



SPEECH FIRST

1300 I St NW Suite 400E
Washington, DC 20005

May 28, 2020

A. Gabriel Esteban, PhD
President, DePaul University
1 E. Jackson Blvd.
Chicago, IL 60604

RE: Free Speech at DePaul University

Dear President Esteban,

Speech First is a nationwide membership organization of students, alumni, and other concerned citizens; the organization is dedicated to preserving civil rights secured by law, including the freedom of speech guaranteed by the First Amendment. Speech First seeks to protect the rights of students and others at colleges and universities through litigation and other lawful means. For example, Speech First recently successfully challenged several policies of the University of Michigan that chilled student speech. *See Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019).

As President of Speech First, I write to urge you to reform your policies to better protect student speech on your campus. As you are no doubt aware, DePaul has received enormous criticism over the past several years for actions it has taken regarding free speech. This is unfortunate. College campuses should be a marketplace of ideas where a wide swath of views can be heard by all.

Although there are many steps DePaul could take to make its campus more welcoming for differing views, there are at least two policies in particular we ask you to review. First, DePaul University's "Speaker Review Procedures" gives university administrators broad authority to restrict outside speakers based on the content of their speech. Second, DePaul University's "Anti-Harassment" Policy punishes students for the content of their speech in vague and overbroad terms. Correcting these provisions now would further DePaul's promise that it is, as it claims, an institution committed to the "free and open expression [that is] essential to intellectual inquiry."¹

I. Free Speech Is Critically Important on College Campuses.

As the Supreme Court has long recognized, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools [of higher education]." *Healy v. James*, 408 U.S. 169, 180 (1972). American universities are "peculiarly the marketplace of ideas," training future leaders "through wide exposure to that robust

¹ See *Guiding Principles for Speech and Expression at DePaul University*, DePaul Univ. (May 26, 2017), https://policies.depaul.edu/documents/other/Guiding_Principles_20170530.pdf.

exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.” *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). “Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.” *Sweezy v. N.H. ex rel. Wyman*, 354 U.S. 234, 250 (1957).

To be sure, private universities like DePaul are not treated the same as public universities under the First Amendment. But as the U.S. Department of Education recently recognized, “private institutions are often required by law to deliver what they have promised, including what they have promised about freedom of speech, including academic freedom, through their own policies.”² A private institution’s failure to adhere to its own institutional policies “can be a contractual breach but it can also be a tort or more.”³ More important, private universities—no less than public universities—have a critical role to play in protecting free speech. Private universities should do everything in their power to ensure that students are free to speak, to debate, and to listen on a campus that is free of institutional censorship.

II. Although DePaul Claims to Protect Student Free Speech, Its Actions Do Not Match Its Commitments.

DePaul University has adopted “Guiding Principles for Speech and Expression at DePaul University.” These principles state, among other things, that DePaul believes “free and open expression [is] essential to intellectual inquiry,” that the DePaul Community should be free “to engage in speech and expression consistent with the values of academic freedom, free inquiry, and civil discourse,” and that there is a “right of individuals to express their viewpoints, even at the risk of controversy.”⁴

Despite holding itself out as an institution committed to free speech and expression, however, there have been numerous instances of DePaul not following these ideals. These examples include, just to name a few:

- DePaul prohibited conservative commentator Ben Shapiro from speaking on campus and threatened to have him arrested if he tried to attend the event or come onto campus.⁵
- DePaul’s requirement that students pay for security officers to monitor their speaker discussions and its “decade-long rap sheet of censorship spanning the ideological spectrum” caused the university to receive the 2018 Lifetime

² *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program*, U.S. Department of Education, 85 Fed. Reg. 3190-01, 3212-13 (Jan. 17, 2020).

³ *Id.*

⁴ See *Guiding Principles for Speech and Expression at DePaul University*.

⁵ See Amanda Prestigiacomo, *Video: DePaul University Threatens to Arrest Ben Shapiro if He Steps on Campus*, Daily Wire (Nov. 15, 2016), <https://www.dailywire.com/news/breaking-video-depaul-university-threatens-arrest-amanda-prestigiacomo>.

Censorship Award, given by the Foundation for Individual Rights in Education (FIRE).⁶

- DePaul tried to minimize the impact of conservative speaker Milo Yiannopoulos by switching the reserved venue and slashing his speaking time.⁷ Shortly after Milo’s appearance, DePaul removed its ratings system on Facebook because so many students were expressing their outrage with the situation by giving one-star ratings.⁸
- DePaul refused to allow the Young Americans for Liberty group to host a “free speech ball” event where students harmlessly toss a beach ball around campus and let students express their thoughts without fear of censorship.⁹ The university claimed the event would create “an environment which invites hate.”¹⁰
- DePaul stopped College Republicans from writing Pro-Trump slogans in chalk after a student group complained the messages were “hate crimes.”¹¹ Their official reason for the censorship was that the chalking “threatened DePaul’s tax-exempt status”– never mind the student’s right to civic participation during an election year.¹²
- DePaul prohibited its College Republican chapter from distributing pro-life flyers on campus that said “Unborn lives matter.”¹³ The University president at the time said the flyers were “bigotry... under the cover of free speech.”¹⁴

These incidents are just a sample of DePaul’s poor record addressing free speech on campus.

⁶ See *The 10 Worst Colleges for Free Speech: 2018*, Foundation for Individual Rights in Education (Feb. 12, 2018), <https://www.thefire.org/the-10-worst-colleges-for-free-speech-2018/>.

⁷ See Peter Maxwell, *DePaul Demands Hefty Security Payment for Milo Yiannopoulos Visit, Slashes His Speaking Time*, College Fix (May 20, 2016), <https://www.thecollegefix.com/depaul-demands-hefty-security-payment-milo-yiannopoulos-visit-slashes-speaking-time/>.

⁸ See Kyle Woosley, *DePaul Facebook Ratings Taken Down After an Influx of 1-Star Reviews*, DePaulia (Sept. 12, 2016), <https://depauliaonline.com/23995/news/depaul-facebook-ratings-taken-influx-1-star-reviews/>.

⁹ See Ken Shepherd, *DePaul University Officials Scuttle “Free Speech Ball,” Citing Possibility of Hate Speech*, Washington Times (Nov. 14, 2017), <https://www.washingtontimes.com/news/2017/nov/14/depaul-univ-administrators-scuttled-free-speech-ba/>.

¹⁰ See *id.*

¹¹ See Peter Maxwell, *Trump Chalking by College Republicans is a “Hate Crime,” Black Students Claim*, College Fix (Apr. 15, 2016), <https://www.thecollegefix.com/trump-chalking-college-republicans-hate-crime-black-students-claim/>.

¹² See *id.*

¹³ See Amber Athey, *“Unborn Lives Matter” Flyer Censored by DePaul*, Campus Reform (Oct. 20, 2016, 9:52 AM), <https://www.campusreform.org/?ID=8283>.

¹⁴ See *id.*

III. DePaul Should Revise Its Policies to Protect Student Speech.

Speech First has identified two steps that DePaul should, at a minimum, take to demonstrate its commitment to free speech on campus.

A. DePaul Should Amend Its Speaker Review Procedures.

DePaul has adopted “Student Organization Speaker Review Procedures,” which authorize the university to deny invitations to outside speakers based on the content of their speech.¹⁵ Under this policy, every student group must obtain a recommendation from the Speaker Review Committee and the Associate Vice President for Student Affairs before a speaker can speak on campus.¹⁶ In choosing whether to grant a recommendation, the Speaker Review Committee and Associate Vice President will consider a wide variety of criteria, including whether the speaker has engaged in speech that demonstrates a history of “abuse” of a “community of people” in a “derogatory fashion” based on a host of factors, including “race, color, ethnicity, religion, sex, gender, gender identity, sexual orientation, national origin, age, marital status, parental status, family relationship status, physical or mental disability, military status, genetic information, or other protected status.”¹⁷ DePaul also forbids speakers who do not encourage “mutually respectful inquiry” or who encourage “hatred.”¹⁸

The Supreme Court has consistently recognized the “substantial and expansive threats to free expression posed by” regulations that restrict speech on the basis of its content. *United States v. Alvarez*, 567 U.S. 709, 717 (2012). Content-based regulations necessarily “restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). Such regulations are antithetical to “our profound national commitment to the free exchange of ideas,” *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989), and hinder the goal of an “uninhibited marketplace of ideas in which truth will ultimately prevail,” *McCullen v. Coakley*, 573 U.S. 464, 476 (2014).

DePaul’s Speaker Review Procedures are precisely the type of content-based regulation that have no business on a college campus. Instead of imposing a content-*neutral* policy, in which student groups can bring speakers to campus when certain objective criteria are met, the university reserves broad discretion to deny speakers if their speech may be “abus[ive]” or “derogatory” based on any number of characteristics. Examples of speakers who could be banned under such policies are easy to see. A speaker urging a tougher immigration policy, including building a wall along the southern border, may be interpreted as making “derogatory” statements on the basis of ethnicity and national origin. A speaker expressing his views on traditional marriage may be interpreted as making “derogatory” statements on the basis of sexual orientation. A speaker advocating for one side or the other of the Israeli-Palestinian conflict may be interpreted as making “derogatory” statements on the basis of religion or national origin. The possibilities for suppressing such speech are

¹⁵ *Student Organization Speaker Review Procedures*, DePaul Univ., <https://policies.depaul.edu/documents/other/Student%20Organization%20Speaker%20Review%20Procedures.pdf>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

nearly limitless. DePaul should, at a minimum, amend its Speaker Review Procedures to eliminate its authority to deny speakers on campus based on the *content* of their prior or expected speech.

B. DePaul Should Amend Its “Anti-Harassment” Policy.

In its student code, DePaul states that “no person shall be the object of discrimination or harassment.”¹⁹ The policy defines “harassment” extremely broadly to include “offensive innuendo,” “derogatory comments,” and “offensive objects or pictures” concerning a person’s “race, color, ethnicity, religion, sex, gender, gender identity, sexual orientation, national origin, age, marital status, pregnancy, parental status, family relationship status, physical or mental disability, military status, genetic information or other protected status.”²⁰

The problem with vague speech codes like these are well known. Universities should not prohibit “the expression of an idea simply because society finds the idea offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Nor should universities seek to shield their students from “the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). Harassment codes are regularly struck down by courts because they are so overbroad that they reach “a substantial amount of constitutionally protected speech,” *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995), and are so vague that they fail to provide “fair notice of the standard of conduct” to which a student will be held, *Leonardson v. City of E. Lansing*, 896 F.2d 190, 196 (6th Cir. 1990).

DePaul’s “harassment” prohibition suffers from these same flaws. It is highly expansive, highly subjective, and hopelessly vague. Virtually any opinion or political belief—as well as any use of humor, satire, or parody—will be perceived by *somebody* as “offensive” or “derogatory.” In order to determine what conduct will be considered “harassment” by the university, one “must make a subjective reference” based on the listener’s own perception of the speech. *Dambrot*, 55 F.3d at 1184. And, “[a]bsent any requirement akin to a showing of severity or pervasiveness—that 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 v. Temple Univ.*, 537 F.3d 301, 317-18 (3d Cir. 2008) (emphasis added). DePaul should revise its “harassment” policy to ensure that students are free to express themselves without fear of punishment.

* * *

DePaul may believe it is doing its students a service by preventing them from hearing “offensive” or “derogatory” speech. But that could not be further from the truth. Some “ideas and information are vital, some of slight worth,” but “the general rule is that the speaker and the audience” should “assess the value of the information presented.” *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). Indeed, provocative speech can often be the *most* informative, as the listener is lifted from his or her comfort zone to confront ideas that some (or maybe many) find wrong or hurtful. This is how we learn and grow. As Frederick Douglass once said, “[t]o suppress free speech is a double wrong. It violates the rights of the hearer as well as those of

¹⁹ *Discrimination and Harassment*, DePaul Univ. Div. of Student Affs. (Feb. 26, 2020), <https://offices.depaul.edu/student-affairs/title-ix/Pages/discrimination-harassment.aspx>.

²⁰ *Id.*

the speaker.” That sentiment is nowhere truer than on the campuses of American colleges and universities.

DePaul has long claimed to promote free speech and expression on its campus. But, as its history and current policies show, DePaul has not lived up to those lofty ideals. DePaul should amend its Anti-Harassment Policy and its Speaker Review Procedures to show students, potential students, and alumni that their free speech rights will be protected on DePaul’s campus.

Thank you for your consideration of these important issues. We look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to read "Nicole Neily". The signature is written in a cursive style with a large, looping 'N' and 'y'.

Nicole Neily
President, Speech First