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Re: Unconstitutional First Amendment Policy on Campus: Bias Reporting System

Dear Dr. Newman:

We are writing to you regarding the Rutgers University bias reporting system and related policies. We are concerned that the policies infringe on students' First Amendment rights because they allow officials to discriminate against the content and viewpoint of speech. The policies also unconstitutionally chill freedom of expression because they allow anyone on campus to report students for perceived bias incidents. As such, we demand that the University revise these unconstitutional policies.

Southeastern Legal Foundation is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic[®]. Through our 1A Project, we educate the public about students' First Amendment rights on college campuses and take legal action on behalf of students whose rights are violated. This letter seeks to inform Rutgers University that bias reporting systems and bias response teams stifle free expression and violate longstanding precedent.

Factual Background

On its website, Rutgers University maintains a webpage called "Bias Prevention," where the University describes its commitment to "taking an anti-bias stance[.]"¹ The webpage states that when there is "[b]road constituent/community consensus that actions . . . are motivated by hatred of others," action must be taken to stop it.² It defines bias as "an act, verbal, written, physical, psychological, that threatens, or harms a person or group[.]"³ The webpage then explains that the University maintains a Bias Prevention Committee, whose mission "is to work with students and all members of the campus and University to prevent, anticipate, respond to acts of bias and intercultural conflict, and to restore the community in the aftermath of bias incidents and

¹ <https://studentaffairs.rutgers.edu/resources/bias-prevention>.

² <https://studentaffairs.rutgers.edu/principles-bias-prevention>.

³ <https://studentaffairs.rutgers.edu/resources/bias-prevention>.

conflicts.”⁴ Elsewhere on the University’s website, the Bias Prevention Committee is referred to as the Bias Response Team⁵ and the Bias and Education Committee.⁶ The team is made up of several administrators, including members of the Office of Student Affairs, the Office of Diversity, Inclusion, and Community Engagement, the Office of the Dean of Students, and campus police.⁷ In fact, the Office of the Dean of Students maintains its own webpage where it urges students to report perceived bias incidents.⁸

The University encourages individuals to report bias incidents through its online reporting form.⁹ Anyone can submit a report anonymously. Once a report is submitted, the Bias Response Team assesses the report and determines how to resolve it. Resolutions may include a letter to the University community, training for an offender, and responses via email or social media.¹⁰

Analysis

It is well-settled that a college campus is the “marketplace of ideas” where students are exposed “to that robust exchange of ideas which discovers truth.”¹¹ Indeed, freedom of speech and academic inquiry are “vital” on college campuses, because only through thoughtful debate and discourse can real education occur.¹² The bias reporting system and related policies undermine this bedrock principle and raise serious First Amendment concerns because the policies (1) are unconstitutionally vague and overbroad; (2) impose a chilling effect on speech; and (3) give university officials unbridled discretion to assess the viewpoint and content of speech to determine if it is biased.

I. Rutgers University’s bias reporting system and related policies are unconstitutionally vague and overbroad.

A policy violates the Constitution when it is so broad that it infringes on constitutionally protected speech. Similarly, a law or policy is unconstitutionally vague when “men of common intelligence must necessarily guess at its meaning[.]”¹³ Vague and overbroad policies are especially dangerous when students must hazard guesses as to what conduct or speech is punishable; students cannot be expected to comply with a vague school policy when they have no way of knowing exactly what is required or prohibited.

⁴ *Id.*

⁵ <https://studentaffairs.rutgers.edu/bias-incident-reporting>.

⁶ <https://studentsupport.rutgers.edu/services/bias-incident-reporting-and-response>. For ease of reference, this letter will refer to the entity responsible for addressing bias incidents as the Bias Response Team.

⁷ <https://studentaffairs.rutgers.edu/resources/bias-prevention>.

⁸ <https://studentsupport.rutgers.edu/services/bias-incident-reporting-and-response>.

⁹ https://cm.maxient.com/reportingform.php?RutgersUniv&layout_id=25.

¹⁰ <https://studentaffairs.rutgers.edu/bias-incident-reporting>.

¹¹ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

¹² *Healy v. James*, 408 U.S. 169, 180 (1972).

¹³ *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

Although the Constitution does not protect obscenity,¹⁴ inciting others to imminent lawless action,¹⁵ true threats of physical violence,¹⁶ and defamation,¹⁷ it *does* protect hate speech and offensive speech.¹⁸ A school cannot single out speech it finds offensive, *even if* the entire student body is offended. That is because “[g]iving offense is a viewpoint.”¹⁹

The bias reporting system at Rutgers University runs headfirst into protected speech when it defines a bias incident as a *verbal* or *written* act that “harms a person or group[.]”²⁰ Although colleges have a duty to prevent unlawful discrimination and harassment, this definition goes too far by banning students from speech and expressive conduct that hurts others’ feelings. In this way, students are forced to hazard guesses about whether another individual would feel upset by what they say, which naturally varies from person to person.

The University attempts to overcome this hurdle by requiring a “community consensus” before determining whether speech is biased. But this just produces more confusion. Who decides? What makes a consensus? Will the University conduct a vote among students? The University lacks any guidelines regarding what it means by community consensus. But even if it had a process to divine the majority opinion on current affairs, it would be irrelevant. “If 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 itself offensive or disagreeable.”²¹

Conservative and libertarian students are especially cautious about expressing their views on college campuses these days, including views about marriage and family life, abortion, immigration, gun control, gender identity, race, and the environment. Under the University’s bias reporting system, those students could be reported for any speech that offends their peers or causes their peers harm, such as handing out flyers describing abortion or hosting a debate about transgender issues. Although speech on these topics may offend some students—even a majority of students—that does not mean a university can shield students from it by giving them a mechanism through which to report it. The University’s definition of bias is therefore vague, overbroad, and unconstitutional.

II. Rutgers University’s bias reporting system and related policies impose an unconstitutional chilling effect on student speech.

Speech is chilled when a speaker objectively fears that speaking will result in discipline, and as a result censors her speech altogether. The Supreme Court repeatedly writes that the danger

¹⁴ Obscene material is lewd, sexual, and serves no artistic, educational, scientific or literary value to the public. *Paris Adult Theater v. Slaton* (1973). Indecent speech does *not* amount to obscenity. *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667 (1973).

¹⁵ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁶ True threats are words or conduct that intentionally put others in fear for their physical safety. This is *not* the same as hate speech. *Koepfel v. Romano*, 252 F. Supp. 3d 1310 (M.D. Fla. 2017), *aff’d sub nom. Doe v. Valencia Coll.*, No. 17-12562, 2018 WL 4354223 (11th Cir. Sept. 13, 2018).

¹⁷ Spreading false rumors about someone can amount to defamation and subject an offender to legal action. *Gertz v. Welch*, 418 U.S. 323 (1974).

¹⁸ *Papish*, 410 U.S. at 670; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380–81 (1992).

¹⁹ *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

²⁰ <https://studentaffairs.rutgers.edu/resources/bias-prevention>.

²¹ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

of chilling speech “is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”²² Any action taken by university authorities that has a chilling effect on student speech is unconstitutional.²³ And even when a member of a university does not have the actual authority to impose discipline, the mere appearance of authority is enough to objectively chill and censor speech.²⁴

As we’ve seen these past few years, cancel culture is a pandemic itself that plagues social media. One need only say something that could be perceived in a remotely offensive way, and he is shouted down, unfollowed on social media, threatened, and even fired from work or expelled from school. Unfortunately, nowhere is cancel culture more visible than on college campuses. With reporting forms at students’ fingertips, students wishing to prevent a controversial speaker from visiting campus or to stop a student organization from garnering interest in their cause can simply report members of that organization for engaging in a bias incident. Speech activities are shut down at the press of a button.

Recent cases make clear that bias response teams and related reporting systems impose an unconstitutional chilling effect on speech.²⁵ They force students to consider whether their speech could offend their peers, which could mean anything these days. On top of that, anonymous reporting forms, like this one, allow students to falsely report each other for harassment without any accountability for the accuser. Rather than risk being reported for expressing their true views, and facing lengthy investigations that could result in punishment, students choose to remain silent.

The Rutgers University bias reporting system is no exception. “[T]he very name ‘Bias Response Team’ suggests that the accused student’s actions have been prejudged to be biased. The name is not the ‘Alleged Bias Response Team’ or ‘Possible Bias Investigatory Team.’ It is the ‘Bias Response Team.’”²⁶ Members of the Bias Response Team are officials with significant authority to act on campus, whose goal is to “prevent, anticipate, [and] respond to acts of bias.”²⁷ The University makes it clear that action will be taken to resolve the perceived bias incident, which may even include referring the accused party to the formal student conduct process.²⁸ In these ways, the bias reporting system imposes an unconstitutional chilling effect on speech.

III. Rutgers University’s bias reporting system and related policies open the door to content and viewpoint discrimination.

Members of the Bias Response Team at Rutgers University are also empowered to engage in unconstitutional viewpoint and content-based discrimination. When a university promotes or discourages speech based on “the speaker’s specific motivating ideology, opinion, or perspective,” it has engaged in viewpoint discrimination.²⁹ Viewpoint-based restrictions are never

²² *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

²³ *Id.*

²⁴ *Speech First, Inc. v. Fenves*, 979 F.3d 319, 333 (5th Cir. 2020).

²⁵ *Id.*; *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1122-24 (11th Cir. 2022).

²⁶ *Schlissel*, 939 F.3d at 765.

²⁷ <https://studentaffairs.rutgers.edu/resources/bias-prevention>.

²⁸ <https://studentaffairs.rutgers.edu/bias-incident-reporting>.

²⁹ *Rosenberger*, 515 U.S. at 820.

constitutional.³⁰ When a university bans discussion of certain topics, the restriction is considered content-based.³¹ Content-based restrictions are presumptively unconstitutional.³²

The University's bias policies give its Bias Response Team unbridled discretion to discriminate against content and viewpoint.³³ In failing to provide guidelines for assessing reports of hate and bias, the University leaves it to individual administrators to decide for themselves whether they think a bias incident occurred. That decision ultimately turns on whether those officials think a student's expression harmed or could have harmed another student. Such subjectivity is unconstitutional because it allows officials to insert their own views while discriminating against others.

Demand

“[C]olleges and universities are not enclaves immune from the sweep of the First Amendment.”³⁴ It is the duty of college officials to protect and defend the voices of every student on campus. But through this unconstitutional reporting system, it is unclear which speech can be considered bias and what action the University will take when it receives reports of bias. The bias reporting system creates a chilling effect on all students, particularly those wishing to share conservative views, and it allows university officials to assess both the viewpoint and content of speech.

SLF urges the University to remove the bias reporting system altogether from campus, as it chills expression rather than invites it. But at a minimum, the University must clarify that speech is protected and cannot be subject to any investigation or punishment. Nowhere on the Bias Prevention website or the Dean of Students' website does the University so much as mention protected speech. Thus, the University must, at a minimum, link to freedom of speech resources on its bias reporting webpage. It must remove the words “verbal” and “written” from its definition of bias to ensure that protected speech is not swept into its definition. It must also remove “harm” from its definition of bias because that term is vague and overbroad. It must clarify that *any* constitutionally protected speech, including hate speech and offensive speech, cannot and will not be investigated or punished. It must explain that any requests to meet with the Bias Response Team or otherwise participate in the resolution process after being reported for protected speech are purely voluntary. And finally, the University must clarify that no community consensus will ever be enough to justify silencing individuals.

Open discourse is critical to both a functioning democracy and a well-rounded college experience. College students are in the unique position of being surrounded by true diversity: diversity of thought, race, religion, and culture. For many, this is the first—and perhaps only—time they will be exposed to a “marketplace of ideas” that differ from their own. The college

³⁰ *Id.*

³¹ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Boos v. Barry*, 485 U.S. 312, 319 (1988).

³² See, e.g., *Papish*, 410 U.S. at 670.

³³ See *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

³⁴ *Healy*, 408 U.S. at 180.

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experience can have a significant impact on the leaders of tomorrow. Rutgers University must do its part to ensure this freedom for *all* its students.

Yours in Freedom,

s/ Cece O'Leary

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Director of 1A Project

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CC: Kimberlee Pastva (secretary@oq.rutgers.edu)