 (4th Cir. 1981) (treating faculty manual as contract between professor and university); see also, *McAdams v. Marquette Univ.*, 2018 WI 88 (2018) (private university breached its contract with a professor over a personal blog post because, by virtue of its adoption of the 1940 AAUP Statement of Principles on Academic Freedom and Tenure, the post was “a contractually-disqualified basis for discipline”).

²³ FACULTY HANDBOOK § 3.10.

²⁴ *Id.*

B. MICA cannot discipline Myers for speech the college determined did not violate policy.

Myers' comments at the department meeting and in his email to Cheon—which touched on issues of free speech, academic freedom, and the need for members of the college community to tolerate dissent and disagreement—were well within the right to free expression enshrined in MICA policies.²⁵ To its credit, MICA correctly found that the charge of harassment was unsubstantiated and did not find any violation of MICA policy. The college then departed from that determination by imposing disciplinary consequences anyway, placing a formal warning in Myers' file and threatening to punish him for similar speech in the future.

While conceding that Myers' comments did not amount to harassment, Bogen's letter nevertheless justified placing a written warning in Myers' file based on MICA's "right to require respectful interactions among members of its community."²⁶ This subverts the purpose and findings of the investigation, which concluded that the only allegation of misconduct against Myers was unsubstantiated.

There is no doubt that MICA can *encourage* faculty members and students alike to engage in civil discussion. So, too, may administrators criticize faculty members or students whose speech transgresses those boundaries. Criticism is a form of "more speech," the remedy preferred to censorship under a commitment to expressive freedom.²⁷ However, the warning letter is not mere criticism: As MICA's faculty handbook correctly recognizes, "written warnings" are a form of disciplinary action.²⁸

When institutions punish speech that they do not prohibit, they raise serious concerns about not only their commitment to freedom of expression, but also about their adherence to fundamental standards of due process. At its core, due process requires that regulations "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."²⁹ There is no opportunity, reasonable or not, to know when administrators may determine that speech doesn't violate policy but is subject to sanction anyway.

Bogen also appeared to premise the disciplinary warning on the possibility that Myers' future conduct could rise to the level of harassment. MICA, of course, has the authority to take action against harassment if and when it actually occurs. But speculation about what Myers might do or say in the future does not justify an official sanction *now*.

²⁵ Myers and MICA disagree as to the exact substance of Myers' comments at the March 31 meeting and whether they were directed at Cheon, but even under the college's version of events, Myers' speech is protected.

²⁶ Letter from Bogen to Myers, *supra* note 8.

²⁷ *Whitney v. California*, 274 U.S. 357, 377 (1927).

²⁸ FACULTY HANDBOOK § 3.7.3.1.

²⁹ *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)

C. MICA's interest in civil discourse is insufficient to override faculty members' expressive freedom.

Moreover, MICA's unequivocal promises of the right to free expression preclude it from disciplining faculty for exercising that right in a manner administrators subjectively view as uncivil or disrespectful. The Equal Opportunity, Harassment, and Nondiscrimination Policy itself states it "is not meant to inhibit or prohibit educational content or discussions inside or outside of the classroom that include germane but controversial or sensitive subject matters protected by academic freedom."³⁰

While many institutions, including MICA, aspire to civil discourse, formal enforcement of 'civility' norms creates considerable risks to expressive freedom because it relies on subjective evaluations about what speech is sufficiently civil or inoffensive. A primary "function of free speech . . . is to invite dispute," and it "may indeed best serve its high purpose when it induces a condition of unrest" or "stirs people to anger," as speech is "often provocative and challenging," carrying "profound unsettling effects[.]"³¹ Freedom of expression necessarily protects "not only informed and responsible criticism" but also "the freedom to speak foolishly and without moderation."³²

These principles do not lose their salience at an institution of higher education. To the contrary, "conflict is not unknown in the university setting given the inherent autonomy of tenured professors and the academic freedom they enjoy."³³ The "wide latitude" afforded by freedom of expression "is not without its costs in terms of the risks to the maintenance of civility and an ordered society," and those risks have often been borne "on the campus and elsewhere."³⁴ However, the "desire to maintain a sedate academic environment does not justify limitations on a [professor's] freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms."³⁵ Further, faculty members "may have to withstand colleagues that do not like them, are rude, and may be generally disagreeable people,"³⁶ but in order to provide adequate breathing room for freedom of expression, any policies limiting faculty members' speech must be objective, narrow, and precise. Because Myers' speech did not violate any such policy, it remains protected by MICA's guarantees of free expression.

A broad rule mandating civility would imperil a broad range of protected expression. Words exchanged during lively debate often may later be isolated, stripped of their context, and recast as incivility. Further, as courts have recognized, civility codes "prohibit[] the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause."³⁷ Thus, while an anti-war protester could give a stemwinder of a speech about his

³⁰ EQUAL OPPORTUNITY, HARASSMENT, AND NONDISCRIMINATION POLICY § 17.

³¹ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

³² *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944).

³³ *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003).

³⁴ *Healy v. James*, 408 U.S. 169, 194 (1972).

³⁵ *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 708–09 (9th Cir. 2009).

³⁶ *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1218 (10th Cir. 2008).

³⁷ *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1020 (N.D. Cal. 2007).

opposition to the draft, freedom of expression protects his right to say, more directly, “fuck the draft,” as the authorities “cannot make principled distinctions” between what speech is civil or inoffensive enough to be permitted.³⁸

III. Conclusion

The written warning in Myers’ file is likely to chill his and other faculty members’ exercise of their expressive rights. Faced with the threat of discipline for engaging in protected speech on topics of academic and public concern, faculty members, including Myers, will rationally choose self-censorship over the risk of punishment, chilling their willingness to participate in discussion about institutional affairs. This concern is not merely hypothetical. Myers now fears future administrative action if he continues to engage in public deliberations and questions or criticizes the ideas, proposals, policies, and beliefs of his colleagues or the administration, lest others—including administrators—find his comments insufficiently respectful. MICA must stop this unacceptable chilling effect from taking root.

Accordingly, FIRE calls on MICA to rescind the formal warning placed in Myers’ personnel file and to reaffirm its laudable commitment to the expressive rights of its faculty.

We request receipt of a response to this letter no later than the close of business on October 21, 2021.

Sincerely,

A handwritten signature in dark ink, appearing to read 'A. Terr', with a long horizontal stroke extending to the right.

Aaron Terr
Program Officer, Individual Rights Defense Program and Public Records

Encl.

³⁸ *Cohen v. California*, 403 U.S. 15, 16, 25 (1971).

Authorization and Waiver for Release of Personal Information

I, Saul Myers, do hereby authorize Maryland Institute College of Art (the “Institution”) to release to the Foundation for Individual Rights in Education (“FIRE”) any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.


This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

If the Institution is located in the State of California, I request access to and a copy of all documents defined as my “personnel records” under Cal. Ed. Code § 87031 or Cal. Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept in my name in any and all Institution or District offices; (2) any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable; and (3) any and all phone, medical or other records in which I am personally identifiable.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:

A black rectangular redaction box covering the signature of the document.

10/1/2021

Date