



November 21, 2024

Marvin Krislov
Office of the President
Pace University
One Pace Plaza, 18th Floor
New York, New York 10038

URGENT

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

Dear President Krislov:

FIRE, a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by Pace University’s investigation of law student Houston Porter for sex-based discrimination based on an allegation that he “aggressively pointed” at a transgender student and “purposefully referred to her as a man in front of classmates, law school faculty and administrators, and guests.” Porter denies these allegations, but even if they are true, his alleged expression falls far short of the standard for actionable harassment that needs to be met to justify Pace’s investigation. By investigating Porter for allegations that do not amount to unprotected expression, Pace violates its own laudable commitment to free expression and its obligation as an American Bar Association-accredited law school. We urge Pace to immediately cease any further investigation or pursuit of disciplinary sanctions against Porter.

On October 15, Porter moderated a Federalist Society-sponsored panel, “Saving Women’s Sports,” that discussed opposition to Proposition 1, a New York ballot measure codifying gender identity and gender expression as protected classes in the state constitution.² The discussion proceeded with limited interruptions for the first 45 minutes, but when Porter opened the floor to questions, “pandemonium” erupted.³ Attendees described a chaotic scene in which audience members—many of whom were wearing trans pride pins—jumped out of their seats, pointing and yelling at the panelists, and a professor allegedly rushed the stage.⁴

¹ For more than 20 years, the Foundation for Individual Rights and Expression has defended freedom of expression, conscience, and religion, and other individual rights on America’s college campuses. You can learn more about our mission and activities at thefire.org.

² Olivia Reingold, *Law Student Faces Expulsion for ‘Aggressive Pointing,’* THE FREE PRESS (Nov. 3, 2024), <https://www.thefp.com/p/law-student-pace-university-title-ix-prop-1-expulsion>. The recitation here reflects our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

³ *Id.*

⁴ *Id.* The professor accused of rushing the stage denies the allegation.

Porter recounted feeling “like [he] was about to get swarmed.”⁵ A chair was knocked over during the uproar, and security had to escort the panelists to their cars.⁶

On October 24, Title IX coordinator Bernard Dufresne notified Porter that the Office of Institutional Equity and Title IX Compliance was investigating him for alleged sex-based harassment in violation of Pace’s sex-based misconduct policy.⁷ The investigation was triggered by a complaint filed against Porter by an unnamed transgender woman accusing him of “aggressively point[ing]” at her and “purposefully referr[ing] to her as a man in front of classmates, law school faculty and administrators, and guests” at the “Saving Women’s Sports” panel.⁸ According to the process outlined in the letter, Porter would face a disciplinary hearing following the investigation.⁹

Pace’s investigation and pursuit of disciplinary sanctions against Porter violate its stated commitment to expressive freedom and its obligations as an ABA-accredited law school. University policy recognizes the right of faculty, staff, and students “to express differing opinions, and to foster and defend intellectual honesty, inquiry and instruction, and free expression on and off campus.”¹⁰ This commitment also aligns with Pace’s responsibility as an ABA-accredited law school to protect academic freedom and the free expression of ideas, including “the rights of faculty, students, and staff to communicate ideas that may be controversial or unpopular, including through robust debate, demonstrations, or protests[.]”¹¹

Both “aggressive pointing” (however that is defined) and publicly referring to a transgender woman as a man are protected under First Amendment standards. As a private university, Pace is not directly bound by the First Amendment, but it is legally and morally bound by its own policy commitment to free expression and the ABA’s accreditation standards,¹² which students would reasonably understand to provide them expressive rights commensurate with those

⁵ *Id.*

⁶ *Id.*

⁷ Letter from Bernard Dufresne, Title IX coordinator, to Houston Porter, student (Oct. 24, 2024), available at <https://drive.google.com/file/d/1CP16iHCCDOnPh3MLvhc1eahLuxjbebpt/view>. The letter stated that the allegation may, if true, also violate the university’s Guiding Principles of Conduct, which prohibit “deliberate actions that cause, or might reasonably be expected to cause, injury, either physical or mental” to another person. *See also Sex-Based Misconduct Policy*, PACE UNIV. (rev. Oct. 2024), https://www.pace.edu/sites/default/files/2024-10/sex-based-misconduct-policy-august-2024_0.pdf [<https://perma.cc/FRT5-4MMS>].

⁸ *Id.*

⁹ *Id.*

¹⁰ *Guiding Principles of Conduct*, Civility, Responsibility and Respect, PACE UNIV., <https://www.pace.edu/student-handbook/university-policies-disciplinary-and-grievance-procedures/guiding-principles-of-conduct> [<https://perma.cc/2NHH-LQ77>] (“These freedoms of expression extend as far as the expression does not infringe on the rights of other members of the community or the orderly and essential operations of the University.”).

¹¹ *Standards and Rules of Procedure for Approval of Law Schools*, Standard 208. Academic Freedom and Freedom of Expression, 2024–2025, AM. BAR ASS’N 16, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2024-2025/2024-2025-standards-and-rules-for-approval-of-law-schools.pdf.

¹² Private universities must “substantially compl[y] with [their] own rules and regulations” in disciplinary matters. *Routh v. Univ. of Rochester*, 981 F.Supp.2d 184, 208 (W.D.N.Y. 2013).

guaranteed by the First Amendment. The “bedrock principle underlying” freedom of speech is that it may not be restricted on the basis that others find it offensive.¹³ “As a Nation we have chosen ... to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”¹⁴ This is particularly true in the context of a university, where “conflict is not unknown”¹⁵ and “dissent is expected and, accordingly, so is at least some disharmony.”¹⁶

Again, Porter denies engaging in the alleged expression. But even hateful or offensive expression is protected unless it meets the high standard for discriminatory harassment articulated in *Davis v. Monroe County Board of Education*.¹⁷ There, the Supreme Court established a strict definition of peer harassment in the higher-ed context: expression must be unwelcome, discriminatory on the basis of a protected status, and “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.”¹⁸

The allegations against Porter fall well short of this high bar, constitute fully protected expression under First Amendment standards, and thus cannot justify a speech-chilling investigation and disciplinary hearing under Pace’s sex-based harassment policy. A single incident of pointing at a person and referring to them in a manner they find hurtful cannot and does not qualify as so severe, pervasive, and objectively offensive as to deprive anyone of the educational opportunities or benefits Pace provides.¹⁹

Pace has an obligation to prevent discriminatory harassment, but in doing so it must not sacrifice its duty as an accredited law school to protect free speech. An investigation and disciplinary hearing based on protected expression is likely to chill student speech—even if the process ultimately concludes in favor of the speaker—because such a process implicitly threatens punishment for that speech.²⁰ The question is not whether the institution actually

¹³ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment based on the “bedrock principle” that government actors “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

¹⁴ *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011) (holding signs outside of soldiers’ funerals reading “Thank God for Dead Soldiers,” “Thank God for IEDs,” and “Fags Doom Nations” was expression protected by the First Amendment).

¹⁵ *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003).

¹⁶ *Higbee v. E. Mich. Univ.*, 399 F.Supp.3d 694, 704 (E.D. Mich. 2019).

¹⁷ 526 U.S. 629 (1999). Student speech may also be unprotected if it falls into any of the “historic and traditional categories of unprotected speech, such as obscenity, defamation, incitement, or fighting words. *United States v. Stevens*, 559 U.S. 460, 468–69 (2010). Porter’s alleged expression does not meet the criteria for any of these categories.

¹⁸ *Davis*, 526 U.S. at 650.

¹⁹ To deprive a student of educational opportunities or benefits, the speech needs to create a concrete, negative effect, such as a change of study habits, school transfer, a drop in grades, or being diagnosed with a behavioral or anxiety disorder. *See Davis*, 526 U.S. at 654; *Nungesser v. Columbia Univ.*, 169 F.Supp.3d 353, 368 (S.D.N.Y. 2016) (“Examples of such negative effects include a drop in grades, missing school, being forced to transfer schools, or mental health issues requiring therapy or medicine.”); *Mandel v. Bd. of Trustees of Cal. State Univ.*, 2018 U.S. Dist. WL 1242067, at *20 (N.D. Cal. Mar. 9, 2018).

²⁰ *See, e.g., Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992) (holding threat of discipline implicit in college president’s creation of ad hoc committee to study whether professor’s outside speech could be considered

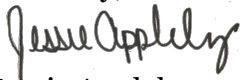
imposes formal sanctions, but whether its actions would “chill or silence a person of ordinary firmness from future First Amendment activities.”²¹ Pace’s actions in this case would most certainly do so.

Instead, where—as here—a complaint appears to allege no more than protected speech, the correct approach is to have administrators conduct a cursory, internal review. If the review confirms the speech being alleged is protected, Pace can close the matter without ever notifying the speaker—thereby avoiding a chilling effect—while offering support to the complainant.²²

To the extent that Pace’s sex-based discrimination policy differs from this approach and requires it to investigate complaints containing allegations of wholly protected speech, the policy contravenes Pace’s stated commitment to free expression and its obligation to protect free speech as an ABA-accredited school. Since these obligations prohibit Pace from punishing protected expression, it is hard to imagine what legitimate purpose Pace’s investigation and hearing based on Porter’s alleged expression could serve. None of this shields Porter from criticism by students, faculty, or the broader community. Criticism is a form of “more speech,” the remedy to offensive expression that the First Amendment prefers to censorship.²³ But Porter most certainly *is* shielded from punishment based solely on his alleged expression.

Given the urgent nature of this matter, we request a substantive response to this letter no later than December 5 confirming that Pace will not pursue an investigation or disciplinary sanctions in this matter.

Sincerely,



Jessie Appleby
Program Officer, Campus Rights Advocacy

Cc: Terry Brown, Vice President and General Counsel
Bernard Dufresne, Title IX Coordinator
Horace E. Anderson, Jr., Dean and Professor of Law

misconduct “was sufficient to create a judicially cognizable chilling effect on [the professor’s] First Amendment rights”); *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

²¹ *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999) (institutional response short of formal punishment can be unconstitutional if it “would chill or silence a person of ordinary firmness from future First Amendment activities”).

²² See Graham Piro & Alex Morey, *Report: Stanford student may need to ‘take accountability,’ ‘acknowledge harm’ for reading Hitler’s ‘Mein Kampf’*, FIRE (Jan. 25, 2023), <https://www.thefire.org/news/report-stanford-student-may-need-take-accountability-acknowledge-harm-reading-hitlers-mein>; Haley Gluhanich, *VICTORY: Stanford adopts FIRE recommendation, will no longer notify students accused of engaging in protected speech*, FIRE (Apr. 18, 2023), <https://www.thefire.org/news/victory-stanford-adopts-fire-recommendation-will-no-longer-notify-students-accused-engaging>.

²³ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J concurring).