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Kelly Haag
Chief Student Affairs Officer
University of Wisconsin-Milwaukee
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Re: Unconstitutional First Amendment Policy on Campus: Bias Reporting System

Dear Ms. Haag:

We are writing to you regarding the University of Wisconsin-Milwaukee 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 the University of Wisconsin-Milwaukee that bias reporting systems and bias response teams stifle free expression and violate longstanding precedent.

Factual Background

On its website, the University maintains a webpage called "Hate/Bias," where it encourages individuals who have witnessed "an incident of hate or bias" to report the conduct to the Office of Equity/Diversity Services.¹ The University defines a hate or bias incident as "any disruptive conduct — oral, written, graphic or physical — that is directed against an individual, or individuals, because of their actual or perceived protected characteristics[.]"² The Office of Equity/Diversity Services reviews the reports and takes action, including referring the reports to the University's Rapid Response Team, "a group composed of representatives from different campus offices — including the Dean of Students Office, Inclusive Excellence Center, and the

¹ <https://uwm.edu/equity-diversity-services/hatebias-2/>.

² *Id.*

student cultural and advocacy centers — which provides care and support in response to incidents of hate and bias.”³ Anyone can submit a bias report anonymously.⁴

The University also maintains a webpage called “Free Speech, Rights and Responsibilities.”⁵ There, the University warns students that “if your behavior crosses the boundary of what is acceptable in civil society or threatens others, you will be held accountable,”⁶ and that “[i]f you believe someone has crossed the line between speech and misconduct, you should report it.”⁷

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.”⁸ Indeed, freedom of speech and academic inquiry are “vital” on college campuses, because only through thoughtful debate and discourse can real education occur.⁹ 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. The University of Wisconsin-Milwaukee’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[.]”¹⁰ 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.

Although the Constitution does not protect obscenity,¹¹ inciting others to imminent lawless action,¹² true threats of physical violence,¹³ and defamation,¹⁴ it *does* protect hate speech and

³ *Id.*

⁴ https://cm.maxient.com/reportingform.php?UnivofWisconsinMilwaukee&layout_id=30.

⁵ <https://uwm.edu/free-speech-rights-responsibilities/>.

⁶ *Id.*

⁷ <https://uwm.edu/free-speech-rights-responsibilities/rights-responsibilities/>.

⁸ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

⁹ *Healy v. James*, 408 U.S. 169, 180 (1972).

¹⁰ *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

¹¹ 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).

¹² *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹³ True threats are words or conduct that intentionally put others in fear for their physical safety. This is *not* the same as hate speech. *Koeppele 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).

¹⁴ Spreading false rumors about someone can amount to defamation and subject an offender to legal action. *Gertz v. Welch*, 418 U.S. 323 (1974).

offensive speech.¹⁵ 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.”¹⁶

The bias reporting system at the University runs headfirst into protected speech when it defines a bias incident as *oral* or *written* conduct.¹⁷ 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 or does not seem “acceptable.”¹⁸ 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.

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, such as handing out flyers describing abortion or hosting a debate about transgender issues. Although speech on these topics may offend some 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. The University of Wisconsin-Milwaukee’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 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.”¹⁹ Any action taken by university authorities that has a chilling effect on student speech is unconstitutional.²⁰ 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.²¹

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.

¹⁵ *Papish*, 410 U.S. at 670; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380–81 (1992).

¹⁶ *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

¹⁷ <https://uwm.edu/equity-diversity-services/hatebias-2/>.

¹⁸ <https://uwm.edu/free-speech-rights-responsibilities/>.

¹⁹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

²⁰ *Id.*

²¹ *Speech First, Inc. v. Fenves*, 979 F.3d 319, 333 (5th Cir. 2020).

Recent cases make clear that bias response teams and related reporting systems impose an unconstitutional chilling effect on speech.²² 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 University of Wisconsin-Milwaukee's bias reporting system is no exception. Not only are its policies vague and overbroad, but there is also a lack of clarity about what happens after a student is reported. Reports of bias go directly to the Office of Equity/Diversity Services, which can then forward the report to officials on campus like the Dean of Students, who have significant authority to act on campus. Communication from such officials regarding a bias incident will naturally take on a weighty tone.

Worse, the University invites and encourages students to report each other any time they think speech goes too far.²³ It warns students that they will be held accountable if they "cross[] the boundary of what is acceptable in civil society."²⁴ These ominous warnings, together with a lack of clarity about what happens after a student is reported, impose an unconstitutional chilling effect on speech.

III. The University of Wisconsin-Milwaukee's bias reporting system and related policies open the door to content and viewpoint discrimination.

The bias reporting system also grants university officials the power 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.²⁵ Viewpoint-based restrictions are never constitutional.²⁶ When a university bans discussion of certain topics, the restriction is considered content-based.²⁷ Content-based restrictions are presumptively unconstitutional.²⁸

The University's bias reporting system gives the Office of Equity/Diversity Services and the Rapid Response Team unbridled discretion to discriminate against content and viewpoint. Every report of bias goes first to a member of Equity/Diversity Services. That member has the authority to assess whether he or she considers something to be biased. After making that judgment call, the individual can send the report to the campus Rapid Response Team, including the Dean of Students, to take further action based on the report. The only guideline the University seems to provide to administrators when assessing reports of hate and bias is whether "behavior crosses the boundary of what is acceptable in civil society."²⁹ This leaves it entirely to campus officials to

²² *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).

²³ <https://uwm.edu/free-speech-rights-responsibilities/rights-responsibilities/>.

²⁴ <https://uwm.edu/free-speech-rights-responsibilities/>.

²⁵ *Rosenberger*, 515 U.S. at 820.

²⁶ *Id.*

²⁷ *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).

²⁸ *See, e.g., Papish*, 410 U.S. at 670.

²⁹ <https://uwm.edu/free-speech-rights-responsibilities/>.

decide for themselves whether *they* perceive something to be acceptable. In failing to provide adequate guidelines that safeguard the viewpoint and content of expression, the University's bias reporting system infringes on freedom of speech.

Demand

“[C]olleges and universities are not enclaves immune from the sweep of the First Amendment.”³⁰ It is the duty of college officials to protect and defend the voices of every student on campus. But through this bias reporting system, it is unclear which speech can be considered biased 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 Hate/Bias website does the University so much as mention protected speech. The University must, at a minimum, link to freedom of speech resources on its bias reporting webpage, including a resource clarifying that hate speech is protected by the First Amendment.³¹ It must remove the words “oral” and “written” from its definition of bias to ensure that protected speech is not swept into its definition. 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 Office of Equity/Diversity Services, the Rapid Response Team, or any other administrator in connection with a report of biased speech are purely voluntary.

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

Yours in Freedom,

s/ Cece O’Leary
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³⁰ *Healy*, 408 U.S. at 180.

³¹ *See, e.g.*, <https://uwm.edu/free-speech-rights-responsibilities/faqs/what-is-hate-speech-and-is-it-protected-by-the-first-amendment/>.