



October 16, 2014

President Steadman Upham
The University of Tulsa
Office of the President
Collins Hall, 2nd Floor
800 South Tucker Drive
Tulsa, Oklahoma 74104

Sent via U.S. Mail and Facsimile (918-631-2300)

Dear President Upham:

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, academic freedom, due process, freedom of speech, and freedom of conscience 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 speech and due process posed by the University of Tulsa's (TU's) disciplinary investigation of student George Trey Barnett for Internet posts critical of TU faculty members and students that were admittedly and demonstrably posted by other individuals. Barnett has been subjected to a long list of interim measures, including suspension from numerous courses and activities, that threaten to impede his academic progress. (Barnett anticipates graduating in December.) Barnett also faces further investigation and potential disciplinary action. TU's unwarranted and unsupportable investigation jeopardizes the right to freedom of speech promised by TU and deprives Barnett of the due process and fundamental fairness TU owes its students.

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

In September 2014, TU Professor Susan Barrett filed a complaint against Barnett under TU's "Policy on Harassment," alleging that he engaged in "repeated acts that have been humiliating, demeaning and damaging to the reputations of two faculty . . . and a student theatre major . . . and also damaging to their morale and relationships with others." Barrett's formal written complaint, filed October 3, details comments posted to Facebook and other websites by Chris Mangum, Barnett's fiancé, who is not a student at TU as well as other unknown, anonymous individuals. The complaint contains screen captures of the allegedly harassing postings showing them to be posted by Mangum or other individuals. Two of the posts in question, found by Barrett on the KTUL website, were authored by an individual using the moniker (or perhaps real name) "John." In her complaint, Barrett speculates on numerous occasions that Barnett must be behind the postings, due to the fact that they related to persons and events affiliated with TU:

I believe Trey and/or Chris wrote this posting attacking Kimberly Powers because it uses the same language and same accusations as the March postings from Ireland.

[. . .]

In all postings Trey has been the common factor. . . . These postings contain vicious personal attacks and specific details of events involving Trey. It is claimed that Chris is the author, but the accusations are all against faculty and students involved with Trey in various incidents.

[. . .]

The "we" makes it clear that Trey and Chris are working together.

[. . .]

Trey seems to think that, as long as he can claim, "Chris did it," he can hide behind Chris and avoid responsibility for these attacks on our faculty and students.

Senior Vice Provost Winona Tanaka notified Barnett of Barrett's initial complaint in a letter dated September 30. Tanaka wrote:

The nature of the allegations, the written evidence already presented to me, and the damaging impact that your alleged conduct has already had

on Theatre faculty, students, academic programs and co-curricular activities are extremely troubling.

Effective September 30, Tanaka suspended Barnett's enrollment in three courses, removed him from his participation in a stage production, and restricted his access to certain buildings on campus as well as his communications with certain individuals.

On October 13, Barnett responded in writing to the allegations against him, denying the claims and providing additional screen captures of the posts in question as well as a sworn affidavit from Chris Mangum stating that the posts to Facebook had been written and posted by him alone. Nevertheless, Barnett is still under investigation and subject to the litany of interim sanctions imposed on September 30.

The disciplinary investigation and interim sanctions imposed on Barnett are based purely on speculation and cannot withstand the lack of evidence that Barnett has engaged in any misconduct.

Investigation and discipline of a student for the actions of another person is anathema to basic notions of justice and due process—and to the educational values that TU purports to uphold. Barrett expressly admits in her complaint that none of the posts complained of were explicitly posted by Barnett and provides no evidence for the speculation that he might be behind them. Instead, Barrett simply concludes that the posts must be the responsibility of Barnett because they relate to people, places, and events closely related to Barnett.

This logical leap ignores the simpler and more plausible explanation: Mangum knew of these details due to his relationship with Barnett. As stated in Barnett's written response, Mangum is closely familiar with the student on whose behalf Barrett filed the complaint. Mangum was presumably otherwise intimately knowledgeable about the details of his fiancé's daily life, including his experiences at TU.

Barrett's conclusion that a post to Barnett's Facebook page through Mangum's account from Ireland (where Barnett was participating in a school activity) was actually posted by Barnett is similarly unsupported. Mangum accompanied Barnett to Ireland, explaining both his familiarity with the dispute as well as the posting's geo-tag. The fact that the allegedly harassing posts involve facets of Barnett's life does not prove that Barnett is responsible for them.

Similarly, it is unreasonable and unfair to hold Barnett responsible for anonymous comments posted to the KTUL website under the name "John." Similarity in language and content to the statements made by Mangum is insufficient grounds for punishing

Barnett—and, if anything, would prove only that *Mangum* may have been responsible for the KTUL comments. Equally likely (and equally unverifiable) is the possibility that another, unrelated individual harbors similar views and chose to express them. Without direct evidence that Barnett authored the comments in question, there is simply no way—consistent with the fundamental fairness TU promises students accused of misconduct—that TU can hold Barnett responsible for these anonymous comments.

FIRE is concerned that, realizing that sanctions cannot be enforced against Chris Mangum, a non-student, TU has instead targeted his fiancé, who falls under the university's jurisdiction. The University of Tulsa bears the burden of proving that Barnett has *himself* committed actionable misconduct before it may sanction him, and it may not rely on mere speculation in doing so. The overwhelming evidence—consisting not only of screen captures showing that another person was responsible for the conduct in question, but also a sworn affidavit from that person acknowledging his responsibility—renders any notion to the contrary highly suspect.

The practical effect of TU's investigation is to render students guilty of misconduct for merely *discussing* dissatisfaction with TU faculty and students with third parties. Such vicarious liability is morally and logically untenable; students must not and cannot be held responsible for the independent actions of others. While Barrett asserts in her complaint that "Trey seems to think that . . . he can hide behind Chris and avoid responsibility," there is no responsibility to avoid. Barnett simply is not responsible for the actions or speech of Chris Mangum. Any attempt to discipline or sanction Barnett due to the fact that Mangum is outside TU's jurisdiction is unacceptable.

Additionally, punishing criticism of faculty members and programs unacceptably jeopardizes the free speech rights of TU students. While TU is not a public institution and thus not bound by the First Amendment, it is nevertheless both morally and contractually bound to honor the explicit, repeated, and unequivocal promises of freedom of expression it has made to its students. TU's *Statement on Rights, Freedoms, and Responsibilities* proclaims:

The University of Tulsa exists to promote the academic and social development of its students, the transmission of knowledge, the pursuit of truth, and a sense of responsibility toward self and society. A deep respect for fundamental rights of expression, assembly and petition is indispensable to the attainment of these goals. Academic freedom, based upon the freedom of the professor to teach and the freedom of the student to learn, is paramount to the purpose of the University.

The same statement provides:

Students should have the opportunity to evaluate the faculty, courses, curriculum, and policies of the University community.

[. . .]

Students should have a means of voicing their opinions regarding appointment of faculty and administrative personnel.

[. . .]

The rights of free inquiry and free expression, both public and private, are essential to the learning process and must be protected by the responsible and mutually supporting efforts of all segments of the University community. These rights shall not be infringed upon.

Given the unmistakable clarity of these statements, students who choose to matriculate at TU do so having relied upon the university's promises of free expression and thus will reasonably expect to exercise this right while enrolled at TU without fear of official discipline. These admirable promises ring hollow if students face harassment charges simply for criticizing TU and its faculty.

Barnett was charged with two forms of harassment:

[I]nappropriate conduct which is defamatory, demeaning, intimidating, threatening, or otherwise places an individual in fear of harm to his person or reputation on or off campus.

and

Conduct or behavior of an inappropriate nature where . . . [s]uch conduct has the purpose or effect of unreasonably interfering with an individual's academic or work performance or of creating an intimidating, hostile or offensive working, educational or campus living environment.

Applying these provisions to criticisms of the university and its faculty impermissibly violates TU's express promises of free speech and the right of students to voice opinions on matters related to faculty, curriculum, and university policies. Where speech involves criticism of a faculty member, that faculty member will naturally feel that his or her reputation has been demeaned. But criticism or questioning of a

professor's methods and integrity is not in and of itself punishable harassment, even if harsh or disrespectful, and may in fact be in the spirit of shared governance expressly contemplated by TU's policies.

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 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 some, or even many, listeners. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (noting that free 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”). Indeed, much protected expression—including parody and satire—exists precisely to challenge, to amuse, and even to offend, and such speech is unambiguously protected under the First Amendment. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Supreme Court ruled that the First Amendment protects even the most blatantly ridiculing, outlandishly offensive parody. If it applies its harassment policies in overbroad ways to stifle dissent and criticism, TU forfeits any claim to the intellectual vitality that results from freedom of inquiry, academic freedom, and shared governance.

Finally, FIRE understands that in an email dated October 10, Senior Vice Provost Tanaka accused Barnett of violating confidentiality requirements due to his discussion of the investigation with Mangum:

I have received emails from Mr. Mangum, responding to and addressing specific aspects of my confidential September 30, 2014 letter and Professor Barrett's confidential October 3, 2014 Formal Complaint.

[. . .]

If you continue to fail to respect the requirement of confidentiality and continue to share information with Mr. Mangum—knowing what the consequences will be—you will be held responsible for your actions and consequences.

These directives and threats shock the conscience and must be renounced and rescinded immediately. Not only is Barnett entitled to share details of his life with his fiancé, Chris Mangum is a witness in Barnett's defense; he admits to having written the posts that Barnett stands accused of and has submitted a sworn and notarized affidavit to that effect. To prohibit Barnett from speaking with Mangum about the case under the guise of a confidentiality requirement has the effect of preventing Barnett from

fully and adequately defending himself in direct violation of TU's *Student Code of Conduct*. The *Code* provides:

E. Section 5: Rights of the Accused

[. . .]

3. The opportunity at the proceeding to present relevant information and witnesses on his/her behalf.

If any disclosure to another person constitutes a violation of confidentiality requirements, would such threats would have been made against a student who informed her parents of a disciplinary investigation against her? And how can TU promise students the right to have a support person present to advise students in disciplinary proceedings? Would the university discipline a student who secured an advisor or retained an attorney to assist him in facing a disciplinary investigation?

Tanaka's interpretation of TU's confidentiality requirements is not only an affront to fundamental fairness and decency, it also fails to survive examination of the actual policy. The "Confidentiality" provision of TU's *Policy on Harassment* states:

Throughout the complaint and investigation process, every effort will be made to assure and provide confidentiality to the fullest extent reasonably possible *to protect against retaliation*. . . . However, the investigation of such complaints will generally require disclosure to the accused party *and other witnesses* in order to gather pertinent facts.

[Emphases added.]

No retaliation is alleged by Tanaka, nor is any retaliation likely to be prevented by prohibiting Barnett from discussing his case with his fiancé. In fact, such disclosure and discussion is both permitted under TU policy and wholly necessary for ensuring that Barnett is afforded the rights and protections explicitly promised him by TU. This improper, unwise, and unjust directive and threat cannot stand.

If TU cannot provide specific evidence beyond conjecture, or any compelling reason why the evidence submitted in Barnett's defense should be dismissed, it must immediately end its disciplinary investigation of Barnett, rescind the interim sanctions it has imposed, and ensure that his ability to graduate in December is unhindered by this incident. TU must also reaffirm its commitment to free speech and make clear that criticism of the university and its community will not be the basis of specious harassment charges in the future. Finally, TU must unequivocally and immediately

renounce Winona Tanaka's threat of disciplinary action against Barnett for discussing his case with Mangum. We have enclosed with this letter a signed FERPA waiver from George Trey Barnett, permitting you to discuss this case fully with FIRE.

We request a response to this letter by October 30, 2014.

Sincerely,



Ari Z. Cohn
Program Officer, Legal and Public Advocacy

Encl.

cc:

Roger N. Blais, Provost and Vice President for Academic Affairs

Winona M. Tanaka, Senior Vice Provost and Associate Vice President for Academic
Affairs

Susan Barrett, Applied Professor of Theatre and Department Chair