



## EASTERN KENTUCKY UNIVERSITY

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May 4, 2023

Ms. Lindsie Rank  
Student Press Counsel  
Foundation for Individual Rights and Expression  
510 Walnut Street, Suite 1250  
Philadelphia, PA 19106

**SENT VIA U.S. MAIL  
AND EMAIL**  
[lindsie.rank@thefire.org](mailto:lindsie.rank@thefire.org)

Dear Ms. Rank,

Please consider this the "substantive response" you requested from Eastern Kentucky University (University) in your letter dated April 14, 2023 regarding the University's alleged "censorial policy" banning student employees from speaking to the student press and the Foundation for Individual Rights and Expression ("FIRE")'s concerns regarding the University's "commitment to expressive freedoms and transparency."

First and foremost, the University is committed to upholding the United States Constitution, complying with federal and state law, and respecting the rights of our students, employees and the greater campus community. In furtherance of the University's mission, the University enacts and implements policies that, among other items, encourage the free expression of ideas and opinions, while ensuring "a safe and secure environment for our students." The University has long maintained "green light status" with FIRE, has shown a willingness to work with FIRE when any issues arise, and remains deeply committed to free expression and the value of the marketplace of ideas, while also balancing the legal duties and rights of its employees.

At the University, Resident Advisors ("RA") are typically undergraduate students serving in this limited employee capacity to provide oversight in the residence halls and an inclusive and welcoming space for all students, but to also serve as a leadership laboratory for the individual RA student. In this vein, the RA is asked to sign a "Resident Advisor Position Agreement" ("Agreement") which articulates to the student employees their duties and responsibilities in this position of responsibility. In that Agreement, the RA, in the RA official capacity, also agrees to refer all press inquiries regarding University housing matters to their supervisor.

After further investigation, we understand that the particular RA that was likely approached by a University student journalist and did not want to speak to the journalist in any capacity, likely used the language in the Agreement to support her denial of the interview. It is unfortunate that instead of attempting to work internally through various identified processes to raise these concerns regarding any free speech rights, student journalists and/or RAs appear to have immediately filed

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a complaint with FIRE. Until the receipt of this notice from FIRE, ECU was not aware that any student resident advisor or student journalist was concerned about any alleged prior restraint or restrictions on student press.

While the University recognizes that *Harman v. City of New York* addresses the notion that those who work within government institutions are in the “best position to know what ails the agencies for which they work,”<sup>1</sup> the University also has an interest in promoting an efficient and effective workplace that maintains compliance with all laws and regulations. The Court in *Pickering v. Board of Education* also recognized that “the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”<sup>2</sup> The University’s RA Agreement balances all of these principles.

Though FIRE argues that the signing of the Agreement and the requirement for RA’s to refer press inquiries to a supervisor is a prior restraint on the RA’s free speech, ECU disagrees with this analysis. An RA, in their capacity as a University employee, does not have free speech rights as it relates to their public employee status on matters relating to their employment<sup>3</sup>, particularly on matters regarding incidents in a residence hall or specific student situations which are nearly always confidential under state and federal law. While the University recognizes there is well established law that an RA, in their capacity as a private citizen speaking on a matter of public concern, has certain free speech rights, that balancing test is difficult for a student employee to manage, and that is why both in training and in the Agreement, the RA is requested to forward any press inquiries to their supervisor for further discussion and review. The University stands by its requirement for official statements and inquiries from the press that are made to a student employee in their RA capacity must be forwarded to the appropriate supervisor for an official University response at a higher level.

Additionally, and in the alternative, if the language in the Agreement is deemed to be prior restraint on a private citizen, the University recognizes there is often a higher burden to justify prior restraint, but implementation of such is not a per se violation of the First Amendment. Instead, a balancing test, such as the ones in *Weaver v. U.S. Information Agency*<sup>4</sup> and *U.S. v. National Treasury Employees Union*,<sup>5</sup> must be employed. Specifically, case law advises that prior restraint may be permissible when the government agency has an interest in “promoting the efficiency of the public services it performs through its employees” that outweighs the employee’s interest in disseminating their views.<sup>6</sup>

Resident Advisors (RAs) hold a very important role within the University. RAs, by the very nature of their employment position and its proximity to their peers, constantly interact with the students they live amongst, and their job duties charge them with enforcing University

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<sup>1</sup> *Harman v. City of New York*, 140 F. 3d 111, 119 (2d Cir. 1998).

<sup>2</sup> 391 U.S. 563, 568 (1968)

<sup>3</sup> See *Connick v. Myers*, 461 U.S. 138 (1983)

<sup>4</sup> See *Weaver v. U.S. Information Agency*, 87 F.3d 1429, 1439 (U.S. App. D.C. 1996).

<sup>5</sup> See *United States v. Nat’l Treasury Emps. Union (NTEU)*, 513 U.S. 454, 455 (1995).

<sup>6</sup> *Weaver*, 87 F.3d at 1439.

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regulations, including but not limited to documenting and reporting student conduct violations, as well as responding to emergencies in their residence halls, including but not limited to accessing highly sensitive medical information on students. And, in addition to First Amendment rights, University students are also guaranteed privacy in their education records pursuant to the Family Educational Rights and Privacy Act (FERPA).<sup>7</sup> FERPA provides very limited exceptions in which the University, and by extension RAs, may legally disclose information from a student's education record without the student's written consent. Accordingly, to protect the privacy of all University students as well as to ensure highly confidential situations involving students that occur on our campus and within our residence halls are dealt with delicately and efficiently, the University advises RAs that media requests should be directed to RA supervisors.

As demonstrated above, the University has an interest in "promoting the efficiency" and, frankly, the legality in its operations that outweighs an individual RA's free speech interests. Furthermore, the University also can demonstrate "reasonable ground to fear that serious evil will result if free speech is practiced" by RAs in their professional capacity and that directing media requests to RA supervisors mitigates such "in a direct and material way."<sup>8</sup> The University prioritizes protecting its students from unwanted disclosure of private information and opening the door for RAs to comment to the media on their specific housing incidents compromises student privacy interests and, likewise, risks residential students feeling uncomfortable or, worse, unsafe going to their RAs for help or guidance when needed. Such results would undermine the effectiveness of the University's RAs, which are critical to the University and its service of residential students. But, to be clear, nothing about the Agreement or any further training or instruction would prevent a student from speaking about a matter of public concern in their private citizen capacity. That said, that is an incredibly difficult analysis for a young, student employee to do.

Finally, it is important to note that the University ensures that the public's right to know is not violated as media requests are not dismissed or rejected entirely. Rather, media are directed to RA supervisors, who are more senior University employees and well trained to respond appropriately given the request and the nature of the situation it involves. This approach allows appropriate public access to information while still ensuring RAs are able to focus on the most integral and critical responsibilities of their work, namely providing crisis management and peer leadership to their fellow students.

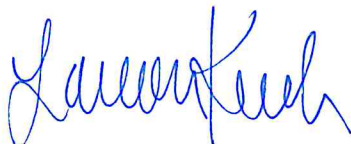
For the reasons outlined above, the University declines to revise its Resident Advisor Position Agreement at this time. The University does, though, closely monitor free speech and other case law developments and will revisit its position on this matter as may be warranted in the future or as it continues to review and revise housing processes and protocols to remain compliant in the ever-changing landscape of student affairs and constitutional law, among many other applicable laws and regulations.

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<sup>7</sup> See Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 CFR Part 99).

Upon review, if you have additional questions, please feel free to reach out for a broader discussion on this issue. Thank you again for your outreach, engagement, and advocacy, and for recognizing EKU's long-standing commitment to free speech on its "green light" campus.

Sincerely,

A handwritten signature in blue ink that reads "Lauren Keeler". The signature is written in a cursive, flowing style.

Lauren Keeler, Assistant Counsel