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

December 22, 2011

President Dana L. Gibson
Sam Houston State University
The Office of the President
Box 2027
Huntsville, Texas 77341

Sent via U.S. Mail and Facsimile (936-294-1465)

Dear President Gibson:

I write today because FIRE is concerned about a policy in force at Sam Houston State University (SHSU) that unconstitutionally restricts the speech rights of SHSU students.

Specifically, SHSU's Code of Student Conduct defines disorderly conduct, in relevant part, as the use of "abusive, indecent, profane or vulgar language." This impermissibly broad definition restricts a staggering amount of constitutionally protected expression and fundamentally violates the First Amendment rights of all SHSU students. Continued maintenance of this policy chills expression on campus and betrays freedoms that SHSU, a public university, is legally bound to protect. Moreover, the policy undermines the mission of an institution presumptively committed to intellectual rigor, robust debate, and a free and vibrant community. **For these reasons, FIRE named this policy our "Speech Code of the Month" for October 2011.**

SHSU's policy prohibits "abusive, indecent, profane or vulgar language." Yet most speech that may be characterized as "abusive," "indecent," "profane," or "vulgar"—however one chooses to define these amorphous terms—is nevertheless entitled to constitutional protection, rendering this provision overbroad on its face. A statute or law regulating speech is unconstitutionally overbroad "if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate." *Doe v. University of Michigan*, 721 F. Supp. 852, 864 (E.D. Mich. 1989), citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

The restriction also suffers from the defect of vagueness. A statute, regulation, or policy is said to be unconstitutionally vague when it does not "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09

(1972). Here, SHSU's policy fails to define the terms "abusive," "indecent," "profane," or "vulgar" in any way, forcing students to guess at what a fellow student or administrator may deem to be punishable. After all, what is "abusive" or "profane" to one person, for instance, may be considered tame, innocuous speech by another. Even if students are somehow able to determine what the policy prohibits—an all but impossible task, given the inherent subjectivity involved—they will likely self-censor to such a degree that expression on campus will be chilled. This is an impermissible result. The Supreme Court of the United States has held that "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone … than if the boundaries of the forbidden areas were clearly marked.'" *Grayned*, 408 U.S. at 109 (internal citations omitted).

While some may take offense at expression they deem to be "abusive," "indecent," "profane," or "vulgar," offense alone is insufficient ground to restrict or punish such speech. I urge you to review the Supreme Court's well-known decision in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), in which it ruled that the First Amendment protects even the most outlandishly offensive parody—in that case, a satirical advertisement suggesting that the Reverend Jerry Falwell lost his virginity in a drunken encounter with his mother in an outhouse. The publication of that advertisement was no doubt perceived by Reverend Falwell—and many others—to be "abusive," "indecent," "profane," and "vulgar," yet that alone did not strip the expression of its constitutional protection. Even more centrally to the college campus, consider the Court's declaration in *Papish v. Board of Curators of the University of Missouri,* 410 U.S. 667, 670 (1973) (internal citations omitted), that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"

As a practical matter, SHSU's policy serves to forbid a student's passionate expression of his or her views on any number of important contemporary issues, so long as a fellow student or administrator deems the expression to be sufficiently "abusive" or otherwise punishable under the policy. Yet the Supreme Court long ago made clear that "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). SHSU's restrictions encompass a great deal of expression that, though perhaps communicated in a manner found disagreeable or offensive by some, is fully entitled to protection under the First Amendment. As the Supreme Court has pronounced, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

In an instructive case for analyzing SHSU's policy, a federal district court struck down a policy at San Francisco State University that mandated that students "be civil to one another." *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007). In invalidating this provision, the court recognized that there is "an emotional dimension to the effectiveness of communication," and that for many speakers, "having their audience perceive and understand their passion, their intensity of feeling, can be the single most important aspect of an expressive act." *Reed*, 523 F. Supp. 2d 1005, 1018–19. Much expression that lacks civility,

after all, can be singularly effective in disseminating a particular message, and the same holds true for the type of expression prohibited by SHSU's policy.

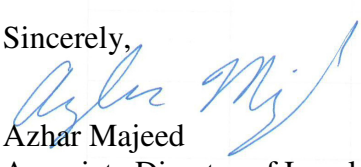
Please be advised that federal and state courts across the country have consistently struck down unconstitutional speech codes, often masquerading as harassment or civility policies, at colleges and universities over the past twenty years. In addition to *Reed*, see *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010) (invalidating university speech policies, including harassment policy, on First Amendment grounds); *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008) (striking down unconstitutional sexual harassment policy); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Smith v. Tarrant County College District*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (invalidating "cosponsorship" policy due to overbreadth); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Booher v. Board of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *Corry v. Leland Stanford Junior University*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.) (declaring "harassment by personal vilification" policy unconstitutional); *The UWM Post, Incorporated v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); and *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy due to unconstitutionality).

Again, Sam Houston State University is a public university bound by the First Amendment, and thus it must abide by rulings of the Supreme Court. The Court has long held that public universities occupy a special place in our nation's First Amendment jurisprudence and that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy v. James*, 408 U.S. 169, 180 (1972).

FIRE asks that SHSU revise its Code of Student Conduct policy on disorderly conduct to make the policy consistent with the requirements of the First Amendment and, to prevent speech at SHSU from being impermissibly chilled, that you clarify to students and administrators that protected expression may never and will never be investigated or punished at SHSU. We ask for a response by January 12, 2012.

Thank you for your attention and sensitivity to these important concerns. I look forward to hearing from you.

Sincerely,



Azhar Majeed
Associate Director of Legal and Public Advocacy

cc:
Frank Parker, Vice President for Student Services, Sam Houston State University
John Yarabeck, Dean of Students, Sam Houston State University