FIRE
Foundation for Individual Rights in Education

August 1, 2014

President Michael Gottfredson
University of Oregon
Office of the President
1226 University of Oregon
Eugene, Oregon 97403

Sent via U.S. Mail and Facsimile (541-346-3017)

Dear President Gottfredson:

As you know, FIRE wrote to you on June 5, 2014, to commend your signing of the University of Oregon's (UO's) new "Academic Freedom Policy" and to urge you to reform several policies at UO that unconstitutionally restrict freedom of speech. We were disappointed not to receive a response by the requested date of June 26. We are yet more distressed to write you for the second time this summer—this time to provide evidence that UO's unconstitutional policies are indeed being used to infringe upon students' rights under both the United States and Oregon constitutions.

FIRE is deeply concerned by the threat to free speech presented by UO's numerous conduct charges against student [redacted] on the basis of a single four-word comment made from a dormitory window to two individuals standing outside. These charges are unsupported by both law and fact, and they highlight the unconstitutionality of several policies maintained by UO. The charges against [redacted] must be rescinded immediately. We again call upon UO to revise the policies outlined in both this and our June 5 letter in order to ensure that the university is in compliance with its legal and moral obligations to uphold its students' constitutional rights.

I. Factual Background

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

At approximately 9:00 p.m. on June 9, 2014, UO student [redacted] was visiting friends in [redacted] Carson Hall. From the window, [redacted] saw a male and female (later identified as a couple) standing outside and shouted, in jest, "I hit it first" out of the dormitory window. The female, interpreting the comment as insinuating that [redacted] was

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claiming to have been intimate with her partner, yelled back: "Fuck you, bitch." Shortly thereafter, the couple complained to Resident Assistant Angela Drury. Because the male student recognized that his window was directly above the window from which [redacted] had shouted, Drury was able to ascertain which room to visit in order to address the complaint.

Drury approached [redacted], the door of which was open, and asked who had shouted out the window. The residents indicated that [redacted] was the responsible party, and retrieved her. ([redacted] had since left to go to another room.) Drury informed [redacted] of the couple's complaint, and insisted that [redacted] apologize. [redacted] complied, informing the couple that she meant no offense and had only been joking. [redacted]'s apology should have ended the matter.

On June 13, however, [redacted] received a "Notice of Allegation" email from Assistant Residence Life Coordinator Nedzer Erilus. The email informed [redacted]:

> The Office of Student Conduct and Community Standards received a complaint(s) regarding your reported behavior on or around June 09, 2014 with the following incident description: Harassing comments yelled from [redacted] to fifth floor resident and girlfriend.
>
> You may have violated the following parts of the Student Conduct Code, which are Oregon Administrative Rules (OARs):
>
> 1. UNIVERSITY HOUSING CONTRACT/NOISE, DISRUPTION/UNREASONABLE NOISE, COMMUNITY DISRUPTION:
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> c. Any resident's behavior that results in unreasonable noise, that disrupts the community, or demonstrates an unwillingness to live in a group setting is prohibited. Courtesy for neighbors in the academic community prevails, and noise will be kept to a minimum at all times.
>
> 2. UNIVERSITY HOUSING CONTRACT/GUESTS:
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> Rules and Regulations:
>
> 5.Guests:
>
> a. University Housing policies apply to all guests. Residents are responsible and accountable for the conduct of their guests while on residence hall property or immediately adjacent areas, or at residence hall-sponsored or supervised activities. This is true when guests are there by the resident's explicit invitation and also when the guests are present with the resident's permission.

[. . .]

3. HARASSMENT:

Oregon Administrative Rule 571-021-0120(3)(f)
Harassment, as defined in OAR 571-021-0105(17), because of another person's race, ethnicity, color, gender, gender identification, national origin, age, religion, marital status, disability, veteran status, sexual orientation, or for other reasons, including but not limited to harassment prohibited by University Policy.

OAR 571-021-0105(17)
"Harassment" means

(a) Intentionally subjecting a person to offensive physical contact;

(b) Unreasonable insults, gestures, or abusive words, in the immediate presence, and directed to, another person that may reasonably cause emotional distress or provoke a violent response (including but not limited to electronic mail, conventional mail and telephone) except to the extent such insults, gestures or abusive words are protected expression; or

(c) Other types of prohibited discrimination, discriminatory harassment, and sexual harassment as defined by law.

4. DISRUPTING UNIVERSITY

Oregon Administrative Rule 571-021-0120(2)(a)

Engaging in behavior that could reasonably be foreseen to cause disruption of, obstruction of, or interference with the process of instruction, research, administration, student discipline, or any other service or activity provided or sponsored by the University.

5. DISORDERLY CONDUCT

Oregon Administrative Rule 571-021-0120(2)(d)
Disorderly conduct (including that resulting from the use of alcohol), unreasonable noise, or conduct that results in unreasonable annoyance.

For the reasons discussed below, UO must terminate the disciplinary proceedings immediately and revise its policies so that they comply with the broad speech rights that the university is both legally and morally obligated to uphold.

II. Analysis

It has long been settled that the First Amendment applies with full force on public university campuses. *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) ("[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.") (internal citation and quotation marks omitted).

The charges against [redacted] violate her rights to free expression and unacceptably chill the speech of UO students generally in violation of both the United States and Oregon constitutions.

A. [redacted]'s speech does not meet the legal standard for harassment.

[redacted]'s speech plainly does not constitute actionable harassment—discriminatory or otherwise.

In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Supreme Court set forth a strict definition of student-on-student (or peer) harassment. In order for student conduct (including expression) to constitute actionable harassment, it must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, (3) directed at an individual, and (4) "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school." *Id.* at 650. By definition, this includes only extreme and typically repetitive behavior—conduct so serious that it would prevent a reasonable person from receiving his or her education. Although the *Davis* formulation was crafted by the Court in the context of sexual harassment, its requirement that harassment be so severe, pervasive, and objectively offensive that it substantially interferes with the victim's ability to receive his or her education is instructive in the general harassment context as well. Indeed, the Department of Education's Office for Civil Rights (OCR), the federal agency responsible for implementing and enforcing federal anti-discrimination laws on our nation's campuses, made clear in its 2001 *Revised Sexual Harassment Guidance* that its definition of harassment is "consistent" with and "intended to capture the same concept" as the Court's definition in *Davis*.

Further, OCR has repeatedly stated that at public institutions like UO, harassment policies do not and cannot take precedence over the First Amendment rights of students. In a July 28, 2003, "Dear Colleague" letter sent to all college and university presidents, former Assistant Secretary Gerald A. Reynolds of the Office for Civil Rights (OCR) of the U.S. Department of Education stated that harassment "must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive." In a 2010 "Dear Colleague" letter regarding bullying, former Assistant Secretary Russlynn H.

Ali explicitly reaffirmed the 2003 letter's understanding of the relationship between the First Amendment and harassment. On April 29 of this year, Assistant Secretary Catherine E. Lhamon issued guidance clarifying again that "the laws and regulations [OCR] enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution" and stating that "when a school works to prevent and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers." Given this repeated, clear instruction from OCR, it is indefensible for a public institution to maintain a harassment policy that fails to comport with *Davis*, or to punish speech protected by the First Amendment as "harassment."

[redacted]'s single four-word comment to the complaining students comes nowhere close to approaching the level of severity and pervasiveness required by *Davis*. A single, momentary communication can hardly be said to be either severe or pervasive, and it is difficult to imagine how any reasonable person's education would be substantially interfered with by such a fleeting, mildly offensive comment. Nor can [redacted]'s comment reasonably be characterized as discriminatory. Not every comment that relates to or references sex or gender is targeted and discriminatory on the basis of gender or sexual orientation. Such a position would place a wide swath of clearly protected speech at risk of unconstitutional punishment. Because [redacted]'s comment fails to meet the standard for actionable harassment, the charges under OR. ADMIN. R. 571-021-0120(3)(f) and OR. ADMIN. R. 571-021-0105(17) must be withdrawn immediately.

B. UO's harassment policies are unconstitutional.

The harassment policies under which [redacted] was charged are unconstitutionally overbroad in numerous ways. A statute or law regulating speech is 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 policies under which [redacted] has been charged define "harassment," in relevant part, as "[u]nreasonable insults, gestures, or abusive words, in the immediate presence, and directed to, another person that may reasonably cause emotional distress or provoke a violent response."

But speech does not constitute unprotected harassment simply because it offends or insults, as recognized in the guidance from OCR discussed above. Indeed, the principle of freedom of speech does not exist to protect only non-controversial speech; it exists precisely to protect speech that some members of a community may find controversial, offensive, or disrespectful. The Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends some, or even many, listeners. *See, e.g.*, *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("[F]ree speech . . . may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."). *See also Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670

(1973) ("[T]he 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.'").

By defining harassment as it does, UO's policy unacceptably prohibits 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 "abusive" or "insulting" under this policy. While a reasonable person may take offense at expression that they consider abusive or insulting, and may even experience emotional distress, these reactions alone are insufficient to justify restricting or punishing such speech as harassment on a public college campus like UO. Again, per the U.S. Supreme Court, only targeted, unwelcome, discriminatory expression that is "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school" may be constitutionally punished as harassment at UO. *Davis*, 526 U.S. at 650.

UO's policies are similarly inconsistent with the precedents of the Supreme Court of Oregon, which has echoed these same principles. In *State v. Johnson*, the court struck down a portion of Oregon's harassment statute—drawn even more narrowly than UO's policies—that prohibited "[p]ublicly insulting such other person by abusive words or gestures in a manner intended and likely to provoke a violent response." 191 P.3d 665, 667 (Or. 2008). Holding that the statute was unconstitutionally overbroad, the court stated:

> Harassment and annoyance are among common reactions to seeing or hearing gestures or words that one finds unpleasant. Words or gestures that cause only that kind of reaction, however, cannot be prohibited in a free society, even if the words or gestures occur publicly and are insulting, abusive, or both. . . . Defendant's expression may have been offensive, but the state may not suppress all speech that offends with the club of the criminal law."[1]

Id. at 668–69.

UO's attempt to incorporate the "fighting words" doctrine into its harassment policies also fails to pass constitutional muster. To the extent that the fighting words exception to the

[1] While this and other Oregon cases cited herein analyze the constitutionality of criminal statutes, they are directly relevant when analyzing the constitutionality of UO's policies. The Supreme Court of Oregon has held that while OR. CONST. art. I, § 8 (which contains Oregon's free speech clause) does not preclude civil claims between private parties based on speech, *e.g.*, defamation and intentional infliction of emotional distress, it "excludes punishment." *State v. Blair*, 601 P.2d 766, 767 n.1 (Or. 1979) (citing *Wheeler v. Green*, 593 P.2d 777 (Or. 1979)). Accordingly, due to the disciplinary nature of student conduct violations, these cases provide relevant and instructive guidance on the constitutionality of UO's policies and their application.

First Amendment remains valid law (a matter of considerable doubt[2]), it has been severely curtailed by the courts such that it applies only to an exceedingly narrow category of speech: face-to-face communications directed at a specific individual that would likely provoke an immediate violent reaction. *See, e.g.*, *Sandul v. Larion*, 119 F.3d 1250 (6th Cir. 1997). UO's policies fail to require that a violent response be *likely* (instead only requiring that such a response *may* be provoked), and also fail to require that such a likely violent response be imminent. As a result, the harassment policies impermissibly forbid speech that is constitutionally protected. *See Johnson*, 191 P.3d at 668 (holding that a harassment statute that lacks a requirement that the likely violent response be imminent "sweeps too much protected speech within its reach to survive a facial challenge.").

UO's harassment policies are also unconstitutionally vague. A 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). By regulating student expression with amorphous and undefined terms such as "abusive," "insults," and "emotional distress," UO fails to provide its students with adequate notice of what speech is and is not prohibited. What is "abusive" or "insulting" to one person may be considered tame, innocuous speech by another. Furthermore, because "emotional distress" is not defined by the policy, students cannot be certain whether such prohibitions apply to speech that genuinely interferes with an individual's education, or whether it will also be applied to cases involving mere offense or hurt feelings (such as apparently occurred in the instant case). 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 at a public university bound by the First Amendment.

UO's policies are also at odds with the Oregon courts' holdings in this regard. In *State v. Blair*, 601 P.2d 766 (Or. 1979), the court struck down a portion of a state harassment statute prohibiting communicating with a person "in a manner likely to cause annoyance or alarm." *Id.* at 767. In doing so, the court noted that "[m]essages that are likely to cause 'annoyance' or 'alarm' are almost limitless." *Id.* at 768. As a result, because the statute did not require that communication actually cause any harm at all, but instead prohibited communication "in fact 'likely' to do so, whether the defendant knew this or not," it was unconstitutionally vague in that it was "inadequate to provide standards capable of consistent application." *Id.* at 768–69.

Finally, that OR. ADMIN. R. 571-021-0105(17) purports to exclude "protected expression" from its ambit does not obviate the constitutional infirmities in these policies. The plain language of these policies prohibits much speech that is constitutionally protected. This attempt at a "savings clause" serves only to create further confusion and uncertainty

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[2] *See* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 510–11 (1990) ("For the foregoing reasons, Supreme Court Justices and constitutional scholars persuasively maintain that *Chaplinsky*'s fighting words doctrine is no longer good law.").

regarding which speech is and is not subject to punishment on campus. A student reading this policy is as likely (if not more likely) to believe that the types of speech included in the policy are not constitutionally protected than he or she is to read the savings clause and understand that the policy specifically prohibiting the aforementioned speech actually permits certain types of that speech. *See, e.g., College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, 1021 (finding that "savings clause" did not render challenged college civility policy constitutional because the "persons being regulated here are college students, not scholars of First Amendment law.").

By leaving students unsure about the precise limits of their rights on campus, this policy impermissibly chills campus speech, as students will engage in self-censorship rather than risk crossing an unclear line. UO must revise these policies to ensure that their language adheres to the law and sets forth for students precisely what speech may and may not be punished by the university.

C. [redacted]'s speech did not constitute disorderly conduct.

The charge against [redacted] under OR. ADMIN. R. 571-021-0120(2)(d), which prohibits "unreasonable noise, or conduct that results in unreasonable annoyance," also fails under scrutiny. Again, speech is not rendered unprotected by virtue of its offensiveness or impoliteness. Accusing [redacted] of "disorderly conduct" is a transparent attempt to punish the content of [redacted]'s speech under the guise of objecting to the manner in which it was conveyed.

Again, precedent from the Oregon courts is helpful. While Oregon courts have upheld the facial validity of disorderly conduct statutes as content-neutral restrictions on prohibited *effects*, their application to speech "will be deemed to be unconstitutionally applied when the application was motivated, not by a desire to inhibit the noncommunicative elements of the activity, but by the desire to stifle expression." *State v. Rich*, 180 P.3d 744, 748 (Or. Ct. App. 2008). Accordingly, whether or not a particular application of a disorderly conduct statute is unconstitutional depends on whether the enforcement is due to "the volume, duration, place, or manner of [the speaker's] words, or because [those] words were obscene, offensive, 'annoying,' 'alarming,' or the like." *Id.*

It is indisputable that the charges against [redacted] are based on the content of her speech. When the Resident Assistant confronted [redacted] immediately following the incident, she demanded that [redacted] apologize not for the volume or manner in which she spoke, but for the offense caused by the speech. Indeed, if not for the offense taken to the speech, no complaint would likely have been lodged in the first place. That UO has charged [redacted] with harassment—a decision necessarily based on the content of the speech—further reinforces this conclusion. College campuses and dormitories are notoriously busy and noisy locations, even at 9:00 p.m. Surely UO does not charge every student (of which there are undoubtedly many) who yells to a friend out the window, down the hall, or across the Memorial Quadrangle with disorderly conduct. Would UO have charged [redacted] for shouting a compliment to the student standing outside? By charging [redacted] with disorderly

conduct, UO impermissibly seeks to impose discipline based on the content of her speech—a result expressly prohibited by the United States and Oregon constitutions.

But even if UO's enforcement of its disorderly conduct policy is *not* based on the content of [redacted]'s speech, its application is nevertheless contrary to Oregon courts' narrow construction of similar disorderly conduct statutes. In the context of such statutes, the Oregon courts have interpreted the term "unreasonable noise" exceedingly narrowly in order to preserve their constitutionality. For example, in *State v. Marker*, the Court of Appeals of Oregon upheld the state's disorderly conduct statute only after construing the term "unreasonable noise" as follows:

> When the word 'noise' in the statute is properly construed consistent with the First Amendment and traditional views, it encompasses communications made in a loud manner only when there is a clear and present danger of violence or when the communication is not intended as such but is merely a guise to disturb persons.

536 P.2d 1273, 1277 (Or. Ct. App. 1975) (quoting *In re Brown*, 510 P.2d 1017 (Cal. 1973)).

The *Marker* court's construction of "unreasonable noise" maintains an appropriately strong level of protection for speech. Expressive activity may not be punished simply because it causes annoyance; much speech having precisely those effects is nevertheless entitled to full First Amendment protection under the principles discussed above. Rather, speech that causes a disfavored effect may only be punished when it falls under one of the narrow categories of unprotected speech or is effectively non-communicative in nature.

In the instant case, [redacted]'s speech clearly posed no danger of immediate violence, nor was it intended to cause a disturbance such that it could properly be considered non-communicative. Accordingly, the content-based reasoning underlying the charge of disorderly conduct is flatly unconstitutional and must be rejected.

D. The allegation of disruption is factually and legally unsupportable.

[redacted]'s comment plainly did not constitute disruption. OR. ADMIN. R. 571-021-0120(2)(a) applies to conduct that causes "disruption of, obstruction of, or interference with the process of instruction, research, administration, student discipline, or any other service . . . provided by the university." Thus, this policy is aimed at conduct that interferes with the functioning or operations of the university. The incident in question occurred solely between students, at a time when they were not engaged in any way with an activity related to the functioning of UO. Further, when the Resident Assistant confronted [redacted] to inform her of the complaint and to demand that she apologize, [redacted] cooperated fully and immediately. There is simply no credible claim that [redacted] disrupted any university functions or operations.

The fact that UO has employed a policy crafted to deter disruptive *conduct* to investigate and punish protected *speech*—in this case a four-word comment made solely to other students—chills expressive conduct that UO is legally and morally bound to protect. UO's action subjects large swaths of student expression to unconstitutional investigation and punishment, and it dramatically lowers the threshold speech must clear to be targeted for discipline. If applied in this manner, the policy would allow any person on campus to complain that someone's speech, in any context at all, caused even a slight amount of distress or discomfort, and the speaker may then be subjected to investigation and punishment. This is an unacceptable and unconstitutional result.

E. The residence hall policy charges are similarly unsupportable.

For the reasons discussed above, the charges arising under UO's "University Housing Contract" policies cannot be justified by fact or law, and they suffer from many of the same constitutional deficiencies previously discussed. The substantive policy [redacted] has been charged with prohibits "behavior that results in unreasonable noise, disrupts the community, or demonstrates an unwillingness to live in a group setting."

With respect to the prohibition on "unreasonable noise" and "[disruption of] the community," our analysis of the disorderly conduct charge is equally applicable. Such ostensibly content-neutral regulations have been applied in a manifestly content-based manner against [redacted]. Because these charges are based on the offense caused by [redacted]'s speech, and because such speech does not fall under a category of unprotected speech, UO may not impose discipline by using the University Housing Contract policies as an end-run around the United States and Oregon constitutions.

Furthermore, if applied to [redacted], not only is the prohibition against "behavior that . . . demonstrates an unwillingness to live in a group setting" an improper and unconstitutionally content-based punishment for protected speech, but the prohibition itself is unconstitutionally vague. The policy is little more than a catch-all provision that allows administrators unfettered discretion to punish speech that they subjectively believe has a negative effect on the housing community. It is impossible for students to read the minds of administrators in order to know what constitutionally protected expression might trigger disciplinary action under this wholly subjective policy. Again, when students are left to guess at what conduct or expression is or is not permitted, the inevitable result is self-censorship and the chilling of protected speech—a result expressly prohibited by the Constitution. *See Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (striking down ordinance prohibiting "annoying" conduct as vague because it subjected exercise of First Amendment rights "to an unascertainable standard").

III. Conclusion

FIRE urges the University of Oregon to reverse this unwise and unconstitutional error. By charging [redacted] under policies that cannot constitutionally be applied to her clearly protected speech, and by maintaining the unconstitutional policies that allow for such

abuses in the first instance—despite FIRE's warnings—the university has unacceptably placed the speech rights of its entire campus community at grave risk. UO must immediately remedy this intolerable result by:

(1) Rescinding all disciplinary charges against [redacted];
(2) Revising its policies (both those noted in this letter, and those discussed in FIRE's June 5 letter) to comport with the legal obligations imposed by federal and state law;
(3) Providing comprehensive training to its residence hall and student conduct staff regarding the broad speech rights afforded to students; and
(4) Clarifying to the entire University of Oregon community that protected speech will never be subjected to such overreaching, reactionary, and unconstitutional disciplinary action in the future.

FIRE is committed to using all of the resources at our disposal to see this matter through to a just conclusion. We have enclosed with this letter a signed FERPA waiver from [redacted], permitting you to fully discuss this case with FIRE.

We request a response to this letter by August 15, 2014.

Sincerely,

Ari Z. Cohn
Program Officer, Legal and Public Advocacy

Encl.

cc:
Michael Griffel, Director of Housing
Lori Lander, Director of Residence Life and Academic Initiatives
Sandy M. Weintraub, Director of Student Conduct & Community Standards
Nedzer Erilus, Carson Assistant Residence Life Coordinator