



FIRE

Foundation for Individual
Rights and Expression

December 28, 2022

Kelly Damphousse
Office of the President
601 University Drive
Texas State University
J.C. Kellam, Room 920
San Marcos, Texas 78666

Sent via U.S. Mail and Electronic Mail (president@txstate.edu)

Dear President Damphousse:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech¹ is concerned by a report that Resident Assistants at Texas State University have received written warnings for speaking with a student journalist for *The University Star* campus newspaper. As a public university bound by the First Amendment to respect students' expressive freedoms, a blanket prohibition on RAs speaking to the media represents an unconstitutional infringement on their right to do so when they speak in a personal capacity on issues of public concern. Accordingly, TXST must rescind any punishment arising from an RA's protected speech and refrain from punishing or investigating students for exercising their basic expressive rights.

On October 7, *The Star* ran an op-ed discussing overcrowding in student dorms.² The piece quoted three RAs—Regina Macias, Yordanos Kinfe, and Ava Melvin—who met with the article's author in their personal capacities to discuss an issue that impacted them as students who live on campus, and to share their unique perspectives as RAs in overcrowded dorms. The students'

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² Andrew Hodge, *Opinion: Texas State needs to rethink housing before next year*, THE UNIVERSITY STAR, Oct. 7, 2022, https://www.universitystar.com/opinions/opinion-texas-state-needs-to-rethink-housing-before-next-year/article_53208df8-45f4-11ed-a735-9b0cae4bc543.html. The following is our understanding of the pertinent facts. We appreciate that you may have more information and invite you to share with us. To that end, please find enclosed waivers authorizing you to share information on this matter.

quotes were used to demonstrate that RAs had to share rooms with students as a result of the University admitting more students than it had space to house.

TXST's "University Policy and Procedure Statement No. 06.05.02 section 04.01(b) – Responding to Media Inquiries" provides that university personnel must "[n]otify their supervisor or the director of the [Office of Media Relations] or the [assistant vice president] for University Advancement Communications[]" when responding to media requests.³ The policy encompasses employees speaking on behalf of TXST Housing and Residential Life, which the University may properly regulate, but the application here proscribes RAs from speaking to the media even in their individual capacities. Acting under this policy, TXST issued written warnings to each of the three RAs that will remain in their employment files.

It has long been settled law that the First Amendment binds public universities like TXST.⁴ Decisions and actions of a public university—including pursuit of disciplinary sanctions—therefore must comply with the First Amendment.⁵ Students who take employment roles at the university do not "relinquish First Amendment rights to comment on matters of public interest by virtue of government employment."⁶ RAs and other student employees retain a First Amendment right to speak to the media in their privacy capacity about matters of public concern, even when they reference their employment or are identified as employees of TXST Housing and Residential Life.⁷

As an initial matter, the *Texas State needs to rethink housing* article unquestionably deals with a matter of public concern, which includes speech that "can be fairly considered as relating to any matter of political, social, or other concern to the community[.]"⁸ TXST admissions policies, including the over-admission of first-year students, who are required to live on campus, is of critical public concern, especially to the RAs who must monitor all students living in on-campus dorms. RAs are best positioned to shine light on the impact of over-admission combined with a requirement that first year students live on campus; they witness the impact of that policy daily.

³ *Policy and Procedure Statement*, TEX. STATE UNIV., <https://policies.txst.edu/university-policies/06-05-02.html> [<https://perma.cc/6MQM-HBR5>].

⁴ *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 omitted).

⁵ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

⁶ *Connick v. Myers*, 461 U.S. 138, 140 (1983); see also *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995) (applying balancing test to restrictions on government employee speech).

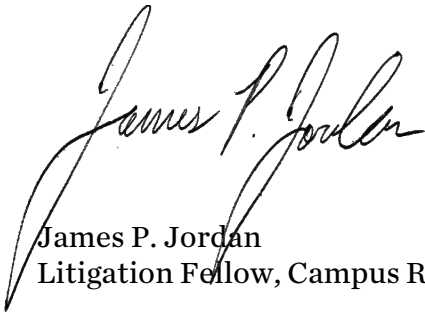
⁷ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 576–78 (1968) (appendix reproducing teacher's letter to a local newspaper criticizing his employer, explaining that he teaches at the high school); accord *Inova Health Sys. v. U.S. Nat'l Labor Relations Bd.*, 795 F.3d 68, 81–87 (D.C. Cir. 2015) (upholding NLRB determinations that a hospital system violated National Labor Relations Act by punishing and/or not promoting nurses who discussed working conditions); see also *Modica v. Taylor*, 465 F.3d 174, 180 (5th Cir. 2006).

⁸ *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

Likewise, it is clear the RAs' quotes were made in their capacity as private citizens. The "critical question" in determining whether speech was that of an employee or private citizen is "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."⁹ As described in the position description for RAs, their duties primarily concern dorm environments and student interactions and comfort, not the determination of housing and admissions policies.¹⁰ Consequently, RAs have a First Amendment right to publicly raise concerns about a university's admissions policies, their workplace conditions, or other important issues on campus. In fact, FIRE has seen universities amend similar policies that did not differentiate between speech about the university and speech on behalf of the university after universities realized the restrictions imperiled RAs', and other student-employees', First Amendment rights.¹¹

The disciplinary letters placed in the RAs' personnel files in response to their constitutionally protected speech violates their First Amendment rights and chill campus speech about important current events. We request receipt of a substantive response to this letter no later than the close of business on January 13, 2023, confirming that TXST will rescind the written warnings and remove them from the RAs' personnel files, and rescind this policy that bans RAs from speaking as private citizens on matters of public concern.

Sincerely,



James P. Jordan
Litigation Fellow, Campus Rights Advocacy

Cc: Nelly R. Herrera, J.D., Vice Chancellor and General Counsel, Texas State University System
Charmaine Mazzantini, J.D., Associate General Counsel, Texas State University–San Marcos

Encl.

⁹ *Lane v. Franks*, 573 U.S. 288, 240 (2014).

¹⁰ *Resident Assistant Position Description*, TEX. STATE UNIV., <https://www.reslife.txst.edu/about/jobs/ras/ra-description.html> [<https://perma.cc/AT5K-JWPA>].

¹¹ See, e.g., Aaron Terr, *University of Utah lifts restrictions on RAs speaking to the media*, FIRE, March 23, 2021, <https://www.thefire.org/news/university-utah-lifts-restrictions-ras-speaking-media>.

Authorization and Waiver for Release of Personal Information and Request for FERPA Records

This is an authorization for the release of records and information, as well as a request for records, under the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) and its applicable regulations (particularly 34 CFR § 99.30).

I, Yordanos Kinfe, born on , do hereby authorize Texas State University (the "Institution") to release to the Foundation for Individual Rights and Expression ("FIRE") any and all information concerning my current status, disciplinary records, or other student records maintained by the Institution, including records which are otherwise protected from disclosure under the Family Educational Rights and Privacy Act of 1974. I further authorize the Institution to engage FIRE's staff members in a full discussion of all matters pertaining to my status as a student, disciplinary records, records maintained by the Institution, or my relationship with the Institution, and, in so doing, to fully disclose all relevant information. The purpose of this waiver is to provide information concerning a dispute in which I am involved.

I have reached or passed 18 years of age or I am attending an institution of postsecondary education.

In waiving such protections, I am complying with the instructions to specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom disclosure may be made, as provided by 34 CFR 99.30(b)(3) under the authority of 20 U.S.C. § 1232g(b)(2)(A).

Records requested under FERPA: I request access to and a copy of all documents defined as my "education records" under 34 CFR § 99.3, including without limitation:

- A complete copy of any files kept in my name in any and all university offices;
- any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable;
- any and all phone, medical or other records in which I am personally identifiable; and
- the log of requests for and disclosures of my education records, as required by 34 CFR § 99.32(a).

Records requested under state public records law: To the extent the applicable public records law would require a faster response, a more comprehensive response, or production of copies of records:

- I request, pursuant to the applicable state public records law, copies of all records that would be available for my inspection under FERPA;
- To the extent the public records law allows disclosure of responsive records, I request that such records be produced in an electronic format, preferably by email.

Fees: I agree to pay any reasonable copying and postage fees of not more than \$20. If the cost would be greater than this amount, please notify me. Bear in mind, however, that FERPA prohibits the imposition of a fee to search or retrieve records (34 CFR § 99.11).

Request for Privilege Log: If any otherwise responsive documents are withheld on the basis that they are privileged or fall within a statutory exemption, please provide a privilege log setting forth (1) the subject matter of the document; (2) the person(s) who sent and received the document; (3) the date the document was created or sent; and (4) the basis on which it is the document is withheld.

Request for Redaction Log: If any portion of responsive documents must be redacted, please provide a written explanation for the redaction including a reference to the statutory exemption permitting such redaction. Additionally, please provide all segregable parts of redacted materials.

Per 34 CFR § 99.10(b), these records must be made available within **45 days**.

I request that the records be sent to me via email at _____ and to FOIA@thefire.org.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights and Expression, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

Student's 

12/27/2022

Date

Authorization and Waiver for Release of Personal Information and Request for FERPA Records

This is an authorization for the release of records and information, as well as a request for records, under the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) and its applicable regulations (particularly 34 CFR § 99.30).

I, Regina Macias, born on , do hereby authorize Texas State University Department of Housing and Residential Life (the "Institution") to release to the Foundation for Individual Rights and Expression ("FIRE") any and all information concerning my current status, disciplinary records, or other student records maintained by the Institution, including records which are otherwise protected from disclosure under the Family Educational Rights and Privacy Act of 1974. I further authorize the Institution to engage FIRE's staff members in a full discussion of all matters pertaining to my status as a student, disciplinary records, records maintained by the Institution, or my relationship with the Institution, and, in so doing, to fully disclose all relevant information. The purpose of this waiver is to provide information concerning a dispute in which I am involved.

I have reached or passed 18 years of age or I am attending an institution of postsecondary education.

In waiving such protections, I am complying with the instructions to specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom disclosure may be made, as provided by 34 CFR 99.30(b)(3) under the authority of 20 U.S.C. § 1232g(b)(2)(A).

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I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

Student's Signature

12/20/2022

Date