



FIRE

Foundation for Individual
Rights and Expression

February 21, 2023

Laurie S. Nichols
Office of the President
Black Hills State University
212 Woodburn Hall
Spearfish, South Dakota 57799

Sent via U.S. Mail and Electronic Mail (Laurie.Nichols@bhsu.edu)

Dear President Nichols:

FIRE is disappointed that you did not respond to our January 31 letter expressing concern that Black Hills State University unconstitutionally removed Young Americans for Liberty members recruiting on campus.¹ Although the university apologized to the students it removed, FIRE remains concerned BHSU has not trained its staff on the university's First Amendment obligations and continues to use an expressive activity form that purports to give the university full authority to eject "objectionable" speakers from campus.

Specifically, BHSU's expressive activity request form claims that the university "reserves the right to eject any objectionable person or persons from the premises upon the exercise of authority through any agent or police personnel."² As we explained in our first letter, as a public university, BHSU has a First Amendment obligation to allow spontaneous expression,³ and cannot shut down speech on the sole basis that others find it offensive.⁴ The university cannot

¹ Copy enclosed.

² *Request Form, Use of Institutional Facilities and Grounds for Expressive Activity*, BLACK HILLS STATE UNIV. (on file with author).

³ See *Roberts v. Haragan*, 346 F. Supp. 2d 853, 870 (N.D. Tex. 2004) (holding Texas Tech's requirement that students acquire a permit at least two days before engaging in expressive activity outside designated free speech areas "sweeps too broadly in imposing a burden on a substantial amount of expression that does not interfere with any significant interests of the University"); see also *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1939) ("Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations . . . it must be fully preserved.").

⁴ *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").

remove students from campus for exercising their First Amendment rights—even if others disagree with the ideas expressed.

We again call on BHSU to commit to training its public safety officers and ensuring all language on its request form and policies complies with the First Amendment. FIRE would be happy to assist you in making these changes. We request a substantive response to this letter by Friday, March 3, 2023.

Sincerely,

A handwritten signature in black ink, appearing to read "Sabrina Conza". The signature is fluid and cursive, with a long horizontal stroke at the end.

Sabrina Conza
Program Officer, Campus Rights Advocacy

Cc: Phil Pesheck, Director of Public Safety

Encl.



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January 31, 2023

Laurie S. Nichols
Office of the President
Black Hills State University
212 Woodburn Hall
Spearfish, South Dakota 57799

Sent via U.S. Mail and Electronic Mail (Laurie.Nichols@bhsu.edu)

Dear President Nichols:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is deeply concerned by a report that student members of Black Hills State University's Young Americans for Liberty (YAL) chapter, speaking in outdoor open areas of campus, were angrily confronted by the Director of Public Safety, who used an expletive and misquoted university policy while demanding they leave the area—an area where the students had every right to be. As you must know, both BHSU policy and the First Amendment unquestionably allow students to express a variety of views on campus—even those that administrators may find controversial. Accordingly, BHSU must ensure that it properly trains staff tasked with enforcing these policies in order to avoid recurrence of this kind of unconstitutional censorship.

On January 24, YAL members were reportedly walking around public, open areas of campus attempting to recruit students. They asked student passersby their opinions on the Second Amendment next to a member of YAL's local leadership who had foam posters advocating gun rights strapped to his body.² While the YAL members spoke with fellow students, a professor approached the group and took pictures of the posters.

Later that day, BHSU Director of Public Safety Phil Pesheck told the YAL members they could not continue advocating on campus because the group had not filled out a request form three

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² The information herein reflects our understanding of the facts as provided from YAL members and a video of the event provided by YAL. We appreciate that you may have additional information to offer and invite you to share it with us.

days in advance to use the grounds for expressive activity.³ Pesheck told YAL the form gives the university authority to ask those expressing messages the university disfavors to leave.⁴ When one of the YAL members asked Pesheck, “what is the intention of this policy?” Pesheck asked them if they wanted him to “actually fucking read” the policy and said they had to leave.⁵

YAL members then came to you to ask what BHSU allows, as Pesheck’s requirements contradict written university policy. You said either you or Pesheck would follow up to confirm what university policy allows, and whether there was a misunderstanding. The same day, Pesheck called chapter president Kyle Benjamin to apologize and affirm that YAL and other student groups may recruit in the outside areas of campus without prior permission. However, BHSU’s First Amendment obligations require that it clarify these rights with staff charged with administering its policies.

It is well-established the First Amendment binds public universities like BHSU,⁶ such that its actions and decisions—including the conduct of police officers⁷ and maintenance of policies implicating student and faculty expression⁸—must comply with the First Amendment. BHSU also expressly “supports the freedoms of speech and assembly guaranteed by the Constitution” and notes in its freedom of speech policy that “[n]othing in this policy shall prohibit university students, faculty, administrators, and other employees to spontaneously and contemporaneously assemble, as long as their conduct is not unlawful and does not materially and substantially disrupt the functioning of the institution.”⁹

The First Amendment also bars government officials like Pesheck from retaliating against citizens for exercising constitutional rights.¹⁰ While Pesheck eventually admitted he misunderstood BHSU policy and the First Amendment, that does not moot his violation of YAL students’ First Amendment rights by stopping them from speaking. FIRE remains concerned by BHSU’s clear lack of training for its public safety staff and about the statement in BHSU’s request form for expressive activity that the university “reserves the right to eject any

³ Video of Phil Pesheck, Director of Public Safety, Black Hills State Univ., speaking with YAL members (on file with author).

⁴ *Id.*

⁵ *Id.*

⁶ *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

⁷ *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).

⁸ *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

⁹ *Freedom of Speech and Use of Institutional Facilities and Grounds for Expression & Demonstration*, POLICY AND PROCEDURES MANUAL, BLACK HILLS STATE UNIV. (rev. Apr. 8, 2021), https://www.bhsu.edu/faculty-staff/policies-and-procedures/_docs/9.3-Freedom-of-Speech.pdf [<https://perma.cc/XYS8-AAMD>].

¹⁰ See e.g., *Baribeau v. City of Minneapolis*, 596 F.3d 465, 481 (8th Cir. 2010) (“A citizen’s right to exercise First Amendment freedoms ‘without facing retaliation from government officials is clearly established.’”) (internal citations omitted).

objectionable person or persons from the premises upon the exercise of authority through any agent or police personnel.”¹¹

While BHSU’s policy governing freedom of expression on university grounds—on which FIRE’s policy reform team worked with BHSU in 2021—complies with the First Amendment, the university’s request form and its actions in restricting speech continue to violate the First Amendment. This is true both with respect to its failure to accommodate spontaneous speech, and its reservation of the right to eject speakers for being “objectionable.”

First, courts have made clear that broad restrictions on spontaneous expression—like requiring students to submit a form to public safety three days before expressing themselves in open areas of campus—are unconstitutional.¹²

Further, Pesheck’s initial articulation of BHSU policy demonstrates serious misapprehension that the university can remove anyone who expresses viewpoints the university dislikes. Quite to the contrary, the Supreme Court has repeatedly, consistently, and clearly held that government actors may not restrict expression on the basis that others find it offensive. This core First Amendment principle is why the authorities cannot outlaw burning the American flag,¹³ punish the wearing of a jacket emblazoned with the words “Fuck the Draft,”¹⁴ penalize a parody ad depicting a pastor losing his virginity to his mother in an outhouse,¹⁵ or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might resort to violence.¹⁶

In ruling that the First Amendment protects protesters holding insulting signs outside of soldiers’ funerals, 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.”¹⁷ This principle applies with particular strength to universities which, by their nature, are dedicated to open debate and discussion.

This recent incident makes clear that amending BHSU’s freedom of expression policy was not enough to ensure it would respect students’ rights on campus. BHSU has the further

¹¹ *Request Form, Use of Institutional Facilities and Grounds for Expressive Activity*, BLACK HILLS STATE UNIV. (on file with author).

¹² *See Roberts v. Haragan*, 346 F. Supp. 2d 853, 870 (holding Texas Tech’s requirement that students acquire a permit at least two days before engaging in expressive activity outside designated free speech areas “sweeps too broadly in imposing a burden on a substantial amount of expression that does not interfere with any significant interests of the University”); *see also Martin v. City of Struthers*, 319 U.S. 141, 146–47 (1939) (“Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations . . . it must be fully preserved.”).

¹³ *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”).

¹⁴ *Cohen v. California*, 403 U.S. 15, 25 (1971).

¹⁵ *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

¹⁶ *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

¹⁷ *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

responsibility to train its public safety officers on what constitutes freedom of expression and how to enforce applicable university policies. This is particularly the case given that when public safety officers or other administrators violate students' First Amendment rights, the university can be vicariously liable.¹⁸

We request a substantive response to this letter no later than the close of business on Monday, February 13, 2023, confirming that BHSU will train its officers to respect students' First Amendment rights and ensure its request form is in line with its policies and the First Amendment.

Sincerely,



Sabrina Conza
Program Officer, Campus Rights Advocacy

Cc: Phil Pesheck, Director of Public Safety

¹⁸ See generally *Brown v. Louisiana*, 383 U.S. 131 (1966).