



FIRE

Foundation for Individual
Rights and Expression

July 8, 2022

Sylvia M. Burwell
Office of the President
American University
4400 Massachusetts Avenue, NW
Washington, D.C. 20016

Sent via U.S. Mail and Electronic Mail (president@american.edu)

Dear President Burwell:

FIRE¹ understands that American University is aware of our concerns regarding the recent investigation of eight law students for alleged discrimination and harassment for expressing pro-choice views in a private class GroupMe chat, which offended a pro-life classmate.² We also understand that yesterday, American found one of those students, Daniel Brezina, not responsible for the charges against him.

FIRE remains troubled that American has defended the investigation—which took more than six weeks—suggesting it is required to investigate all complaints its Office of Equity and Title IX receives, and that it does not investigate claims solely premised on protected speech. American also revealed that there were additional allegations supporting the charges, notwithstanding that, in violation of basic notions of due process, those allegations were not cited in the notice of investigation provided to students.

FIRE wholeheartedly agrees that American must take appropriate action on all allegations of discriminatory harassment. However, because merely offensive expression, without more, fails to approach the legal definition for discriminatory harassment, investigating students for their protected speech is not appropriate. This mandate comes directly from the Supreme Court, which holds student expression may only constitute actionable discriminatory harassment where it is (1) unwelcome, (2) discriminatory on the basis of a protected status, and (3) “so severe, pervasive, and objectively offensive, and that so undermines and detracts

¹ The Foundation for Individual Rights and Expression is a nonpartisan nonprofit dedicated to defending freedom of speech, expression, and conscience, and other individual rights on campus and beyond. You can read more about our mission and activities at thefire.org.

² Press Release, *American University launches bogus harassment investigation into students who criticized leaked Supreme Court abortion ruling in private group chat*, FIRE (June 24, 2022), <https://www.thefire.org/american-university-launches-bogus-harassment-investigation-into-students-who-criticized-leaked-supreme-court-abortion-ruling-in-private-group-chat>.

from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."³ By definition, this includes only extreme, and typically repetitive, behavior targeted at an individual based on a protected class—conduct so serious it would prevent a reasonable person from receiving his or her education. Prior federal guidance addressing peer harassment, while simultaneously protecting free expression, is also informative: The U.S. Department of Education's Office for Civil Rights has been explicit that campus harassment "must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive."⁴

In view of the above, and because American unequivocally promises students free expression,⁵ it must take several steps to ensure similar investigations will not continue to infringe students' expressive rights:

First, American must revise its "Discrimination and Non-Title IX Sexual Misconduct Policy," which appears to have triggered this episode by advancing an inaccurate interpretation of law. Specifically, it appears to have incorrectly suggested to the complaining student that a single instance of speech that "offends, belittles, denigrates, or shows an aversion toward" another on the basis of a protected class—such as political affiliation or religion—may alone constitute discriminatory harassment.⁶ FIRE's Policy Reform department is happy to review the existing policy, always free of charge, and to suggest edits that will bring the policy into compliance with applicable law.

Second, American must direct trained staff to undertake a prompt preliminary review of any claims premised on speech and dispatch those that solely involve protected expression *before* students are notified of any formal investigation. Notifying students that they are being investigated for protected speech will chill them and their peers from further exercising their expressive rights, even where a formal investigation ultimately resolves in their favor.

Law students in particular, who frequently must disclose any disciplinary action when they apply to legal jobs or to the bar, sometimes including investigations, face strong incentives to self-censor rather than risk any kind of misconduct investigation that could stall their legal careers. The recently cleared student, Brezina, tells FIRE that this chilling effect worked almost instantly to silence him and many of his classmates, who no longer feel comfortable

³ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

⁴ U.S. Dep't of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec'y for Civil Rights (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>. [<https://perma.cc/84RK-NFXR>]

⁵ *Guidelines for Freedom of Expression and Dissent*, AM. UNIV., <https://www.american.edu/policies/au-community/upload/freedom-of-expression-2016.pdf> [<https://perma.cc/XSJ6-Y4AX>].

⁶ Discrimination and Non-Title IX Sexual Misconduct Policy, AM. UNIV., <https://www.american.edu/policies/au-community/upload/discrimination-and-non-title-ix-sexual-misconduct-policy-08-23-2021-web.pdf> [<https://perma.cc/PD9D-5QB8>] ("Examples of conduct that can constitute harassment if based on an individual's legally protected category includes but is not limited to . . . jokes or negative stereotypes . . . [w]ritten, printed or graphic material that contains offensive, denigrating or demeaning comments or pictures... [c]onduct, whether verbal, physical, written or electronic that threatens, intimidates, offends, belittles, denigrates, or shows an aversion toward an individual or group because of their legal protected status.")

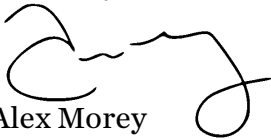
having discussions in their GroupMe chat and have since refrained from using the forum for discussions of any kind.

Finally, to the extent any of the investigations into other students remain ongoing and are predicated on protected speech, American must drop them, promptly inform the students involved of the resolution, and recommit to ensuring students' rights will not be similarly infringed in the future.

Here at FIRE, we feel strongly that the right to an educational atmosphere free from discrimination and harassment is of critical importance. So too is justice for students promised the right to speak authentically about controversial legal issues as part of their law school education, yet subject to a formal investigation for doing so. Law students, especially, must be free to debate the legal issues of the day without fearing institutional reprisal. The goals of preventing discriminatory harassment and protecting free expression on American's campuses need not be in tension. We hope you agree and will join us in committing to these important principles, not just on paper, but in practice.

We request a substantive response to this letter no later than the close of business on Friday, July 22, 2022.

Sincerely,



Alex Morey
Director, Campus Rights Advocacy

Cc: Traevena Byrd, General Counsel
Leslie T. Annexstein, Associate Vice President for Equity and Title IX Coordinator
Caitlyn G. Myron, Equity and Title IX Investigator

Encl.

Authorization and Waiver for Release of Personal Information and Request for FERPA Records

This is an authorization for the release of records and information, as well as a request for records, under the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) and its applicable regulations (particularly 34 CFR § 99.30).

I, Daniel Brezina, born on , do hereby authorize American University (the "Institution") to release to the Foundation for Individual Rights and Expression ("FIRE") any and all information concerning my current status, disciplinary records, or other student records maintained by the Institution, including records which are otherwise protected from disclosure under the Family Educational Rights and Privacy Act of 1974. I further authorize the Institution to engage FIRE's staff members in a full discussion of all matters pertaining to my status as a student, disciplinary records, records maintained by the Institution, or my relationship with the Institution, and, in so doing, to fully disclose all relevant information. The purpose of this waiver is to provide information concerning a dispute in which I am involved.

I have reached or passed 18 years of age or I am attending an institution of postsecondary education.

In waiving such protections, I am complying with the instructions to specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom disclosure may be made, as provided by 34 CFR 99.30(b)(3) under the authority of 20 U.S.C. § 1232g(b)(2)(A).

Records requested under FERPA: I request access to and a copy of all documents defined as my "education records" under 34 CFR § 99.3, including without limitation:

- A complete copy of any files kept in my name in any and all university offices;
- any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable;
- any and all phone, medical or other records in which I am personally identifiable; and
- the log of requests for and disclosures of my education records, as required by 34 CFR § 99.32(a).

Records requested under state public records law: To the extent the applicable public records law would require a faster response, a more comprehensive response, or production of copies of records:

- I request, pursuant to the applicable state public records law, copies of all records that would be available for my inspection under FERPA;
- To the extent the public records law allows disclosure of responsive records, I request that such records be produced in an electronic format, preferably by email.

Fees: I agree to pay any reasonable copying and postage fees of not more than \$20. If the cost would be greater than this amount, please notify me. Bear in mind, however, that FERPA prohibits the imposition of a fee to search or retrieve records (34 CFR § 99.11).

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 it is the document is withheld.

Request for Redaction Log: If any portion of responsive documents must be redacted, please provide a written explanation for the redaction including a reference to the statutory exemption permitting such redaction. Additionally, please provide all segregable parts of redacted materials.

Per 34 CFR § 99.10(b), these records must be made available within **45 days**.

I request that the records be sent to me via email at _____ and to FOIA@thefire.org.

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 and Expression, 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.

A solid black rectangular box redacting the student's signature.

Student's Signature

7/8/2022

Date