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DIRECT ALL CORRESPONDENCE
TO THE LANCASTER OFFICE

April 7, 2010

President Daniel J. Obara
Westmoreland County Community College
145 Pavilion Lane
Youngwood, PA 15697
Sent via facsimile to: 724-925-4221

**RE: Protecting Student Speech at Westmoreland County
Community College**

Dear President Obara:

I write as an ally of the Alliance Defense Fund¹ and on behalf of Jesse Samek and Garrett Wible, students at Westmoreland County Community College. Mr. Samek and Mr. Wible are concerned about a speech code at the College. A “speech code,” of course, is a term used for policies—typically harassment or nondiscrimination policies—which suppress and punish speech that may be subjectively perceived as offensive to members of the campus community. Specifically, they are concerned about his ability to speak, publicly or privately,

¹ 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.

about a host of issues pertaining to sexual orientation and conduct, gender, sexual practices, and other matters from a religious or 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 that of Westmoreland County Community College. *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).

Westmoreland County Community College's Sexual Harassment Policy (like the speech codes in the cases above) violates the constitutional rights of students. The policy, as set forth in the 2009-10 College Catalog & Student Handbook, prohibits not only true sexual harassment but "other verbal...conduct of a sexual nature when...[s]uch conduct has the purpose or effect of...creating an...offensive working or study environment."

The remaining portions of the policy are what anyone would expect in a sexual harassment policy. The language, however, specifically targets speech that covers sexual topics. Based on the broad language of this policy, your students are concerned about possible punishment for speech related to gender issues, sexual practices, and sexual orientation, even if such speech is based on their religious beliefs. At best, the policy is vague. It has the potential for abuse, particularly concerning controversial speech from a minority viewpoint, which necessitates correcting this policy.

As it is, the policy conditions free speech rights based upon the subjective

response of the listener. Per the quoted language, a student risks discipline for comments that a listener or someone who simply overhears claims may 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 *effect* of interference. *See id.* In the same way, your college's sexual harassment policy is flawed because a student can run afoul of the policy by merely making comments that someone subjectively perceives as offensive even if the college's educational mission is not actually 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 at Westmoreland County Community College is unconstitutional.

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Public universities have traditionally been a place of the exchange of ideas. However, when targeting speech considered by some listeners to be offensive (even someone who merely overhears), a university crosses a dangerous line. According to *DeJohn*, speech that some may consider 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 college’s policy and the failure to limit its prohibition to severe and pervasive situations where the educational mission of the school is actually undermined, the policy unconstitutionally “provides no shelter for core protected speech.” *DeJohn*, 537 F.3d at 318.

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

Sincerely yours,



Leonard G. Brown, III

cc: Jesse Samek
Garrett Wible
Alliance Defense Fund
Randall L. Wenger, Esq., Independence Law Center