



Foundation for Individual Rights in Education

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May 21, 2009

President Brian C. Mitchell
Bucknell University
219 Marts Hall
Lewisburg, Pennsylvania 17837

Sent by U.S. Mail and Facsimile (570-577-3369)

Dear President Mitchell:

The Foundation for Individual Rights in Education (FIRE; www.thefire.org) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, freedom of conscience and religion, and freedom of association on America's college campuses.

FIRE is gravely concerned about the violations of freedom of speech committed by Bucknell University against the Bucknell University Conservatives Club (BUCC). First, the university prevented BUCC from engaging in symbolic political protest against President Obama's financial stimulus efforts by forbidding the group from distributing "Obama stimulus dollars" on campus. The university then shut down BUCC's "affirmative action bake sale" protest and refused to permit BUCC to engage the campus on the issue of affirmative action in the future except in a highly restrictive "debate" format. Finally, a university administrator claimed that students may not distribute any material on campus to their fellow students, including everything "from Bibles to other matter," without prior permission.

If the university truly values freedom of expression, it must repudiate such unconscionable restrictions on peaceful protest and distribution of expressive printed materials.

This is our understanding of the facts. Please inform us if you believe we are in error.

"Obama Stimulus Dollar" Distribution Shut Down

On March 17, 2009, BUCC handed out fake dollar bills (images enclosed) issued jointly by the "Socialist State of America" and the "United Nations" with a picture of President Obama on the front, and the sentence "Obama's stimulus plan makes your money as worthless as monopoly money" on the back. BUCC members stood at Bucknell's Elaine Langone Center and handed out the protest

bills, telling students they may have free stimulus money. After about one hour, two members of the Reservation, Information and Conference Services (RICS) staff, including Director Judith L. Mickanis, approached the students. Mickanis said “You’re busted!” and put her hand on a female student’s arm. The administrators shut down the protest, stating that BUCC had been “soliciting” without prior approval in the form of an approved “Sales and Solicitation” request. BUCC’s Vice President for Special Events, Sami Prehn, asked why a Sales and Solicitation form was necessary, since club members were merely handing out free, fake money as a symbolic protest. The RICS administrators said that this was considered solicitation and was the equivalent of handing out Bibles.

On May 4, BUCC President Travis Eaione e-mailed his account of the event to Mickanis, and she verified it via e-mail later that day:

Yes, I used those words, but I put a hand on the young woman’s arm and said that I was teasing, but that you need to fill out a sales and solicitation form to give anything out. The group politely questioned this, and the young woman said she didn’t know about this policy. The policy is in place to protect the entire BU community and I said that consistently permission was needed to hand out anything from Bibles to other matter. You just can’t hand things out without approval. I told them to go to RICS when it reopened at 1pm and fill out a form, that I would approve it, but it had to be done consistently with other groups. However, let me qualify by saying that groups can solicit only from behind tables, not out in the open like they were doing.

It is important to note here that Mickanis has drastically misinterpreted the university’s Sales and Solicitation policy (see <http://www.bucknell.edu/x8503.xml>) in order to shut down the distribution of controversial material—even material that has nothing at all to do with solicitation. In fact, Mickanis has interpreted the policy so as to prevent the distribution of *all* material between students on campus. Such an interpretation of the policy has now had a severely negative effect on campus discourse and debate, requiring prior review and prior approval of everything “from Bibles to other matter” before students will be allowed to communicate their ideas to other students, on paper, in public areas of the Bucknell campus. Important political debate that might have been generated by the “Obama stimulus dollars” was summarily cut off.

Moreover, distributing noncommercial handbills and other noncommercial written material has been central to American social and political activism and discourse since before the founding of the United States. Any policy that labels such discourse as “solicitation,” bans it from being “out in the open,” restricts it to being distributed from “behind tables,” and subjects it to prior review is inimical to any university, like Bucknell, that claims to value freedom of expression. To maintain such a policy is a betrayal of the mission of any university with any pretense of being a free marketplace of ideas and is antithetical to the idea of a free society itself.

Affirmative Action Bake Sales Shut Down

On April 7, 2009, two Bucknell administrators shut down BUCC’s previously approved “affirmative action bake sale,” an event designed as a protest of affirmative action policies that

treat people differently because of their race. When BUCC tried to hold the sale a second time, Bucknell administrators refused to approve this expressive protest. Then, a Bucknell dean refused to let BUCC engage students on the issue of affirmative action at all unless they did so in a “debate” format.

In expressing its views about affirmative action, BUCC believed itself to be taking seriously Bucknell’s “Student Pledge of Responsibility.” This document is a kind of loyalty oath that calls all Bucknell students to “understand that bias on the basis of ... race ... whether expressed in word or action, is repugnant, and that Bucknell will not tolerate ... discrimination ... against any person for any reason.” BUCC’s first bake sale event also was intended to alert students of an April 8 event featuring Coalition on Urban Renewal and Education president and affirmative action opponent Star Parker.

BUCC had received permission to hold its bake sale on April 7 after submitting a Sales and Solicitation form to RICS. The form did not offer space for the group to explain the name and purpose of the event—an appropriate omission in that this omission helps prevent the university from making viewpoint-based decisions when approving bake sale events. The group began its event at noon with four dozen doughnuts and a poster displaying the price list, which was meant to represent affirmative action policies, with different prices corresponding to different races. About 40 minutes into the event, Assistant Dean of Students Lewis A. Marrara II went to the sale, took a picture of the bake sale sign, and left. About 20 minutes later, Marrara and Associate Dean of Students Gerald W. Commerford told BUCC that the event was being shut down. Commerford cited a discrepancy between the Sales and Solicitation form and the price list, noting that the highest price being asked for the doughnuts was \$1.00, instead of \$2.00 as indicated on the form.

According to a video record of the event, Commerford added that because of this discrepancy, “we have the opportunity to shut you down.” Commerford did not give any other reason for shutting down the protest. The BUCC students offered to restate the prices in accordance with the form, but Commerford rejected that option. Instead, he stated that BUCC would be able to “re-register at another time” and hold the event at some future time.

Heeding Commerford’s words, on April 21, BUCC submitted a request to RICS for another affirmative action bake sale, again filling out a Sales and Solicitation form as Bucknell apparently requires. Although the April 7 event had been approved, and the April 21 event was also approved by Dining Services representative John Cummins, this time the group was told by RICS that for “controversial events,” additional approval from a representative of the Dean of Students Office is required. BUCC members had engaged in arguably “controversial” events before, but they had never before been required to get special approval from this office.

Following the direction from RICS, BUCC proceeded to the Dean of Students Office on April 21, where Commerford reviewed BUCC’s request on the spot. Commerford completely rejected the request to hold the event. FIRE is in possession of an audio recording of this conversation. Even though the sale was listed as explicitly political and not commercial on the request form, Commerford told BUCC that the sale would be in violation of Bucknell’s discrimination policy. Commerford also stated that the only way he would approve an event about affirmative action

would be to schedule an open debate; he deemed any kind of protest bake sale on this topic unacceptable.

In particular, according to an audio record of the meeting, a BUCC member asked if the event would be approved if the group listed the bake sale prices as “optional,” making clear that anyone could pay whatever price they wanted, regardless of race. Commerford completely rejected this option, however, saying, “No, no, no, no, no, no, no, no, because it’s a discriminatory [pricing] policy.” He then added, “It’s a political issue, ok; it needs to be debated in its proper forum, ok, and not on the public property on the campus.” When a BUCC member then asked, “There is no way we can have an event like this?” Commerford replied, “No.”

In an April 24 article in *The Bucknellian*, Bucknell’s primary student newspaper, News Editor Mike McPhee quoted Commerford as saying that he wanted BUCC to find “a proper venue for a campus dialogue to discuss and/or debate affirmative action and related issues.” Commerford also was quoted as saying that he would not permit a protest bake sale at all because “I explained there is a proper venue for fundraising activities and other venues for presentation of issues. I concluded that this was not a fundraising activity.” Although Commerford apparently acknowledged that the event was a protest, he would not permit it to occur because of the political views being expressed by BUCC and the way in which the BUCC members chose to express themselves in their protest.

Bucknell Administrators Have Failed to Uphold Bucknell’s Mission as a Free Marketplace of Ideas

It is deeply troubling that these events could take place at any university, like Bucknell, that claims to be committed to freedom of expression and the freedom of students to engage one another on important social and political issues. Like many private universities, Bucknell has committed itself to the basic principle of freedom of expression in its student handbook and other documents. As the Supreme Court declared—and as I am sure you will agree—“[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’” *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted). That marketplace cannot function when administrators shut down events that express views with which they disagree. When administrators use shallow pretexts in order to do so, the lesson learned is not about freedom but about the arbitrary abuse of power.

Bucknell also should remember the Supreme Court’s timeless expression of the important role of our universities in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957):

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. **To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.** No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made.... Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always

remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. [Emphasis added.]

Further, you should know that in Pennsylvania, documents such as the *Bucknell Student Handbook* have been found to constitute binding contracts between students and the university. For example in *Reardon v. Allegheny College*, 926 A.2d 477, 480 (Pa. Super. Ct. 2007) the court stated:

The relationship between a privately funded college and a student has traditionally been defined in this Commonwealth as strictly contractual in nature. ***Barker v. Trustees of Bryn Mawr College***, 278 Pa. 121, 122, 122 A. 220, 221 (1923); *see also, Ross v. Pennsylvania State Univ.*, 445 F.Supp. 147, 152 (M.D. Pa. 1978). As such, we review the agreement between the parties concerning disciplinary procedures, contained within a portion of the student handbook known as The Compass, as we would any other agreement between two private parties. [Emphasis in original.]

Although the *Bucknell Student Handbook* provides relatively weak protection for freedom of expression compared to public universities or community colleges or even the public sidewalks immediately off campus, even Bucknell's speech code does not apply to the essential political speech that was restricted by the shutdown of the "Obama stimulus dollar" distribution and the shutdown and banning of the "affirmative action bake sale." In fact, the *Handbook* instructs students not only that they *have* freedom of speech but that "deliberate interference" with this freedom is prohibited. Furthermore, the stated exceptions to this freedom in the *Handbook*, such as speech that is truly threatening or harassing, do not come close to describing the political speech in which the BUCC attempted to engage before being shut down time after time.

As you are no doubt aware, parody and satire are important—indeed, vital—components of political speech and are at the core of our country's honored traditions. Protests that rely on satire—such as the "affirmative action bake sale" and feminist "wage gap bake sales" that aim to protest the gap between men and women's average earnings—exist to challenge, to amuse, to provoke, and, indeed, to offend. Fake "Obama stimulus dollars" are part of precisely the same tradition. We strongly encourage you to read the landmark Supreme Court cases of *Cohen v. California*, 403 U.S. 15 (1971) and *Hustler Magazine, Inc., et al. v. Jerry Falwell*, 485 U.S. 46 (1988). Taken together, the precedents set by these cases illustrate arguments for protecting even highly offensive material, farce, profanity, and exaggeration. These cases confirm that parody and satire play essential roles in our society precisely because they challenge our deepest assumptions and beliefs.

The great irony of Bucknell's attempt to squelch potentially unpopular political protests is that a special function of the university as a whole, in any free society, is to serve as the ultimate forum for free speech. Any university serious about the search for truth should be seeking, at all times, to expand open discourse, to develop intellectual inquiry, and to engage and challenge the way individuals think. A university that is intolerant of the often messy reality of a free society is incapable of teaching students to live as citizens in such a society. By shutting down BUCC events, Bucknell sends the message to its students that speech is to be feared, monitored, and

ultimately restrained if it is deemed sufficiently controversial. This message is completely incompatible with a free society and stands in stark opposition to the values of higher education. Bucknell's actions against BUCC are wholly misplaced at an institution preparing students to be engaged citizens in a pluralistic democracy.

Bucknell is not the only university that has attempted to shut down an affirmative action bake sale protest on the ground that it is "discriminatory." The University of California at Irvine, the University of Colorado, the College of William and Mary, Northeastern Illinois University, and DePaul University (a private university) also attempted to shut down affirmative action bake sale protests or punish their sponsors on similar grounds. FIRE intervened in each of these cases and the institutions relented, realizing that attempting to silence this type of political protest runs afoul of free expression and opens the institution to legal liability for violating the First Amendment, or the university's contractual promises of freedom of expression, or both.

FIRE is categorically committed to seeing this situation through to a just and moral conclusion. To this end, we request your administration's written assurance to BUCC that any affirmative action bake sale protest will henceforth be allowed to proceed unhindered by the administration, that non-disruptive distribution of all noncommercial materials including "Obama stimulus dollars" will be permitted without prior review, and that no university policy or contrivance will be used to infringe upon the free speech of students at Bucknell.

Please spare Bucknell University the embarrassment of fighting against freedom of speech, to which Bucknell is legally and morally bound. We urge you to show the courage necessary to admit the errors of your subordinates, renounce the unjust policies and their unjust application, and tell the world that free speech is to be celebrated, honored, and broadened—not feared, suppressed, and restricted. Let your students exercise their basic human rights; let them protest as their consciences dictate. Because of the importance of this matter and the rights of Bucknell students that are at stake, FIRE requests a response by June 4, 2009.

Sincerely,



Adam Kissel
Director, Individual Rights Defense Program

cc:

Michael A. Smyer, Provost and Vice President for Academic Affairs
Susan Hopp, Dean of Student Services
Gerald W. Commerford, Associate Dean of Students
Lewis A. Marrara II, Assistant Dean of Students and Director of Fraternity and Sorority Affairs
Kari M. Conrad, Assistant Dean of Students and Director of Campus Activities and Programs
Molly Pavlechko, Development Research Specialist
Judith L. Mickanis, Director, Reservation, Information and Conference Services
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Tom Evelyn, Director of Media Relations
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