



April 8, 2010

President Michelle Howard-Vital  
Cheyney University of Pennsylvania  
1837 University Circle  
P.O. Box 200  
Cheyney, PA 19319  
*Sent via facsimile to: 610-399-2415*

**RE: Protecting Student Speech at Cheyney University of Pennsylvania**

Dear President Howard-Vital:

I write on behalf of several juniors and seniors at Cheyney University of Pennsylvania. They are represented by the Independence Law Center and the Alliance Defense Fund due to their concerns about speech codes at the University. A “speech code,” of course, is a term used for a policy—typically a harassment or nondiscrimination policy—which suppress and punish speech that is subjectively perceived as offensive to members of the campus community. Specifically, these students feel inhibited about speaking, publicly or privately, about a host of issues relating to religious beliefs, sexual orientation and conduct, gender (including gender identity), or other matters from a conservative perspective.

From the inception of the speech code movement, such codes have not fared well in court, either as they are written or as they are applied to students. In fact, there has never been a case in any jurisdiction to uphold a policy similar to Cheyney’s. *See, e.g., DeJohn v. Temple*, 537 F.3d 301 (3rd Cir. 2008) (enjoining overbroad university’s sexual harassment policy that limited protected speech); *Saxe v. State College Area School District*, 240 F. 3d 200, 216-17 (3rd Cir. 2001) (striking down overbroad anti-harassment regulations in Pennsylvania public high school); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of overbroad “cultural diversity and racism” policy statement); *Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477 (E.D. Mich. 1993)

(enjoining university's "discriminatory harassment" policy because it was overbroad and vague); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (ruling that policy prohibiting discriminatory epithets was overbroad and vague); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining overbroad and vague discrimination and harassment speech code); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip opinion) (finding private university's speech policies unconstitutionally overbroad).

Cheyney University's Sexual Harassment Policy (like the speech codes in the cases above) violates the constitutional rights of your students. The policy, as set forth in the Student Handbook, prohibits

acts or conduct of an *offensive* nature that include *spoken words, gestures and the production, display or circulation of written words, pictures or other materials*. It is harassment i[f] the action or conduct is unwelcome to the recipient and could reasonably be regarded as *humiliating, offensive or intimidating* to that person in relation to: *gender, marital status, family status, religious belief, age, disability or race*.

Student Handbook, p. 114 (emphasis added). Based on the broad language of this policy, which specifically targets speech, Cheyney students are concerned about possible punishment for speech related to religious beliefs, including gender issues and sexual orientation, from a conservative perspective. Indeed, the policy conditions free speech rights based upon the subjective response of the listener. In fact, a student can be disciplined for comments that a listener or someone who simply overhears may subjectively claim offense at. However, the United States Supreme Court has stated that speech can only be constitutionally prohibited when its danger "rises far above public inconvenience, annoyance, or unrest." *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949).

In *Saxe*, the Third Circuit reviewed a public school's anti-harassment policy that, in essence, prohibited "(1) verbal or physical conduct (2) that is based on one's actual or perceived personal characteristics and (3) that has the purpose or effect of either (3a) substantially interfering with a student's educational performance or (3b) creating an intimidating hostile, or offensive environment." *Saxe*, 240

F.3d at 216. The Court determined that the policy was overbroad because it limited speech even when there was only a purpose to interfere with the educational mission and no actual interference. *See id.* In the same way, Cheyney's sexual harassment policy is flawed because a student can run afoul of the policy by merely making comments that someone may subjectively perceive as "humiliating" or "offensive" even if Cheyney's educational mission is not undermined.

According to *Saxe*,

it is certainly not enough that the speech is *merely offensive* to some listener. Because the Policy's "hostile environment" prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about *some enumerated personal characteristics the content of which offends someone*. This could include much "core" political and religious speech: the Policy's "Definitions" section lists as examples of covered harassment "negative" or "derogatory" speech about such contentious issues as "racial customs," "religious tradition," "language," "sexual orientation," and "values." Such speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights.

*Id.* at 217 (emphasis added) (internal citations omitted). For the same reasons, the sexual harassment policy is unconstitutional.

This is not Cheyney's only unconstitutional policy implicating speech. The Network and Computer Use Policy states in relevant part, "No person shall *harass others by sending annoying, threatening, libelous, sexually, racially, or religiously offensive messages.*" Student Handbook, p. 124 (emphasis added). This policy unconstitutionally aims at core protected speech, even speech about religion. A student could run afoul of this policy by simply discussing the differences between religions so long as the recipient subjectively perceives the discussion to be "annoying" or "offensive." Speech should not be limited merely because of subjective perception of annoyance or offense. Instead, according to *DeJohn*, speech considered offensive

may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, “[i]f 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 offensive or disagreeable.”

*Id.* at 314 (quoting *Saxe*, 240 F.3d at 209). Because of the breadth of the policy and the failure to limit its prohibition to severe and pervasive situations where the educational mission of the school is undermined, the policy unconstitutionally “provides no shelter for core protected speech.” *DeJohn*, 537 F.3d at 318.

Additionally, Cheyney’s policy regarding “Harassment, Intimidation, or Threats” prohibits “[m]ocking, taunting, or the use of derogatory slurs and epithets towards another.” See Student Handbook at 92. Merely because speech is perceived as “disagreeable” does not mean that it is not constitutionally protected. *DeJohn*, 537 F.3d at 314. Those who engage in controversial speech are often accused of “[m]ocking” or “taunting” or “derogatory slurs and epithets” simply because persons are annoyed or angered by their message. However, particularly on college campuses, we should respect the exchange of ideas and not make students risk discipline merely because others may accuse them of improper speech. Indeed, speech is no less worthy of protection merely because some claims the speech may cause “annoyance” or incite “unrest.” *Terminiello*, 337 U.S. at 5. Moreover, the policy unconstitutionally limits speech even when it does not actually undermine the educational mission of the school. For these reasons, the unconstitutional aspects of this policy must be corrected.

While Cheyney has enacted unconstitutional policies that threaten the rights of students, this letter is being sent in a spirit of cooperation. It is our hope that the University would promptly correct these policies so that there is no need for litigation to protect your students’ speech. In fact, we would be happy to work with the University to revise its policies. However, if the University is serious about reforming these policies and wishes to avoid litigation, please contact us within the next 30 days.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'RWenger', with a stylized flourish at the end.

Randall L. Wenger

cc: Alliance Defense Fund  
Leonard G. Brown, III, Clymer, Musser, Brown & Conrad