



Foundation for Individual Rights in Education

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January 6, 2012

Chancellor Steve Ballard
East Carolina University
Office of the Chancellor
East Fifth Street
Greenville, North Carolina 27858

Sent via Electronic Mail, U.S. Mail, and Facsimile (252-328-4155)

Dear Chancellor Ballard:

As you can see from the list of our Directors and Board of Advisors, FIRE unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals from across the political and ideological spectrum on behalf of liberty, free speech, legal equality, due process, the right of conscience, and academic freedom on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is concerned about the threat to freedom of the press posed by East Carolina University's (ECU's) termination of the adviser to student newspaper *The East Carolinian*. Members of the newspaper's editorial board reportedly were informed by a senior ECU administrator that they might face "consequences" due to their controversial editorial decision. Firing their adviser because of that decision violates the First Amendment.

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

During halftime at the ECU football game on Saturday, November 5, 2011, a man unaffiliated with ECU ran naked ("streaked") across the field. On the front page of its November 8 print edition, *The East Carolinian* printed three photos of the man, including one in which he can be seen from the front.

The East Carolinian's editorial board, including Editor in Chief Caitlin Hale, met with *East Carolinian* adviser Paul Isom and ECU Vice Chancellor for Student Affairs Virginia Hardy on November 8. According to Hale, Hardy warned her that she would be "facing consequences" for her decision to run the unedited photos.

In a November 9 article in *The Daily Reflector*, a local newspaper, Hardy is quoted in a public statement saying that “[t]he decision by *The East Carolinian* to publish a photo of a streaker that showed full frontal nudity was in very poor taste” and that “East Carolina University does not agree with that decision and does not support it.” Hardy added that “with the freedom of the press comes a certain level of responsibility about what is appropriate and effective in order to get their message across.” According to the *Reflector*, Isom stated, “the decision to publish the pictures was made by the editor.” The *Reflector* also reported that Isom said that as a state employee, he “cannot legally interfere with decisions made by the student staff” and “would be guilty of prior review if I did that.”

The East Carolinian is an independent, student-run newspaper funded by student activity fees, operated independently of ECU’s pedagogical or academic oversight, and produced without reference to or involvement with ECU’s educational curriculum. The constitution of ECU’s Media Board protects *The East Carolinian*’s freedom of expression and acknowledges its editorial independence:

Editorial policy of an individual medium shall be excluded from board control. The board shall uphold and support the First Amendment guarantees granted to the print media under their oversight.

This is a wise policy. Most importantly, it respects the First Amendment rights of student journalists. However, it has the additional benefit of shielding the university from liability incurred by student expression, as courts have indicated that institutions exerting control over student publications may be found liable for the content published therein. *See, e.g., Lewis v. St. Cloud State University*, 693 N.W.2d 466, 475 (Minn. App. 2005) (because state university system forbid university from “exercising any editorial control over the contents of [the university]’s student-run newspaper,” university could not be found liable for allegedly defamatory content published therein); *Mazart v. State*, 441 N.Y.S.2d 600, 606 (N.Y. Ct. Cl. 1981) (“in light of the University’s eschewing control, editorial or otherwise, over the paper and the constitutionally imposed barriers to the exercise by the University of any editorial control over the newspaper ... the relationship of the University and the Pipe Dream is not such as would warrant the imposition of vicarious liability on the State for defamatory material appearing in the student newspaper”). Were ECU to assert editorial control over student publications like *The East Carolinian*, it would assume liability for their content, rendering the university a deep-pocketed target for litigation from those who might wish to sue for libel or defamation.

Given *The East Carolinian*’s unequivocal independence, ECU may not punish *The East Carolinian* for its exercise of expression protected by the First Amendment. That the First Amendment’s protections fully extend to public universities such as ECU has long been settled law. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities”); *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted) (“[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’’).

The First Amendment protects the right of *The East Carolinian* to print and disseminate photographs such as those published in the November 8 issue. To lose First Amendment protection as “obscenity,” speech must meet the exacting three-prong test announced by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973). However, with regard to the photograph in question, (1) the average person, applying contemporary community standards, would not find that the published work, taken as a whole, appeals to the prurient interest (an inordinate interest in sex); (2) the work does not depict or describe, in a patently offensive way, sexual conduct; and (3) the work, taken as a whole, does not lack serious literary, artistic, political, or scientific value. *The East Carolinian* reporting at issue here, disseminating news about a streaker to the university community, does not qualify as “obscene” material under *Miller* and is thus protected under the First Amendment.

ECU may not punish or restrict protected expression published by *The East Carolinian*. Courts have long held that adverse administrative action by a public university against a student newspaper as a result of protected speech violates the First Amendment. *See, e.g., Husain v. Springer*, 494 F.3d 108, 124 (2d. Cir. 2007) (“when a public university establishes a student media outlet and requires no initial restrictions on content, it may not censor, retaliate, or otherwise chill that outlet’s speech, or the speech of the student journalists who produce it, on the basis of content or viewpoints expressed through that outlet”); *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983) (“[a] public university may not constitutionally take adverse action against a student newspaper ... because it disapproves of the content of the paper”); *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973) (“if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment”). Indeed, in *Springer*, the United States Court of Appeals for the Second Circuit noted the remarkable unanimity of the federal circuits with regard to the First Amendment rights of college student newspapers, observing that “all the circuits that have considered the issue have determined that, at the very least, when a public university creates or subsidizes a student newspaper and imposes no *ex ante* restrictions on the content that the newspaper may contain, neither the school nor its officials may interfere with the viewpoints expressed in the publication without running afoul of the First Amendment.” *Springer*, 494 F.3d at 124.

Firing *The East Carolinian*’s adviser unquestionably qualifies as adverse administrative action against the newspaper, given the prominent role of the adviser in the production of the newspaper and the relationship thus established between student editors and the adviser. Nor can there be any question that the adviser’s firing is a direct result of the November 8 issue’s content, given the explicit warning communicated to the editors by Hardy, who stated that the paper would be “facing consequences” as a result of its publication of protected expression. ECU’s decision to fire Isom will result in an impermissible chill on all student media with advisers, who are now subject to termination whenever the university disagrees with students’ editorial decisions.

ECU would do well to remember, even at this late stage, that the First Amendment's guarantee of freedom of expression does not exist to protect only non-controversial speech; indeed, it exists precisely to protect expression that some members of a community may find controversial or offensive. The Supreme Court has recognized that this treasured principle is of special import on our nation's college campuses, and it protects student newspapers despite content some may find objectionable or in "poor taste." In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973), the Court held 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,'" when upholding the First Amendment right of a college student newspaper to publish an article with the headline "Motherfucker Acquitted."

Quoting *Papish*, the Fourth Circuit reached a similar result in *Thonen v. Jenkins*, 491 F.2d 722, 723 (4th Cir. 1973), a case involving East Carolina University student editors punished for publishing a letter to the editor that criticized the university president and used an expletive. The Fourth Circuit held that "[F]irst [A]mendment rights on college campuses are coextensive with those in the community at large. ... [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (Internal citations and quotations omitted.)

FIRE reminds you that the Fourth Circuit's decisions in *Joyner* and *Jenkins* are fully binding on ECU, as North Carolina is within the Fourth Circuit's jurisdiction and thus must abide by the Fourth Circuit's rulings.

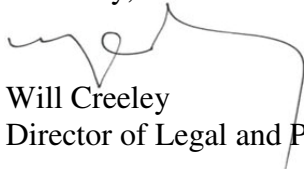
Finally, FIRE notes that the financial consequences faced by other public institutions for violating First Amendment rights in similar fashion have been severe. For example, in 2002, a student newspaper adviser at Fort Valley State University in Georgia brought suit against the university and several university administrators following his firing, which followed newspaper reporting on the questionable financial dealings of university officials. The adviser's claim was eventually settled outside of court for \$192,000 and for the adoption of a new university policy explicitly protecting the student press. In 2005, a high school newspaper adviser in Indiana was awarded \$74,000 to settle his federal lawsuit after he was fired over the publication of a story about a student arrested for murder. In 2006, Ocean County College in New Jersey was ordered by a federal judge to temporarily reinstate a student newspaper adviser who alleged she had been fired for publication of pieces critical of college administrators; the suit was settled after the college reinstated her permanently. In 2008, the Georgia Institute of Technology was ordered to pay \$203,734.14 in attorneys' fees following students' successful challenge of university policies violating the First Amendment. Similarly, in 2010, Tarrant County College in Texas was ordered by a federal district court to pay \$240,000 in attorneys' fees following its unsuccessful defense of university speech policies used to silence student protest on campus in violation of the First Amendment.

ECU has both a legal and a moral obligation to respect the freedom of expression rights enjoyed by its students. Please spare East Carolina University the embarrassment of fighting

against the Bill of Rights. FIRE asks that ECU reinstate Isom immediately. We are prepared to use the full range of our resources to secure a just result in this case.

FIRE requests a response by January 23, 2012.

Sincerely,

A handwritten signature in black ink, appearing to read 'Will Creeley', with a long, sweeping underline that extends to the right.

Will Creeley
Director of Legal and Public Advocacy

cc:

Marilyn Sheerer, Provost and Senior Vice Chancellor for Academic Affairs
Virginia Hardy, Vice Provost for Student Affairs
Lynn M. Roeder, Associate Vice Chancellor and Dean of Students
Caitlin Hale, Editor in Chief, *The East Carolinian*
Jenna Elizabeth Dabrishus, Chairperson, East Carolina University Media Board
Daniel Thornton, East Carolina University Media Board
Michael Jarrett, East Carolina University Media Board
Chelsea Roach, East Carolina University Media Board
Courtney Dupree, East Carolina University Media Board
Patrick DeSota, East Carolina University Media Board
Sarah Moran, East Carolina University Media Board
Christina Kendrick, East Carolina University Media Board
Charles Twardy, East Carolina University Media Board
Chris Stansbury, East Carolina University Media Board