FIRE
Foundation for Individual Rights in Education

April 15, 2016

Nancy M. Targett
Acting President
University of Delaware
104 Hullihen Hall
Newark, DE 19716

Patrick Ogden
Chief of Police
University of Delaware Police
413 Academy St.
Newark, DE 19716

Sent via U.S. Mail and Electronic Mail (president@udel.edu; patrick.ogden@udel.edu)

Dear Acting President Targett and Chief Ogden:

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 free expression posed by the recent actions of a University of Delaware (UD) Department of Public Safety police officer. The officer, relying upon UD's overly broad definition of sexual harassment, told students to cover words and drawings on a "free speech ball" intended to promote freedom of speech and also told them to self-censor further writings by other students to avoid offensive or upsetting messages. These actions, some of which were captured on video, infringe upon the expressive rights of students at UD, a public university bound by the First Amendment.

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

On April 13, 2016, between 10:00 a.m. and 4:00 p.m., members of the UD chapter of Young Americans for Liberty (YAL) gathered on "The Green," a large, open, outdoor area on UD's campus. These members included UD students Jason Stewart and Aaron Cooper. Stewart, Cooper, and YAL sought to promote free speech on campus in conjunction with that evening's

screening of "Can We Take A Joke?," a documentary about the state of free speech in comedy and on college campuses. To these ends, the YAL members brought with them a large beach ball upon which they invited passing students to write anything they wished. This "free speech ball" served as a means of encouraging students to engage in and discuss their rights to free expression.

Stewart and Cooper were approached by an officer from the UD Department of Public Safety who identified himself as Officer Slater. Slater told Cooper that a drawing of a penis and the word "penis" on the free speech ball potentially violated UD's Sexual Misconduct Policy, and that the students had two options in order to avoid "problems." The first option was to "scribble out" the markings; the other was to turn them into something other than a penis. Slater contacted another officer, believed to be a superior at the Department of Public Safety, to confirm that his actions were appropriate.

At this point, or shortly thereafter, Cooper began filming the encounter with Slater.[1] In the videotaped conversation, Slater cited several categories of speech that the YAL students must monitor and restrict when allowing students to write on the ball. He stated that UD police "have to investigate" reports of "derogatory" writings, which he classified as potential "hate crimes," and written "rumor[s]," which might be "harassing" or "libel." Slater explained that, although he sympathized with the students' goal, he was acting as a "mediator," intervening because "high-level" administrators work nearby and might summon police to investigate the messages on the free speech ball. Slater assured the students that he would not be "going through [the free speech ball] with a fine-tooth microscope," but informed the students that they were required to "monitor what people write." Officer Slater told the students "we also gotta, you know, keep in the back of our mind that everything that people say may be, you know, offensive to other people."

The video also captures the students telling Officer Slater that "we'll scribble out the, uh, penis," to which Slater replied: "Especially the penis . . . [I]f you look up the University of Delaware sexual misconduct policy, you'll see that it's written in there—we have protocols, our RAs have protocols on how to respond when we see that written in the dormitories and on all of their campus."

Slater's admonitions threaten the First Amendment rights of the YAL students and their peers.

It has long been settled law that the First Amendment is binding on public universities such as UD. *See 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.

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[1] The video, with subtitles, may be viewed at https://www.youtube.com/watch?v=mJ-LFWSWb1Q.

Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'") (internal citation omitted); *DeJohn v. Temple University*, 537 F.3d 301, 314 (3d Cir. 2008) (on public university campuses, "free speech is of critical importance because it is the lifeblood of academic freedom").

The categories of speech that Slater identifies as problematic are so broad that they include any speech that a passing university community member might find subjectively distasteful or upsetting. Most expression communicated in a manner found disagreeable or offensive by some is fully entitled to protection under the First Amendment. The Supreme Court has made clear 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." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If 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.").

The U.S. Court of Appeals for the Third Circuit, the rulings of which are binding on UD, has made clear that a university cannot suppress speech simply because some may find it offensive. Categorical bans on offensive speech are "hopelessly ambiguous and subjective." *McCauley v. University of the Virgin Islands*, 618 F.3d 232, 250 (3d Cir. 2010). Because such bans can be used to punish any message based on the subjective reaction of the listener, they cannot withstand First Amendment scrutiny. *Id.* at 252; *DeJohn*, 537 F.3d at 317. Restrictions on speech defined broadly as "harassing" or "derogatory" are similarly ambiguous and constitutionally suspect. *See id.* at 317–18 (striking down university policy restricting "offensive," "hostile," and "gender-motivated" speech because it could burden "'core' political and religious speech, such as gender politics and sexual morality").

In addition to telling Cooper and Stewart to monitor messages on the free speech ball going forward, Slater identified certain contributions that should be covered up or altered. He cited UD's Sexual Misconduct Policy as the reason that the students should cover or alter a picture of a penis and the word "penis" itself. These, he indicated, could constitute sexual harassment prohibited by the policy.

The mere depiction of and the written word "penis" are certainly protected expression. *Cf. Cohen v. California*, 403 U.S. 15 (1971) (reversing conviction of man wearing a jacket bearing the slogan "Fuck the Draft" into a courthouse because message was protected under First Amendment). While some may find the depiction and word juvenile or distasteful, a harassment policy cannot be employed to punish protected expression because it is offensive. *See DeJohn*, 537 F.3d at 317–18 (holding university harassment policy that could be applied to cover any "gender-motivated" speech that offended someone to be facially unconstitutional). Indeed, in a July 28, 2003, "Dear Colleague" letter sent to all college and university presidents, then-Assistant Secretary Gerald A. Reynolds of the Office for Civil Rights (OCR) of the U.S.

Department of Education made clear that harassment "must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive."

Though UD's Sexual Misconduct Policy is written broadly enough to cover merely offensive speech, that fact does not excuse the suppression of protected expression so much as it makes plain the urgent need for the policy's immediate reform. UD's policy defines sexual harassment to include "verbal . . . conduct of a sexual nature when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance or unreasonably creating an intimidating, hostile, or offensive working, living or academic environment." In *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008), the Third Circuit struck down a sexual harassment policy containing a definition of sexual harassment nearly identical to UD's as facially unconstitutional because its overbroad language could be applied to core protected speech. FIRE would be happy to work with UD to revise its definition of sexual harassment to prevent its campus police officers from having to engage in such unconstitutional applications of the policy in the future.

Finally, when a law enforcement officer warns a student that she or he needs to monitor the messages they display because they might be distasteful, offensive, or upsetting to others—particularly when he suggests such messages may be illegal—the chilling effect on the student's protected speech cannot be overstated. While Slater was perfectly polite in this encounter, he is nonetheless a law enforcement officer informing public university students that they ran the risk of punishment for speech protected by the First Amendment. Faced with such a warning, most if not all students will self-censor to avoid trouble. This is an unacceptable outcome at a public university legally and morally bound by the First Amendment.

The University of Delaware has an obligation to protect the free speech rights of its students and a duty to assure that anyone enforcing its policies respects the First Amendment. To prevent speech at UD from being impermissibly chilled in the future, UD must publicly clarify that it will not censor words or ideas simply because someone may find them offensive, ensure that its policies do not endanger speech protected by the First Amendment, and train its law enforcement officers to respect students' First Amendment rights.

We appreciate your attention to our concerns and request a response to this letter no later than April 29, 2016.

Sincerely,

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cc:
Dawn Thompson, Vice President for Student Life
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