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TO THE LANCASTER OFFICE

April 7, 2010

President Claibourne D Smith  
Delaware State University  
1200 N. DuPont Hwy.  
Dover, DE 19901  
*Sent via facsimile to: 302.857.6083*

**RE: Protecting Student Speech at Delaware State University**

Dear President Smith:

I write as an ally of the Alliance Defense Fund<sup>1</sup> and on behalf of Jarrett McKinney, a student at Delaware State. Mr. McKinney requests that Delaware State conform its speech codes to the United States Constitution.

A “speech code,” of course, is a term used for a policy—typically a harassment or nondiscrimination policy—which suppresses and punishes speech that is perceived as offensive to persons in the campus community. Specifically, Mr. McKinney feels inhibited about speaking, publicly or privately, about a host of issues relating to religious beliefs, matters pertaining to sexual orientation and conduct, gender and other matters from a conservative perspective.

From the inception of the speech code movement, such codes have been routinely struck down as unconstitutional by federal courts, 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 policies similar to those of Delaware State. *See, e.g., DeJohn v. Temple*, 537 F.3d 301 (3rd Cir. 2008) (enjoining overbroad university’s

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<sup>1</sup> The Alliance Defense Fund is a not-for-profit public interest law and educational group comprised of the Center for Academic Freedom. The organization exists to educate the public and the government about the right to freedom of speech, particularly in the context of the expression of religious sentiments. The Alliance Defense Fund has numerous allied attorneys throughout the United States who assist the organization.

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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).

Delaware State’s Sexual Harassment Policy (like the speech codes in the cases above) violates the constitutional rights of its students. The policy is not limited to prohibiting the prototypical pressure regarding sexual conduct that we immediately think of when the issue of sexual harassment is raised. Instead, the University’s Sexual Harassment Policy explicitly aims at speech of a “sexual nature” when it is perceived as “offensive to a reasonable person (as judged by the University Administration).” However, “there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive.” *Saxe*, 240 F. 3d at 206. A university cannot “proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people.” *Id.* at 215.

Due to the broad language used by the policy, speech about a vast range of issues is implicated, “including” speech that is perceived as offensive concerning gender and sexual orientation. This policy, like that found unconstitutional in *DeJohn*, covers speech about social issues. *See DeJohn*, 537 F.3d at 318-19. Moreover, those espousing traditional views regarding sexual practices, sexual orientation, or what constitutes gender are often accused of being bigoted and offensive and, therefore, risk this policy being applied against them.

Freedom of speech should not be conditioned upon the response of the listener, particularly when controversial issues are involved. However, here a student can be disciplined for comments that a listener or someone who simply overhears claims offense at. 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 United States Court of Appeal for 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 unconstitutionally 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, Delaware State's sexual harassment policy is flawed because a student can run afoul of the policy by merely making comments that someone considers offensive even if the University's educational mission is in no way 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). The policy unconstitutionally uses the "purpose or effect" language when the Third Circuit has been clear that speech may not be proscribed simply because of the intent of the speaker. *See Saxe*, 240 F. 3d at 216-17. Moreover, the policy prohibits speech "even when the conduct does not rise to the level of creating a hostile work environment" but instead includes "verbal harassment...of a sexual nature" and "repeated communications...with sexual or demeaning implications." However, unless there is "a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work-

-the policy provides no shelter for core protected speech.” *DeJohn*, 537 F.3d at 318. Since the policy covers core protected speech and fails to meet the requirements of *Saxe* and *DeJohn*, the Sexual Harassment Policy is unconstitutional.

Delaware State University has other unconstitutional speech codes. The Conduct Standards and Policies from the Student Handbook states that it is a personal violation to engage in “[v]erbal abuse” which is defined as the “use of harsh, often insulting language to any member of the University community.” Student Handbook, p. 42. This language lacks any of limiting language from *Saxe* and *DeJohn* and is unconstitutional as written since “insulting language” is constitutionally protected unless it rises to the level of fighting words. In order to qualify as fighting words, the language must constitute “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” *Virginia v. Black*, 538 U.S. at 359 (quoting *Cohen v. California*, 403 U. S. 15, 20 (1971)). Delaware State’s Conduct Standards and Policies, however, only requires the language to be perceived as insulting, not a “true threat.” *Id.*

The Student Handbook’s Conduct Standards and Policies also includes a prohibition on Disorderly Conduct that prohibits making an “offensive utterance”. Student Handbook, p. 42. For the reasons explained above, punishing or threatening to punish someone for making a subjectively “offensive utterance” is also unconstitutional.

While Delaware State has enacted unconstitutional policies that destroy 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.

Very truly yours,



Leonard G. Brown, III

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cc: Jarrett McKinney  
Alliance Defense Fund  
Randal L. Wenger, Esq., Independence Law Center