FIRE

Foundation for Individual Rights in Education

601 Walnut Street, Suite 510 • Philadelphia, Pennsylvania 19106
T 215-717-3473 • **F** 215-717-3440 • fire@thefire.org • www.thefire.org

May 15, 2009

Representative Rebecca Hamilton
2300 North Lincoln Boulevard, Room 510
Oklahoma City, Oklahoma 73105

Sent via U.S. Mail and Facsimile (405-557-7351)

Dear Representative Hamilton:

As President of the Foundation for Individual Rights in Education (FIRE), I write to request your assistance in ending abridgements of free speech on our nation's college campuses.

In the wake of the controversy surrounding noted evolutionary biologist Richard Dawkins' March lecture at the University of Oklahoma, I wanted to take a moment to explain to you how pernicious the threat to free expression on campus really is—and how much we could use your support.

Like most Americans, you likely would be surprised to learn how often the right to free expression is violated at our nation's colleges and universities, despite the fact that the vitality of these institutions relies upon the free and open exchange of ideas. In just the last year, FIRE has defended basic constitutional freedoms in some truly remarkable cases at both public and private schools.

Despite being legally bound to uphold the First Amendment on campus, public colleges and universities routinely trample upon the rights of students and faculty. For example, just in the last year, we defended a student at Valdosta State University in Georgia who was expelled for creating a satirical online collage to peacefully protest the university's plans to construct campus parking garages. Also, at Indiana University–Purdue University Indianapolis, we defended a student-employee found guilty of racial harassment for reading a book celebrating the defeat of the Ku Klux Klan in a 1924 street fight. The administrator's rationale was, amazingly, that the pictures of Klansmen on the cover constituted harassment, despite the fact that the book was distinctly and proudly *anti-Klan*! Meanwhile, FIRE is currently fighting on behalf of a student government leader at Michigan State University who was found guilty of violating the school's

spamming policy after she sent an e-mail to a group of faculty members encouraging them to weigh in on proposed changes to the school's academic calendar.

Private colleges and universities are no better at honoring the promises of freedom of expression made to students and faculty. At Brandeis University, we are fighting for a professor found guilty of racial harassment because he used the term "wetbacks" in order to explain and *criticize* the term in his Latin American Politics class. At Tufts University, we have been fighting to convince the administration to overturn a finding of racial harassment against a student newspaper for printing factual information about Islam as part of a satirical advertisement.

Additionally, you may be surprised to learn that despite ten state or federal court decisions unequivocally striking down campus speech codes on First Amendment grounds from 1989 to 2008, the number of unconstitutional restrictions on campus speech actually has dramatically increased during that time. In a detailed study,[1] FIRE found that 77 percent of public colleges and universities maintain speech codes that fail to pass constitutional muster when gauged against applicable legal precedent. Indeed, some of these colleges maintain codes with language virtually identical to language overturned in court. While our estimate may seem surprisingly high, of the eleven constitutional challenges brought against codes that FIRE deemed unconstitutional, *all* of them have resulted in either a strong opinion overturning those codes or the university voluntarily rescinding the code. As you know, a perfect success rate in litigation is a rare thing and speaks to the manifest unconstitutionality of these policies.

These codes have to be seen to be believed. As an illustration, I offer a few representative examples of the different types of unconstitutional speech codes most often enforced on campus:

- "Speech zone" policies like the one at the University of Cincinnati, which limits the free speech activities of 37,000 students to only one area of campus, requires that activities in that area be formally scheduled with the university, and threatens students who violate the policy with criminal trespassing charges.
- "Student rights and obligations" policies like the one at Texas A&M University, which prohibits students from violating others' "rights" to "respect for personal feelings" and "freedom from indignity of any type."
- Computer use policies like the one at Northeastern University in Boston, which prohibits students from using campus e-mail accounts or servers to send any message that, "in the sole judgment of the University," is "annoying" or "offensive."
- Diversity policies like the one at The Ohio State University, which warns that "[w]ords, actions, and behaviors that inflict or *threaten* infliction of bodily or *emotional harm*, whether done intentionally or with reckless disregard, are not permitted." (Emphasis added.)

[1] "Spotlight on Speech Codes 2009: The State of Free Speech on Our Nation's Campuses," *available at* http://www.thefire.org/speechcodereport.php.

But the most common type of speech code comes in the form of absurdly overbroad "harassment policies." For example:

- The University of Iowa defines sexual harassment as something that "occurs when somebody says or does something sexually related that you don't want them to say or do, regardless of who it is."
- Davidson College's sexual harassment policy prohibits the use of "patronizing remarks" and, heartbreakingly, explicitly prohibits "comments or inquiries about dating."
- The University of the Pacific's harassment policy prohibits conduct "that undermines the emotional, physical, or ethical integrity of any community member."
- Jackson State University's harassment policy bans, among other things, speech which "degrades," "insult[s]," or "taunt[s]" another, "use of profanity," and "verbal assaults."

The abuse and often willful misinterpretation of harassment law to suppress speech that might merely offend students or administrators should be especially troubling to those of us who care about fighting real incidents of racial and sexual harassment. FIRE has always recognized that universities are legally and morally obligated to prevent true discriminatory harassment. However, as you can see from the examples above, and from hundreds of additional well-documented examples, the goal of preventing "harassment" is too often used to justify impermissibly overbroad and vague restrictions on student and faculty speech. Indeed, of the ten speech code decisions dating back to 1989, all of them involve a challenge to a speech code masquerading as a harassment regulation. Unconstitutional codes that misrepresent true harassment do great harm to the perceived legitimacy of harassment regulations when applied in such frivolous ways and constructed with such wildly unconstitutional language. These policies not only violate well-established law with regard to the free speech rights of college students and faculty, but they also trivialize real harassment.

Luckily, the solution to the problem of overbroad harassment codes is simple and has already been provided by the United States Supreme Court. In *Davis v. Monroe County Board of Education*, 526 U.S. 629, 652 (1999) the Court defined student-on-student harassment as conduct which is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." If universities would simply adopt the language of *Davis* and make clear that their policies encompass no more and no less than the language prescribed by the Supreme Court, a tremendous percentage of speech codes would instantly disappear, and so would the justification for so many free speech abuses over the last twenty years.

Representative Hamilton, the First Amendment needs your help. Legislators like yourself can help ensure that our nation's public colleges and universities honor their binding legal and moral obligations to uphold the First Amendment on campus. As previously mentioned, the courts have handed down an unbroken series of decisions invalidating

campus speech codes.[2] Congress, for its part, has issued two powerful statements in the form of "sense of Congress" resolutions on the value of free speech on campus in just the last ten years. Indeed, college administrators have even ignored an unambiguous letter of clarification from the Department of Education's Office for Civil Rights (OCR) sent in 2003 to every college and university in the country making it exceedingly clear that federal harassment law cannot be used as a justification for censoring or punishing protected speech. Sadly, further action must be taken in order to convince university administrations to allow a true marketplace of ideas to flourish on their campuses.

There are many tools at your disposal that could help improve the situation on campus. Perhaps the most effective step you could take would be to publicly condemn the existence of campus speech codes. Such a public statement could change the thinking of those administrators in Oklahoma who deem such illiberal restrictions necessary. Indeed, your moral leadership on this issue would be invaluable, for without a cultural shift among university administrators, I fear the codes will simply reappear in new forms.

In these times, college censorship may not seem to be the most pressing issue. However, we believe that the consequences of failing to address the problem will have serious implications for our country's future. Failing to educate an entire generation about the deep wisdom, rationality and, indeed, beauty of our constitutional ideals of liberty—and, still worse, actually teaching students that they have a positive duty to censor opinions with which they disagree—means that it will not be long before these attitudes pervade our society with dangerous consequences for our pluralistic and diverse republic. In the words of University of Pennsylvania professor Alan Charles Kors, FIRE's co-founder, "A nation that does not educate in liberty will not long preserve it and will not even know when it is lost." Or in the words of President Abraham Lincoln on upholding the rule of law in our democracy, addressing the Young Men's Lyceum of Springfield, Illinois, in 1838: "Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others."

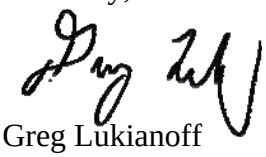
We trust that you share our belief in the essentiality of free speech both in our society and, especially, in our institutions of higher education. We sincerely hope that you will help to

[2] *See* DeJohn v. Temple Univ., 537 F.3d 301 (3d Cir. 2008) (declaring Temple University sexual harassment policy facially unconstitutional); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); Coll. Republicans at San Francisco State Univ. v. Reed, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); Roberts v. Haragan, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); Bair v. Shippensburg Univ., 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); Booher v. Bd. of Regents, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); The UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy due to unconstitutionality); Corry v. Leland Stanford Junior Univ., No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.) (declaring university discriminatory harassment policy unconstitutionally overbroad).

eliminate censorship on college campuses and restore respect for robust expression in higher education.

Thank you for your attention.

Sincerely,



Greg Lukianoff

cc:
Members of the Oklahoma House of Representatives
Burns Hargis, President, Oklahoma State University and the Oklahoma State University System
David L. Boren, President, University of Oklahoma