



Foundation for Individual Rights in Education

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March 12, 2007

President Larry E. Penley
Colorado State University
102 Administration Building
Fort Collins, CO 80523

Sent via U.S. Mail and Facsimile (970-491-0501)

Dear President Penley:

As you can see from our Directors and Board of Advisors, the Foundation for Individual Rights in Education (FIRE) 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, freedom of religion, academic freedom, due process, and freedom of speech and expression on America's college campuses. Our web page, www.thefire.org, will give you a greater sense of our identity and activities.

We are writing to express our grave concern regarding restrictive speech codes currently in place at Colorado State University. In August 2006, FIRE recognized Colorado State as a "Speech Code of the Month" for the Hate Incidents Policy in your Residence Hall Handbook. We hoped that public awareness would have been sufficient motivation to amend this policy and are disappointed to see that this has not been the case. Since that time, we have also been contacted by a group of concerned Colorado State students¹ about several additional policies that unlawfully restrict students' right to freedom of speech.

As a public institution, Colorado State is bound by the First Amendment and may not violate the expressive rights of its students. In spite of this, Colorado State maintains the following unconstitutional restrictions on speech:

- 1) The aforementioned "Hate Incidents" policy, which prohibits "expressions of hostility against a person or property because of a person's race, color, ancestry, national origin, religion, ability, age, gender, socio-economic status, ethnicity, or sexual orientation."

¹ Keith Anderson, Seth Anthony, Ian Bezek, Amanda Broz, Robert Drost, Andrew Lopez, Brooke Malcolm, and Ben Prytherch

- 2) The “Peaceful Assembly at CSU” policy, which designates just one area, the Lory Student Center Plaza, as “the ‘Public Forum’ space for Colorado State University—open to all individuals for the purpose of free speech,” and requires students wishing to assemble to reserve the Plaza “at least 14 days in advance of the event.”
- 3) The Residence Hall Handbook’s “Advertising Policy,” which prohibits the use of “offensive language” as well as any reference to alcoholic beverages or drugs.

We will address these policies in the order in which we have cited them above.

1) The Hate Incidents Policy: A public university such as CSU cannot lawfully ban “expressions of hostility.” Under even the most rudimentary definition of freedom, people are allowed to be hostile. Only when those expressions cross the line into constitutionally unprotected harassment—i.e., when they are, in the words of the U.S. Supreme Court, “so severe, pervasive, and objectively offensive that [they] effectively bar[] the victim’s access to an educational opportunity or benefit”—may a public university like Colorado State prohibit them. In fact, the Supreme Court has explicitly held on numerous occasions that speech cannot be restricted simply because it offends people. In *Street v. New York* (1969), the Court held that “[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” In *Papish v. Board of Curators of the University of Missouri* (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.” In *Terminiello v. Chicago* (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.”

From a practical standpoint, this policy shuts down a lot of legitimate discussion in the residence halls, which are traditionally spaces where students interact openly and learn from one another in an informal way: many formative discussions take place over late-night pizza in the dorms. Under this policy, the university could punish a student for saying the school gives “rich snobs preferential treatment” (an expression of hostility because of socio-economic status), or for harshly criticizing the Catholic Church for preventing the ordination of women (an expression of hostility because of religion).

It is not a legitimate response to say that the university *wouldn’t* punish this type of expression, because the mere existence of this vague and overbroad policy may—because of the threat of punishment it imparts—prevent those discussions from ever taking place. This is known as a “chilling effect” on free speech, and it is something the First Amendment does not permit.

2) The Peaceful Assembly Policy: The only possible defense of Colorado State’s assembly policy would be that it is a “reasonable time, place and manner” restriction as allowed by cases like *Ward v. Rock Against Racism* (1989). There is nothing “reasonable,” however, about transforming the vast majority of the university’s property—indeed, *public* property—into a “censorship area,” and in maintaining a system of onerous requirements by which students must

abide in order to exercise their fundamental rights. Federal case law regarding freedom of expression simply does not support the transformation of public institutions of higher education into places where constitutional protections are the exception rather than the rule. Time and again, courts have determined that to be considered legal, “time, place, and manner” restrictions must be “narrowly tailored” to serve substantial governmental interests. The generalized concern for order that underlies the establishment of free speech zone policies is neither specific enough nor substantial enough to justify such restrictions.

FIRE has challenged the establishment of free speech zones at universities across the nation, including at West Virginia University, Seminole Community College in Florida, Citrus College in California, the University of North Carolina–Greensboro, Texas Tech University, and the University of Nevada at Reno. In all of these cases, the institutions challenged have either decided on their own to open up their campuses to expressive activities or have been forced by a court to do so. For instance, in FIRE’s case at Texas Tech, a federal court determined that Texas Tech’s policy must be interpreted to allow free speech for students on “park areas, sidewalks, streets, or other similar common areas...irrespective of whether the University has so designated them or not.” *See Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004). Colorado State would be well advised to take this into account in considering its own policies.

Moreover, Colorado State’s strict regulations on speech are tragic in light of the fact that the special function of the university as a whole, in any free society, is to serve as the ultimate “free speech area.” Colorado State affirms this sentiment in its General Catalog, which states that “[t]he policy of Colorado State University is to encourage members of the University community to engage in discussion, to exchange ideas and opinions, and to speak, write, and publish freely in accordance with the guarantees and limitations of our state and national constitutions.” Colorado State’s Peaceful Assembly Policy runs afoul of both the First Amendment and the university’s own commitments to free speech by restricting free speech to just one area of the campus and by requiring two weeks of advance notice for events.

3) The Advertising Policy: As discussed above, the university cannot restrict speech simply because it is offensive to some listeners. Moreover, the policy does not specify whether the speech must be objectively offensive—that is, offensive to a reasonable person as opposed to subjectively perceived as offensive by more sensitive listeners—nor does it specify who exactly serves as the final arbiter of what is offensive. Presumably, that arbiter is someone within the university administration, and any policy that gives the university unfettered discretion to determine what speech is and is not permissible is dangerously arbitrary and overbroad.

In addition, the prohibition on “any reference to alcoholic beverages or drugs” in advertising is also overbroad. This policy, taken literally, prohibits the advertisement of Alcoholics Anonymous or Narcotics Anonymous meetings, as well as the advertisement of debates on pertinent topics such as marijuana policy reform or the sentencing disparity between offenders in possession of crack cocaine versus powdered cocaine. Again, the fact that the university might claim it does not *use* the policy to prohibit those types of advertisements is irrelevant; the fact is that the policy, on its face, prohibits an entire category of constitutionally protected speech, which is simply unacceptable at a public university such as Colorado State.

Please spare Colorado State the embarrassment of fighting against the Bill of Rights—a statement of both law and principle by which the university is legally and morally bound. We urge Colorado State to undo these unjust policies, and to tell the world that free speech at Colorado State is to be celebrated, honored, and broadened—not feared, restrained, and hidden. Let your students exercise their basic legal, moral, and human rights; let them speak, assemble, and protest as their consciences dictate.

FIRE is committed to using all of its resources to abolish the unconstitutional limits on freedom of expression at Colorado State. We request a response on this matter by March 26, 2007.

Sincerely,



Samantha Harris
Director of Legal and Public Advocacy

cc:

James T. Dolak, Executive Director, Housing and Dining Services, Colorado State University

Michael E. Ellis, Executive Director, Lory Student Center, Colorado State University

Blanche Hughes, Vice President for Student Affairs, Colorado State University

Seth Anthony

Ian Bezek

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