



December 6, 2021

Sarah C. Mangelsdorf  
Office of the President  
University of Rochester  
240 Wallis Hall  
Rochester, New York 14627

**URGENT**

*Sent via Electronic Mail (ThePresidentsOffice@Rochester.edu)*

Dear President Mangelsdorf:

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 removal of University of Rochester ("UR") Professor David Bleich from teaching due to complaints that Bleich quoted a racial epithet when reading from an article by Harvard Law Professor Randall Kennedy. While others may—and did—find Bleich's vocalization of the epithet offensive, it falls squarely within the protection afforded by academic freedom, which gives faculty members the breathing room to determine whether, and how, to discuss pedagogically relevant material students may find offensive. That right is not constrained, as asserted by the university, by an interest in "showing respect" for others' opinions that a faculty member should not exercise that right.

As such, FIRE joins the Academic Freedom Alliance and Professor Kennedy in calling on UR to immediately lift Bleich's suspension and reaffirm to its faculty that it will protect their academic freedom and expressive rights.

**I. Bleich Quotes a Racial Epithet During a Class Lecture**

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.

David Bleich is a professor in the Department of English at UR, where he teaches a class ("Gender and Anger") discussing how "women have collectively mobilized to announce and describe their anger to the public," including in particular writing by feminists of color

illustrating racist speech.<sup>1</sup> This fall semester, Bleich sought to prepare students in this class for an assigned reading—“Like a Winding Sheet” by Ann Petry, who wrote “the first novel by a black woman to sell more than a million copies”<sup>2</sup>—in which the author illustrates the prejudices faced by an impoverished African-American couple, including a white employer berating the protagonist using the slur “nigger.”<sup>3</sup>

Following a classroom debate over whether Bleich should enunciate the slur when reading from Petry’s story, and to explain why he views it as important to interrogate the offensive language illustrated by Petry, Bleich sent students the article “Is It Ever OK to Enunciate a Slur in the Classroom?,” written by Harvard Law Professor Randall Kennedy, which addresses whether the word “nigger” should be spoken in the classroom.<sup>4</sup> Bleich read the article aloud to students in class on September 21 to discuss whether to say the epithet while reading Petry’s short story. While reading Kennedy’s article, Bleich quoted the word “nigger” so as to differentiate between when Kennedy wrote the euphemism “n-word” in the article and when he wrote “nigger.”

On September 23, a student in the Gender and Anger course submitted a bias-related incident report complaining of Bleich’s enunciation of the “N-word” and other “four letter words.”<sup>5</sup> On September 28, Bleich met with Donald Hall, Dean of the Faculty of Arts, Sciences and Engineering, and Beth Olivares, Dean for Diversity in Arts, Sciences and Engineering, to discuss the complaint.<sup>6</sup> During the meeting, Hall and Olivares discussed Bleich’s account of the class and recommended that Bleich find a story other than Petry’s to include in the reading list, so as to avoid discussing or saying a racial epithet.

On October 4, Gloria Culver, Dean of the School of Arts and Sciences, sent Bleich a letter to “describe the informal process” under the Policy Against Discrimination, Harassment, and Discriminatory Employment/Service Practices to which Bleich was being subjected.<sup>7</sup> Prior to Culver’s letter, Bleich was not told that he was being investigated, had only met with Hall and Olivares, and was not given the option to go through a formal investigatory process, which would include more due process protections for Bleich.

Culver’s letter informed Bleich that he was “relieved from all further teaching duties” for the remainder of the semester.<sup>8</sup> The letter also placed a number of conditions on Bleich to return to teaching in the Spring semester, including committing in writing not to “speak the N-word aloud in class,” permitting faculty members to observe his lectures, and taking “no steps to

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<sup>1</sup> David Bleich, Faculty, Dept. of English, UNIV. OF ROCHESTER, [https://www.sas.rochester.edu/eng/people/faculty/bleich\\_david/index.html](https://www.sas.rochester.edu/eng/people/faculty/bleich_david/index.html) (last visited Nov. 30, 2021).

<sup>2</sup> Courtney Vinopal & Tayari Jones, *5 book covers that show how Ann Petry’s ‘The Street’ was depicted over time*, PBS NEWS HOUR (June 1, 2020), <https://www.pbs.org/newshour/arts/5-covers-that-show-how-ann-petrys-the-street-was-depicted-over-time>.

<sup>3</sup> Ann Petry, *Like a Winding Sheet*, in *THE CRISIS* 317, 318 (Roy Wilkins ed., Nov. 1945), available at <https://bit.ly/3xMs1R4>.

<sup>4</sup> Randall Kennedy, *Is It Ever OK to Enunciate a Slur in the Classroom?*, *CHRON. HIGHER EDUC.* (Sept. 10, 2021), <https://www.chronicle.com/article/is-it-ever-ok-to-enunciate-a-slur-in-the-classroom>.

<sup>5</sup> Letter from Gloria Culver, Dean, Sch. of Arts and Scis., to David Bleich, Professor, Sch. of Arts and Scis., Oct. 4, 2021 (on file with author).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

discover” what students said to administrators about his quotation of the epithet in class.”<sup>9</sup> The letter threatens termination if he does not assent to these conditions.

On December 5, Culver provided a statement to the *Campus Times*, stating:

[T]he University and the deans in AS&E are firmly committed to the principle of academic freedom. This commitment is outlined in the University’s Faculty Handbook. We are equally committed to the principal pedagogic value — also reflected in the Faculty Handbook — of respecting the opinions and contributions of others, which is essential to a successful learning environment.<sup>10</sup>

Culver also said she could not comment on the specific situation due to confidentiality and an ongoing investigation.<sup>11</sup>

## **II. Bleich’s Vocalization of a Racial Epithet is Protected by the University of Rochester’s Commitment to Academic Freedom**

Suspending Bleich for vocalizing a racial epithet in a pedagogically relevant context, not directed at any particular student, violates his pedagogical autonomy—protected by the basic tenets of academic freedom—to determine what material to teach and how it should be taught. These rights are firmly protected by UR’s commitments to academic freedom and freedom of expression.

### ***A. UR’s Commitments to Academic Freedom Protect Bleich’s Choice to Quote an Epithet.***

As UR is a private institution, the First Amendment does not compel it to grant faculty expressive freedoms. Nevertheless, UR has made clear commitments to uphold its professors’ right to freedom of expression and academic freedom. Having made these commitments, UR is bound to uphold them.<sup>12</sup>

UR’s Faculty Handbook states that underlying all of its rules are “the fundamental convictions that shape the life of the modern university— above all, an abiding commitment to the free inquiry essential to the creation and dissemination of knowledge.”<sup>13</sup> UR also promises faculty that it is “committed in word and deed to the protection of unfettered inquiry and the academic freedom of its faculty.”<sup>14</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> Hailie Higgins, *Professor suspended after saying n-word in class*, *CAMPUS TIMES* (Dec. 5, 2021), <http://www.campustimes.org/2021/12/05/professor-suspended-after-saying-n-word-in-class>.

<sup>11</sup> *Id.*

<sup>12</sup> *See, e.g., McAdams v. Marquette Univ.*, 914 N.W.2d 708, 737 (Wis. 2018) (private Catholic university breached its contract with a professor over a personal blog post because, by virtue of its adoption of the 1940 Statement of Principles on Academic Freedom and Tenure—the same statement adopted by the University of Rochester—the blog post was “a contractually-disqualified basis for discipline”).

<sup>13</sup> *FACULTY HANDBOOK*, UNIV. OF ROCHESTER, <https://www.rochester.edu/provost/wp-content/uploads/2021/11/Faculty-Handbook.pdf> (rev. Oct. 2021) (“*FACULTY HANDBOOK*”).

<sup>14</sup> *Id.*

Additionally, UR has adopted the American Association of University Professors' 1940 Statement of Principles on Academic Freedom and Tenure.<sup>15</sup> Accordingly, UR has promised faculty the “freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.”<sup>16</sup>

***B. Academic Freedom Protects the Right to Discuss and Present Pedagogically Relevant Material.***

Academic freedom grants faculty members substantial breathing room to determine how to approach subjects and materials relevant to their courses.

These materials may include subjects that some, many, or most students find upsetting or uncomfortable, including discussion of America's fraught and unresolved history of racism and discrimination. Faculty members confronting and examining that history must be free of institutional restraints in navigating these issues. Even the express use of racial slurs in a pedagogically relevant context is not uncommon. Princeton University, for example, defended a professor who used the word “nigger” in an anthropology course to discuss cultural and linguistic taboos.<sup>17</sup> Law professors use it to teach the “fighting words” doctrine;<sup>18</sup> journalism professors discuss how to tell stories that involve it;<sup>19</sup> and sociology professors study the impact of the term in defining who is welcomed in various spaces.<sup>20</sup>

Although the First Amendment is not directly applicable to private universities, it provides a helpful framework to determine what faculty and students can reasonably expect from private universities—like UR—that promise expressive rights.

In *Hardy v. Jefferson Community College*, the United States Court of Appeals for the Sixth Circuit unequivocally rejected “the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction” as “totally unpersuasive.”<sup>21</sup> There, a white adjunct instructor 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.”<sup>22</sup> Students, solicited by the instructor for examples, suggested

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 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>.

<sup>18</sup> 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/2017/2/9/free-speech-professor-takes-heat-using-racial-epit>.

<sup>19</sup> Frank Harris III, *Without Context, N-Word Goes Best Unsaid*, HARTFORD COURANT (Feb. 13, 2018), <https://www.courant.com/opinion/hc-op-harris-ct-teacher-uses-n-word-20180209-story.html>.

<sup>20</sup> See, e.g., Elijah Anderson, *The White Space*, 1 SOCIO. OF RACE & ETHNICITY, 10 (2015), available at [https://sociology.yale.edu/sites/default/files/pages\\_from\\_sre-11\\_rev5\\_printer\\_files.pdf](https://sociology.yale.edu/sites/default/files/pages_from_sre-11_rev5_printer_files.pdf).

<sup>21</sup> 260 F.3d 671, 680 (6th Cir. 2001).

<sup>22</sup> *Id.* at 674.

the words “lady,” “girl,” “faggot,” “nigger,” and “bitch.”<sup>23</sup> 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 “gratuitously used . . . in an abusive manner.”<sup>24</sup>

Finding that the instructor’s speech was protected, the Sixth Circuit held that expression, “however repugnant,” that is “germane to the classroom subject matter” constitutes speech on “matters of overwhelming public concern—race, gender, and power conflicts in our society.”<sup>25</sup> Consequently, the college’s administrators were not entitled to qualified immunity because punishing the lecturer was “objectively unreasonable.”<sup>26</sup>

Like the situation at Jefferson Community College, Bleich’s vocalization of a racial epithet was germane to the classroom subject matter. Bleich quoted the epithet from an article to acclimate students to an upcoming assigned reading, which would include the word “nigger,” and to argue that it is important to confront unsettling language in interrogating texts depicting unvarnished prejudice. In using the epithet, Bleich quoted the words of a subject-matter expert and engaged students in a discussion about the future use of the epithet in pedagogically relevant classroom materials.

***C. The University’s Interest in “Showing Respect” for Others’ Opinions Does Not Override Bleich’s Academic Freedom.***

The university’s statement argues that its action is justified by a countervailing interest, alongside its interest in academic freedom, in showing respect for “the opinions and contributions of others.” This position confuses the delineation between classroom speech and extramural speech set forth in the 1940 Statement of Principles on Academic Freedom and Tenure. That policy, which the university has adopted, provides that faculty are entitled to “freedom in the classroom in discussing their subject,” including the right to teach “controversial matter” related to their subject.<sup>27</sup>

That provision is not in tension with the provision relied upon by the university’s statement. The latter provision, which advises that faculty “should . . . show the respect for the opinions of others,” is not a limitation on discussing controversial matters in the classroom. First, this is—as the AAUP explained to the Wisconsin Supreme Court, and which as that court held—“not viewed as [a] binding obligation[],” but is instead aspirational.<sup>28</sup> Second, the provision arises in the context of *extramural* speech, not classroom speech. Even if it did impose an

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<sup>23</sup> *Id.* at 675.

<sup>24</sup> *Id.* at 675, 679.

<sup>25</sup> *Id.* at 683.

<sup>26</sup> *Id.* at 675, 683.

<sup>27</sup> Faculty Handbook at 38.

<sup>28</sup> *McAdams v. Marquette Univ.*, 914 N.W.2d 708, 731 (Wis. 2018). See also Brief for American Association for University Professors as Amicus Curiae Supporting Appellant at 7, *McAdams v. Marquette Univ.*, 914 N.W.2d 708 (Wis. 2018) (No. 2017AP1240), available at [https://www.aaup.org/sites/default/files/McAdams\\_Marquette\\_Feb2018.pdf](https://www.aaup.org/sites/default/files/McAdams_Marquette_Feb2018.pdf). (“Views and opinions should be subject to debate, not to limitations based on claims that the expression of views infringes upon the rights of others. Adding such a component will only serve to limit the openness and breadth of the views expressed in academia, compromising essential rights of academic freedom.”)

objective, enforceable limit on classroom discussion, a faculty member who solicits and considers students' opinions, but ultimately comes to a contrary conclusion, cannot be said to evidence a lack of respect for those opinions. Students' academic freedom to take "reasoned exception" to class discussion<sup>29</sup> does not grant students a right to *override* faculty members' academic freedom.

The exhortation that faculty respect others' opinions is aspirational, but cannot impinge the pedagogical decisions of faculty. Applying these principles to a comparable situation, the AAUP—which, again, provides authoritative interpretations of the standard adopted by the University of Rochester—has explained that academic freedom protects pedagogically relevant utterances of this particular word.<sup>30</sup>

Because Bleich's enunciation of the epithet is clearly protected by fundamental principles of academic freedom, removing Bleich from the classroom violated his academic freedom rights, which UR guarantees "in word and deed." UR's punishment of Bleich will have a chilling effect on faculty members' willingness to confront challenging or difficult material.<sup>31</sup> This is an unacceptable result at an institution that makes clear commitments to protect its faculty's academic freedom.

### **III. The Process by Which Bleich Was Removed from the Classroom Raises Significant Due Process Concerns**

UR's removal of Bleich from teaching raises serious due process concerns, as that decision appears to have been reached without providing Bleich with a meaningful opportunity to contest the propriety of imposing sanctions upon him. Suspension of a faculty member from teaching "without a hearing, or a hearing indefinitely deferred, is tantamount to dismissal," requiring substantial procedural protections.<sup>32</sup>

A fundamental principle of due process is the accused's opportunity to be informed of and contest all allegations against them before the imposition of discipline.<sup>33</sup> Bleich was not provided this opportunity. Bleich was not informed that he was being investigated under the discrimination and harassment policy, let alone provided the opportunity to meaningfully contest the allegations. Although Bleich was able to meet with Hall and Olivares and discuss the complaint, he was not permitted anything that could be considered a hearing and he was

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<sup>29</sup> AAUP, *et al.*, JOINT STATEMENT ON RIGHTS AND FREEDOMS OF STUDENTS (rev. Nov. 1992), *available at* <https://www.aaup.org/report/joint-statement-rights-and-freedoms-students>.

<sup>30</sup> Letter from Gregory F. Scholtz, Dir., Dep't of Academic Freedom, Tenure, & Governance, AAUP, to Dr. Dwight A. McBride, Provost & Exec. Vice Pres. for Academic Affairs, Emory Univ. (July 10, 2019), *available at* <https://bit.ly/3lH5nop>.

<sup>31</sup> *See, e.g., Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992) (public university's investigation into a faculty member's writings on race and intelligence violated the First Amendment).

<sup>32</sup> *See generally* AM. ASS'N OF UNIV. PROFS., THE USE AND ABUSE OF FACULTY SUSPENSIONS (Aug. 2008), *available at* <https://www.aaup.org/report/use-and-abuse-faculty-suspensions>.

<sup>33</sup> *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (notice of the allegations of misconduct is "[a]n elementary and fundamental requirement of due process" and must "apprise interested parties of the pendency of the action and afford them an opportunity to present their objection"); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.") (internal quotations and citations omitted).

not provided with the information gathered from Olivares' interviews with seven students in the class.

Contrary to affording the accused the fundamental right to have an opportunity to view the allegations and evidence against him, Bleich was not provided with that information prior to punishment. Instead, UR has prohibited Bleich from seeking even to ascertain the substance of the statements made by witnesses or complainants. While UR has an important interest in prohibiting Bleich from retaliating against complainants, it cannot withhold information from the accused and then prohibit him from seeking it out. Providing respondents with the evidence against them helps to *deter* the possibility that a respondent might take steps that, while intended to marshal evidence to build a defense, might be misconstrued as retaliatory.

Additionally, Bleich has little opportunity to appeal, as he is only able to submit a faculty grievance on due process grounds. The university's failure to afford Bleich basic due process rights casts doubt on its determination, and necessitates a reversal of its punishment of Bleich.<sup>34</sup>

#### IV. Conclusion

Bleich's quotation of a racial epithet in class is clearly protected. In situations such as this, where students, other faculty, administrators, or the broader community disagree with a faculty member's pedagogical choices to teach offensive material, there is a simple solution—*more speech*, the remedy for offensive expression that the First Amendment prefers to censorship. Faculty are not shielded from all consequences of their choices: Criticism is a form of more speech. However, UR's guarantees of free expression and academic freedom limit the *types* of consequences that may be imposed and who may impose them, and UR's discipline of Bleich for his pedagogical decision to quote a racial epithet is not among the acceptable consequences.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Monday, December 13, 2021, confirming that UR will restore Bleich to the classroom and drop any "restrictive conditions" for him to return to teaching.

Sincerely,



Sabrina Conza  
Program Analyst, Individual Rights Defense Program

Cc: Gloria Culver, Dean, School of Arts and Sciences

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<sup>34</sup> See *Mathews*, 424 U.S. at 344 (“[D]ue process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions.”); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring) (“The validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”).