



FIRE

Foundation for Individual
Rights and Expression

October 26, 2023

Lauren Keeler
Office of University Counsel
Eastern Kentucky University
521 Lancaster Avenue
Richmond, Kentucky 40475

Sent via U.S. Mail and Electronic Mail (university.counsel@eku.edu)

Dear Ms. Keeler:

Despite the assurances in your May 24, 2023, letter that Eastern Kentucky University “is committed to upholding the United States Constitution,” the Student Press Freedom Initiative at FIRE¹ remains concerned by EKU’s unconstitutional gag order on resident advisors that forbids them from speaking to reporters.²

First, we note that while your response insists “nothing about the Agreement or any further training or instructions would prevent a student from speaking about a matter of public concern in their private citizen capacity,” EKU’s Resident Advisor Position Agreement is not so narrowly tailored.³ Instead, it requires “All requests from the media . . . to be referred to [a] supervisor,” without regard to the nature of the request.⁴ Reasonable RAs would read this to cover all requests they may receive from journalists—including those regarding their employment with EKU and those related to wholly separate subjects. Imposing a prior restraint on RA speech unrelated to their employment surely has no bearing on EKU’s interest in “promoting the efficiency of the public services it performs.”⁵

Second, we do not deny that EKU may, within constitutional bounds, limit some commentary RAs provide to the media—such as prohibiting RAs from speaking to reporters *on behalf of* the

¹ As you may recall, the Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit dedicated to defending freedom of speech and the press, and has defended freedom of expression, conscience, and religion, and other individual rights on America’s college campuses for more than 20 years. You can learn more about our recently expanded mission at thefire.org.

² The following reflects our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

³ *2023-24 Resident Advisor Position Agreement*, EASTERN KENTUCKY UNIV. (on file with author).

⁴ *Id.*

⁵ *Weaver v. U.S. Information Agency*, 87 F.3d 1429, 1439 (U.S. App. D.C. 1996).

institution, or barring reporters from publicly sharing confidential or internal information.⁶ However, even if the policy were directed only at speech related to RAs' employment, as EKU asserts, it still is not sufficiently tailored as the First Amendment requires.

For instance, you cite confidentiality concerns related to FERPA and other legal and ethical obligations as causes for the prohibition, but EKU can address those with a much narrower regulation. University of North Carolina at Chapel Hill, by way of comparison, permits RAs to speak to reporters "on their personal experiences, as long as [they] refrain[] from sharing confidential information about Carolina students or other University employees[.]"⁷ Other universities maintain similar policies and train RAs to ensure they understand their rights and obligations.⁸

EKU's current policy, conversely, would (for example) prevent an RA from speaking with *The Eastern Progress* even about the policy itself. It would also prohibit an RA from speaking about how much they love living in dorms, about subjects entirely unrelated to EKU Housing like their feelings on the presidential race, and even about subjects so mundane as how much they hate sushi or their affection for punk music.

The Supreme Court's decision in *United States v. National Treasury Employees Union* is instructive. In *NTEU*, the government barred federal employees from receiving compensation for speeches or articles.⁹ Like EKU's ban on RA speech to reporters, that at issue in *NTEU* applied even to expressive activity with no "connection with the employee's official duties."¹⁰ And similar to your insistence here, the government in *NTEU* asserted that *Pickering v. Board of Education*'s balancing test allowed it to "deter[] a broad category of expression,"¹¹ and it eschewed narrower regulation on grounds that "a wholesale prophylactic rule is easier to enforce."¹² The Court rejected those arguments. Noting the prohibition at issue "chill[ed] potential speech before it happen[ed]" and affected the public's right to know, it held such a

⁶ For example, we take no issue with EKU's rule for RAs who are also members of the press that they may not "disclose any confidential or internal information that you have received through your resident advisor role." Resident Advisor Position Agreement, *supra* note 3.

⁷ *Staff Media Relations Policy*, Carolina Housing, <https://housing.unc.edu/wp-content/uploads/2020/11/Media-Relations-Policy-for-all-Carolina-Housing-Staff.pdf> (last visited Oct. 13, 2023). The policy goes on to require that RAs pass "any media requests for a statement about a Housing matter" on to their supervisor.

⁸ For example, University of Virginia's RA agreement adequately and constitutionally balances their interests, stating, "The Chairs of the Resident Staff program represents Resident Staff to the University, the press, and the public. Any inquiries by the press or other media outlets seeking a statement by, or the official position of, the Resident Staff program should be referred to the Chairs. Individual Resident Staff members may speak to the media or public in their individual capacities, making clear they are not speaking on behalf of or for the program." Letter from Allen W. Groves, UVA Dean of Students to Lindsie Rank, Sept. 18, 2020, <https://www.thefire.org/research-learn/university-virginia-letter-fire-september-18-2020>.

⁹ *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 457 (1995).

¹⁰ *Id.*

¹¹ *Id.* at 467.

¹² *Id.* at 474.

wholesale ban “requires a much stronger justification” than the “dubious claim of administrative convenience.”¹³

Here, too, EKU cannot justify an overbroad gag on RA speech to reporters based on concerns about confidentiality and RAs’ purported inability to understand when their speech is in their private capacities rather than on behalf of the institution. EKU entrusts its “young, student employee[s]” (as you put it) with a “very important role within the University” to provide “crisis management,” “safety and security,” “academic resources” and other services to residents.¹⁴ We are sure, then, that EKU will agree that with adequate training, it can also trust RAs with their own constitutional rights.

To these ends, we renew our insistence that EKU revise its policy regarding RAs’ responses to media requests to make clear they are free to speak with the press as individual citizens, so long as they do not divulge confidential information or purport to speak on behalf of the university.

We request a substantive response to this letter no later than the close of business on Thursday, November 9, 2023 confirming EKU will revise its policy as requested.

Sincerely,



Lindsay Rank
Student Press Counsel

¹³ *Id.*

¹⁴ See letter from Lauren Keeler to Lindsay Rank, May 4, 2023 (on file with author); *Summer Resident Advisor*, SALARY.COM, <https://www.salary.com/job/eastern-kentucky-university/summer-resident-advisor/j202304090432554377551#:~:text=Job%20Summary%2FBasic%20Functions&text=Summer%20Resident%20Advisors%20are%20integral,to%20our%20summer%20residential%20students> (Oct. 3, 2023).