FIRE

Foundation for Individual Rights in Education

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August 2, 2004

President John Nazarian
Rhode Island College
600 Mt. Pleasant Avenue
Providence, Rhode Island 02908

URGENT

Sent By U.S. Mail and Facsimile (401-456-8287)

Dear President Nazarian,

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, due process, freedom of speech and academic freedom on America's college campuses. Our website, www.thefire.org, will give you a greater sense of our identity and activities.

FIRE is profoundly concerned about the dire threat to free speech posed by the formal hearings now proceeding at Rhode Island College against Professor Lisa B. Church, who has been accused of violating a policy on "hostile environment racism" and of "the use of intimidation" in her handling of a controversy over racially-based comments made by a parent of a student at RIC's Cooperative Preschool. The charges against Dr. Church have triggered RIC's disciplinary hearing procedures, which can lead to punishments ranging from oral reprimand to termination of employment. From the facts that we have gathered, FIRE believes these claims to be thoroughly unfounded and wholly without merit. Furthermore, for a public institution of higher education such as RIC to make such claims actionable as potential "discrimination" is an egregious violation of the freedoms of speech and expression guaranteed to RIC students, faculty and staff by the First Amendment to the U.S. Constitution.

The following is our understanding of the facts, based upon documents and a personal account provided by Professor Church. We ask that you correct any misunderstanding of the facts, if any exists. In addition to being an associate professor at RIC, Professor Church was the coordinator for the 2003-2004 school year of a cooperative preschool on campus that is open to all students, faculty, and

staff. On February 19, 2004, three mothers of students participating in the preschool engaged in a heated conversation about welfare and race. The discussion evidently ended abruptly when one mother took offense to what she felt were racist statements being made by another mother. The statements allegedly made were, "[a]ll of the Spanish people get everything because they don't speak English…We (whites) are the minorities…We have no rights compared to Spanish and Black…I do not believe in making interracial children." The offended mother, whose daughter has an African-American father, angrily left the preschool. One of the mothers chased after her to apologize but was ignored; the other called her at home that evening to apologize for any unintended offense, but was similarly rebuffed. Professor Church was not present during the conversation.

On February 27, the offended woman, who was also the secretary of the preschool's board, brought the incident to Professor Church's attention, requesting that the matter be discussed at a school meeting. Professor Church, believing that the issue involved a disagreement between private individuals rather than the entire preschool, declined to do so. Instead, Professor Church suggested mediation between the parties and a sensitivity training session for the co-op at large. The offended woman refused this suggestion and insisted that Professor Church take disciplinary action against the other mothers involved—action that would likely have violated the First Amendment's guarantees of free speech. When Professor Church declined, the offended woman accused her of discriminatory conduct and became very upset. On February 29, the offended woman was invited to discuss the matter at the school's Executive Board meeting, but she refused, indicating instead that she intended to file a discrimination complaint.

On April 30, Associate Dean for Student Life Scott Kane informed Professor Church that the offended mother had filed a complaint with the RIC Affirmative Action Office, alleging discrimination and intimidation by Professor Church, the two other mothers involved in the initial conversation, and a teacher at the preschool. The women demanded to be informed of the charges against them, and on June 1, 2004, Kane responded as follows:

> The complaint as filed alleges racial discriminatory insults by an unnamed person and the use of intimidation by Cooperative Preschool staff and leadership when these insults were reported. Additionally, the complaint seems to suggest the Cooperative Preschool also may not have met its responsibility to create, promote and ensure a positive climate where individuals may learn, teach and work free from discrimination as required in the College's Policy on Equal Opportunity/Affirmative Action.

Kane did agree to meet with the four women named in the complaint on June 15, but only to discuss the procedural issues involved.

At the June 15 meeting, when pressed by Professor Church to identify the specific policies she and the others had allegedly violated, Associate Dean Kane directed her to RIC's Policy on Equal Opportunity/Affirmative Action. The policy states that RIC "recognizes a higher order responsibility to create, promote and ensure a positive climate where individuals may learn, teach and work free from discrimination." The policy also cites Titles VI and VII of the Civil Rights Act and Rhode Island law as legal justification for maintaining a "working environment free of discriminatory insults, intimidation, and other forms of harassment."

According to Professor Church, Associate Dean Kane indicated that he was not interested in whether or not the RIC policy was unconstitutional. He also told her that he was uninterested in the July 2003 letter from the Office of Civil Rights of the United States Department of Education (OCR) to colleges and universities nationwide (attached), which flatly states that "OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR." Despite the fact that "the offensiveness of a particular expression, standing alone" was the exact subject matter of the complaint, Associate Dean Kane decided that the disciplinary procedure should continue, therefore ignoring both the spirit and letter of OCR's directive.

Professor Church then sought clarification of RIC's policies from Patricia Giammarco, RIC's director of affirmative action, in a series of meetings and e-mails. On July 19, Church e-mailed Giammarco a series of questions about the issues surrounding the accusations against her. Giammarco's responses to these questions, taken from an e-mail sent later on July 19, display a singular misunderstanding of First Amendment law, basic free speech principles, and policy constraints that state-funded institutions face. For instance, Giammarco writes, "The College has a zero tolerance policy for any kind of discrimination…on the college campus, certain types of remarks will not be tolerated, no matter what the intent." Giammarco also contends that "derogatory comments about entire groups of people, when those people have the protection of Title VII, are not open for debate," presumably meaning that such comments are punishable as discrimination. She equivocates about whether someone filing a false claim can be punished, saying that "some of it likely happens in every case since stories are seldom the same." She also insists that RIC can have a different standard for discrimination than does the law, since "this is not a court of law," and implies that any expression that someone subjectively finds "intimidating" may be punishable under RIC's policies.

Nicholas T. Long, RIC's general counsel, personally disputed many of these claims in a July 21 e-mail. While Long begins by saying that Giammarco's comments could be "misinterpreted," the substance of his e-mail is in direct contradiction to Giammarco's e-mail to Professor Church. Indeed, Long's comments show a good understanding of the First Amendment and discrimination law. For instance, while Giammarco insists that RIC's policies can diverge from the law, Long makes it clear from the outset that "College policies relating to discrimination do reflect legal standards and do not purport to set a standard that is different from the law." He points out that "[g]enerally speaking *the expression of mere words does not constitute 'discrimination'*…mere expression of racist views or sexist views is *rarely going to be actionable*, however offensive it might be." [Emphasis ours.]

Long also points out that the standard for determining whether a remark is discrimination at RIC is indeed an objective standard, despite Giammarco's contention that the standard need not be the legal standard since RIC's hearing procedure is not a court of law. He states that filing a false complaint "violates College policy and is also a crime," while admitting that this is often difficult to prove. Finally, he reminds Giammarco that "intimidation" by itself is only punishable when it is "akin to a 'threat'," observing that "Non-illegal intimidation occurs regularly in the work place and in the class room. If I don't study and do the reading I'm going

to fail the course…A boss or professor may routinely remind an employee or student of those facts and be intimidating."

Unfortunately, Giammarco did not heed this largely accurate characterization of the law and of the rights of students and faculty. Instead, she responded in an e-mail on the following day, asserting that she agreed with Long more than she disagreed with him. She also suggested that the "reasonable person" standard used to judge whether speech is offensive could be replaced by a doctrine (commonly called the "eggshell skull" doctrine) which would hold people making offensive comments more responsible if the person was "extremely sensitive" to the offense. Less than seven hours later, Long responded to that message with a strong statement that he did not believe that "the College has the legal authority…to create additional or different legal standards of conduct, particularly in areas that may be counterbalanced by first amendment or academic freedom situations." Again correctly assessing the state of the law, Long went on to say, "the College may not enforce an anti-discrimination policy using non-legal standards as to what constitutes 'illegal discrimination,' [*sic*] To the extent that the College attempts to do so, it is creating a grave risk of liability as well as mis-informing the College community as to what is actionable and what is not."

Mr. Long's legal analysis is generally on target when it comes to the state of discrimination, harassment, and First Amendment law on public college campuses. He is correct to point out the "grave risk of liability" if RIC intends to enforce clearly unconstitutional speech policies against Professor Church, against the other individuals charged, or against any student or faculty member on its campus. On July 27, however, in a strange reversal, Long wrote in an e-mail that a hearing was justified because, "[t]he 'four corners' of the complaint make allegations that are quite different from the types of circumstances that we were discussing last week." This statement is mystifying, as Long's e-mails make it clear that he was indeed addressing the issues in the complaint as related to Professor Church. These issues did not change in the five days between Mr. Long's July 22 and July 27 e-mails.

It should be noted that RIC's written policy does seem to follow Ms. Giammarco's legally untenable interpretation of what constitutes illegal discrimination. For example, the New Student Guide defines "jokes or demeaning statements about a person's gender, race/ethnicity, disabling condition, etc." as discrimination. In classifying such statements as discrimination, RIC's Policy outlaws speech protected by the Constitution—indeed, exactly the type of speech OCR sought to protect from overzealous college speech policies, and exactly the type of speech Mr. Long said was protected. The New Student Guide's instructions on what RIC considers to be "discrimination" illustrate precisely how incompatible RIC's policy is with the First Amendment.

Freedom of speech is protected at public institutions even if the speech is highly offensive or arouses people to anger, as it did in this case. As early as 1949, long before the protections of the Fist Amendment were fully appreciated by the U.S. Supreme Court, the Court held in *Terminello v. Chicago*,

> [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. Speech is often provocative and challenging…That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups. (Internal citations omitted.)

While the offended mother obviously found the speech at issue to be offensive, this simply is not a basis for punishing the person who made those remarks, and certainly is not a basis for punishing Professor Church for refusing to take steps to censor such speech. This is not to say that the woman who complained is without recourse. She is free to protest the offensive speech; she is free to inform the student media of her story or to bring it to the attention of students, who are likely to share her disapproval of such comments. She is not, however, free to abuse anti-discrimination laws or regulations to punish the speaker and/or Professor Church.

We must emphasize that even according to the accuser's allegations, Professor Church did not say anything that could be construed as discriminatory, even under RIC's unconstitutionally overbroad definition of that term. Professor Church merely suggested that the offended woman seek resolution of the matter through mediation. Also, by no legitimate definition can this be said to constitute "intimidation." (The Supreme Court, in *Virginia v. Black*, stated, "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.") However, even if Professor Church had directly made the statements attributed to one of the other mothers accused, she still would only have been exercising the constitutional freedoms enjoyed by every person at a public institution of higher learning in the United States. OCR's July 2003 letter is instructive in this regard: "[s]ome colleges and universities have interpreted OCR's prohibition of 'discrimination' as encompassing all offensive speech regarding sex, disability, race or other classifications. *Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of words, views, symbols or thoughts that some person finds offensive*…No OCR regulation should be interpreted to impinge upon rights protected by the First Amendment to the U.S. Constitution." [Emphasis ours.] Since Rhode Island College, as a public institution, is bound by Titles VI and VII of the Civil Rights Act—and to OCR's enforcement of these statutory requirements—to ignore OCR's clear directives evinces a particularly flagrant disregard of both Federal law and the U.S. Constitution.

Furthermore, it is no excuse that the school is "merely" holding hearings on this incident and that it has not yet found Professor Church "guilty." Expression that is clearly constitutionally protected, as is the expression at issue here, may not be subject to administrative review by a state university. The reasons for this should be obvious; for example, if the constitution allowed journalists to be hauled into court any time they published anything "offensive" to any person, free speech would be utterly devastated even if the court found those journalists "innocent" every single time. Such retroactive respect for free speech would be, to quote Justice Robert

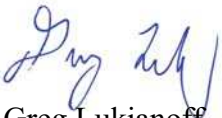
Jackson in the seminal case of *West Virginia State Board of Education v. Barnette* (1943), a "mere shadow of freedom."

Thus far, the injustice and abuse of rights connected with the disciplinary process in this case has been painful and exhausting for Professor Church and her family. Professor Church has expressed to us that she does not wish to bring harm to the college, but neither can she accept having her reputation tarnished by unfounded accusations. Rhode Island College must understand that its denial of free speech through the holding of formal disciplinary hearings on this matter erodes the rights of its existing students and faculty, degrades the academy's robust spirit of inquiry, and sends a chilling message to higher education as a whole. RIC charts a dangerous course when it ignores the time-honored guarantees of the First Amendment. By continuing to sanction a hearing that may result in disciplinary action against Professor Church simply due to her proximity to another women exercising her freedom of speech, Rhode Island College has betrayed the very principles of equality and dignity it seeks to uphold.

FIRE hopes to resolve this dispute discreetly and amicably. We are, however, committed to using all of our resources to support Professor Lisa Church in this matter, and to seeing this process to a just and moral conclusion.

I look forward to hearing from you.

Sincerely,



Greg Lukianoff
Director of Legal and Public Advocacy

cc:
Dan King, Vice President for Academic Affairs, Rhode Island College
Gary Penfield, Vice President for Student Affairs, Rhode Island College
Scott D. Kane, Associate Dean for Student Life, Rhode Island College
Patricia Giammarco, Director of Affirmative Action, Rhode Island College
Nicholas T. Long, General Counsel, Rhode Island College
Robert G. Tetreault, Director of Human Resources, Rhode Island College
Jason Blank, President, RIC/AFT Local 1819
Professor Lisa Church

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

July 28, 2003

Dear Colleague:

I am writing to confirm the position of the Office for Civil Rights (OCR) of the U.S. Department of Education regarding a subject which is of central importance to our government, our heritage of freedom, and our way of life: the First Amendment of the U.S. Constitution.

OCR has received inquiries regarding whether OCR's regulations are intended to restrict speech activities that are protected under the First Amendment. I want to assure you in the clearest possible terms that OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution. OCR has consistently maintained that the statutes that it enforces are intended to protect students from invidious discrimination, not to regulate the content of speech. Harassment of students, which can include verbal or physical conduct, can be a form of discrimination prohibited by the statutes enforced by OCR. Thus, for example, in addressing harassment allegations, OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR. In order to establish a hostile environment, harassment must be sufficiently serious (*i.e.*, severe, persistent or pervasive) as to limit or deny a student's ability to participate in or benefit from an educational program. OCR has consistently maintained that schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech. OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment.

As you know, OCR enforces several statutes that prohibit discrimination on the basis of sex, race or other prohibited classifications in federally funded educational programs and activities. These prohibitions include racial, disability and sexual harassment of students. Let me emphasize that OCR is committed to the full, fair and effective enforcement of these statutes consistent with the requirements of the First Amendment. Only by eliminating these forms of discrimination can we fully ensure that every student receives an equal opportunity to achieve academic excellence.

Some colleges and universities have interpreted OCR's prohibition of "harassment" as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational

program. Thus, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances, including the alleged victim's age.

There has been some confusion arising from the fact that OCR's regulations are enforced against private institutions that receive federal-funds. Because the First Amendment normally does not bind private institutions, some have erroneously assumed that OCR's regulations apply to private federal-funds recipients without the constitutional limitations imposed on public institutions. OCR's regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses. Any private post-secondary institution that chooses to limit free speech in ways that are more restrictive than at public educational institutions does so on its own accord and not based on requirements imposed by OCR.

In summary, OCR interprets its regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles. No OCR regulation should be interpreted to impinge upon rights protected under the First Amendment to the U.S. Constitution or to require recipients to enact or enforce codes that punish the exercise of such rights. There is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment. With these principles in mind, we can, consistent with the requirements of the First Amendment, ensure a safe and nondiscriminatory environment for students that is conducive to learning and protects both the constitutional and civil rights of all students.

Sincerely,

Gerald A. Reynolds
Assistant Secretary
Office for Civil Rights
Department of Education