



## Foundation for Individual Rights in Education

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April 22, 2011

President Wim Wiewel  
Portland State University  
341 Cramer Hall  
1721 SW Broadway  
Portland, Oregon 97201

*Sent via U.S. Mail and Facsimile (503-725-4499)*

Dear President Wiewel:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals from across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, [thefire.org](http://thefire.org), will give you a greater sense of our identity and activities.

FIRE is concerned about the threat to freedom of speech and due process posed by Portland State University's (PSU's) punishment of student Rachel Cain for unspecified speech over the telephone toward a PSU Library staff member, which PSU labeled "borderline threatening and inappropriate." In addition to a \$10 fine and probation, Cain is being required to sign a "behavioral agreement" ordering her to "follow[] protocol and hav[e] appropriate conversation about and towards University staff members that are present."

The following is our understanding of the facts; please correct us if you believe we are in error.

On March 16, 2011, Rachel Cain had a telephone conversation with a member of the PSU Library staff regarding the Library's policy for handling records of interlibrary loans. The conversation at some point grew contentious, but it remained centered on the topic. Afterward, according to Cain, she also called the Library and left a voice message for the staff member complaining about the staff member's alleged lack of professionalism. Because Cain has not been permitted to obtain a copy of the complaint against her, neither she nor FIRE is privy to the university's full account of the conversations at issue.

On March 18, PSU Library Access Services Manager Molly Blalock-Koral informed Cain via email that due to Cain's "hostile treatment toward library staff," Cain henceforward must submit "any requests you have of the library ... to

me as a formal written request,” and that Blalock-Koral had reported Cain to PSU’s Office of the Dean of Student Life. According to Cain, however, in an email reply to Blalock-Koral on March 18, the staff member is the one who “hung up on [her], after repeatedly disrupting [her] and talking over [her] in a rude condescending tone.”

On March 23, Cain received via email a letter signed by the Office of the Dean of Student Life alleging violations of PSU’s Code of Student Conduct and Responsibility, namely “Obstruction or Disruption of University Activity or Process” and “Failure to comply with a University Official’s requests.” The notice alleged that on March 16, Cain had “disrupt[ed] University processes by engaging in consistently disruptive behavior toward University staff members.” No evidence supporting either allegation was supplied.

The letter further informed Cain that her case would be heard by Conduct Coordinator Dementro Powell on March 30, explaining the purpose of the hearing as follows:

The purpose of this hearing is to determine whether there are reasonable grounds to believe the complaint is well-founded. If it is found that there are not reasonable grounds to adjudicate this complaint, the matter may be referred to mediation or dismissed. If it [is] determined there are reasonable grounds to adjudicate the complaint, you will then be assigned to a hearing body.

On March 26, Cain replied to the email asking for the names of her accusers and an account of “exactly what I allegedly did and/or said” so that she would be able to adequately prepare for the hearing. No such information was provided to Cain.

Powell and Cain met for her hearing on March 30. According to Cain, she was permitted to see a one-paragraph complaint against her and was permitted to share her account of events, but she was not permitted to keep a copy of the complaint. According to Cain, the complaint was written not by the staff member with whom Cain had spoken, but by Blalock-Koral. Powell would not permit Cain to record the hearing.

On April 11 at 6:11 p.m., Powell emailed Cain a formal notice that he had found her “responsible” for both charges. Powell did not, as the March 23 letter had promised, assign her case to a hearing body.

Instead, Powell stated that “[Cain’s] actions have been incongruent with the University Code of Conduct to the point of borderline threatening and inappropriate behavior.” Yet, Powell did not provide details or evidence regarding any failure to comply with an order, nor did he describe any disruption to the Library, much less a material or substantial disruption. Powell assessed a \$10 fine against Cain and put her “on a probationary period” of unspecified length, during which “all communication with the Library” from Cain must occur via email with Blalock-Koral.

Powell also required Cain to sign a Behavioral Agreement by Friday, April 15, which states that Cain must express her “frustrations and/or concerns in a more professional manner” by “following protocol and having appropriate conversation about and towards University staff members that are present.” The Agreement also notes that further violations of the student code

will result in “more serious” sanctions and that failure to sign and return the agreement by April 15 would result in “additional disciplinary action” including a hold placed on her account, which would effectively be an expulsion, preventing Cain from registering for classes in the future. The letter also gave Cain 10 business days to appeal (i.e., until April 25).

Cain replied to Powell via email on April 12, stating that she “will not admit to doing something I did not do.” Strangely, Powell replied via email on April 12 that the Agreement “is not something that is stating you were doing something wrong,” despite its clearly stated punishments and requirements.

Cain did not sign the Agreement, and on April 20 a hold was placed against her registration for future classes. Today she received an email from the Office of Dean of Student Life stating that “[Cain] will not be able to register for classes, check [her] grades, or complete any other administrative functions as a student until the hold is rem[ov]ed from [her] student account.”

Cain’s formal appeal should be construed as including this letter from FIRE.

As you should already know, PSU is a public institution and thus may not punish Cain for engaging in speech protected by the First Amendment. That the First Amendment’s protections fully extend to public universities such as PSU has long been settled law. See, e.g., *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’”); *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”).

PSU’s punishment of Cain for her speech, including speech-restrictive requirements in the Behavioral Agreement, appears to violate Cain’s First Amendment rights in several ways.

First, the First Amendment’s guarantee of freedom of expression does not exist to protect only non-controversial speech; indeed, it exists precisely to protect speech that some members of a community may find controversial or offensive. The right to free speech includes the right to say things that are deeply offensive to many people, and the Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends people. 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.’” First Amendment protection extends even to those statements that anger others. In *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), the Court held 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.” In *Texas v. Johnson*, 491 U.S. 397, 414 (1989), the Court eloquently explained the rationale behind these decisions, stating that “[i]f 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.”

Under these and other binding legal precedents, there is little question that Cain’s speech, while allegedly harsh, is nevertheless fully protected. PSU must recognize that Cain, a student, is not required to adhere to the standards of professionalism to which a PSU staff member might reasonably be held. In contrast, the First Amendment right to petition public officials, such as PSU Library staff, for a redress of grievances is a longstanding principle at the heart of the relationship between citizens and the government.

Furthermore, PSU may not punish protected speech merely by citing the rationale of “disruption” of a university function. Rather, actionable disruption related to speech must be both material and substantial. This constitutional principle holds even at the grade school level, an educational context in which students enjoy more limited speech rights. In the seminal case of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969), the Supreme Court declared that “the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.” The fact that the Library staff member hung up the phone on Cain and felt free to end the conversation further demonstrates that the telephone conversation came nowhere near a reasonable standard of actionable disruption. If PSU has evidence to the contrary, it must be adduced; at present, no such evidence has been provided.

Second, although Powell argues that Cain’s speech was “borderline threatening” and “inappropriate,” neither is an actionable charge. Again, it seems very unlikely that Cain’s remarks came anywhere close to the definition of a “true threat” as articulated by the Supreme Court in *Virginia v. Black*, 538 U.S. 343, 359 (2003). In that case, the Court held that only “those statements where the speaker means to communicate *a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals*” fall outside the boundaries of First Amendment protection. (Emphasis added.) At any rate, PSU may not punish Cain for expression—unspecified expression at that—which was merely “borderline threatening.”

Third, the Behavioral Agreement fails to provide Cain with clear instructions on what she may and may not say. The requirement to “follow[] protocol and hav[e] appropriate conversation about and towards University staff members that are present” is unconstitutionally vague and overbroad. The Supreme Court has held that laws must “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that [s]he may act accordingly,” or else the regulation is unconstitutionally vague. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). The problem in Cain’s case is compounded by PSU’s failure to identify how her alleged speech was prohibited and disruptive in the first place.

PSU’s treatment of Cain also raises significant due process concerns which put into question PSU’s commitment to basic principles of fairness for students accused of disciplinary offenses. The apparent violations of Cain’s right to due process include the following:

- PSU has not made clear what Cain allegedly said that was disruptive.

- PSU has not provided evidence of disruption beyond a one-paragraph complaint from someone other than the staff member involved.
- Cain was provided no opportunity to face her accuser, which is particularly important in a case with two different accounts of a phone conversation.
- No explanation of the finding of “failure to comply” is provided, nor does Powell’s disciplinary letter provide any evidence or even a description of the request with which Cain allegedly failed to comply.
- Cain was provided no advance notice of the grounds behind her charges, preventing her from preparing an adequate defense in her hearing with Powell.
- Cain was not provided with the promised hearing before a hearing body as described on March 23.
- Powell’s email to Cain on April 12 misrepresented the Behavioral Agreement as “not something that is stating you were doing something wrong,” despite its clearly stated punishments and requirements.

FIRE asks that Portland State University address its errors as discussed above by providing specific information about the speech that allegedly disrupted the Library substantially enough to deserve punishment; by explaining how Cain allegedly failed to comply with a lawful request; by providing an opportunity for Cain to face her accuser directly; and by providing the promised hearing before a hearing body. Again, PSU may not punish Cain’s protected expression, and it is likely that upon further consideration, PSU should abandon its charge of “disruption” against Cain’s expression. FIRE also asks that you construe this letter as Cain’s formal appeal, subject to further elaboration by Cain before the April 25 deadline. Accordingly, the hold on Cain’s registration must be removed pending the outcome of the appeal.

FIRE hopes this situation can be resolved amicably and swiftly. We are, however, committed to using all of our resources to see this situation through to a just and moral conclusion. We request a response to this letter by May 13, 2011.

We have enclosed a signed FERPA waiver from Rachel Cain, allowing you to freely discuss her case with FIRE.

Sincerely,



Adam Kissel  
Vice President of Programs

Encl.

cc:

Michele Toppe, Dean of Student Life  
Domanic Thomas, Director of Conduct and Community Standards  
Dementro Powell, Conduct Coordinator  
Molly Blalock-Koral, Access Services Manager, University Library