



SPEECH FIRST

1300 I St NW Suite 400E
Washington, DC 20005

October 9, 2020

Michael A. Fitts, Esq.
President, Tulane University
6823 St. Charles Avenue
New Orleans, LA 70118

SENT VIA U.S. MAIL CERTIFIED RETURN RECEIPT

RE: Speech and Expression Policies at Tulane University

Dear President Fitts,

Speech First is a nationwide membership organization of students, alumni, and other concerned citizens. Our 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, Tulane has been repeatedly criticized 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 Tulane could take to make its campus more welcoming for differing views, there are at least three policies in particular we ask you to review. First, Tulane's policies and guidelines surrounding technology and social media use threaten students with discipline for speech based on the content of that speech. Second, Tulane's Code of Student Conduct punishes students for the content of their speech in vague and overbroad terms. Third, Tulane's Demonstration Guidelines forbid students from spontaneously protesting the most important issues of the day. Correcting these provisions now would further Tulane's promise that it is,

as it claims, an institution “committed to an environment in which a variety of ideas can be freely expressed and critically examined.”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 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 Tulane 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 Tulane Claims to Protect Student Free Speech, Its Actions Do Not Match Its Commitments.

Tulane has repeatedly stated that it is committed to freedom of speech and expression. For example, its “Demonstration Guidelines” state that “Tulane University’s purpose is to create, communicate and conserve knowledge in order to enrich the capacity of individuals, organizations and communities to think, to learn and to act and lead with integrity and wisdom. Congruent with that purpose, Tulane is committed to an environment in which a variety of ideas can be freely expressed and critically examined. The University expects that the expression of views be made

¹ See *Demonstration Guidelines*, Tulane University Campus Services (Mar. 2017), <https://bit.ly/3aUbCPd>.

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.*

with respect for the dignity and freedom of others.”⁴ And in its “Social Media Guidelines,” Tulane states that it “encourages freedom of expression and recognizes the value of diverse opinions.”⁵

Despite holding itself out as an institution committed to free speech and expression, however, there have been many instances of Tulane not following these ideals. Indeed, just a few weeks ago, Tulane postponed an online talk⁶ by author Edward Ball, whose book, *Life of a Klansman*, described his ancestor’s experience as a white supremacist.⁷ Student government complained that allowing this book talk would be “violent towards the experience of Black people in the Tulane community,” and the university agreed to postpone the event.⁸ Incidents like these have earned Tulane a reputation for imposing undue restrictions upon its students’ free speech. The Foundation for Individual Rights in Education (FIRE) has ranked Tulane as a “red light university” for its policies that “clearly and substantially” restrict freedom of speech. *School Spotlight: Tulane University*, FIRE, <https://bit.ly/3jbOHls>.

Like many institutions, Tulane’s commitment to free expression is being tested. For example, last July, Tulane received a list of demands from a student activist group, including demands for a “zero tolerance policy for any racist, sexist, misogynistic, or bigoted language or actions from students, faculty, or staff.” *Tulane Black Student Union Demands and Expectations for Tulane University*, Tulane Black Student Union (July 2020), <https://bit.ly/2Yxi9ub>. It is more important now than ever that Tulane reaffirm its commitment to freedom of speech on its campus by implementing real change in its policies that stifle that freedom.

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

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

⁴ *Demonstration Guidelines*, Tulane University Campus Services (Mar. 2017), <https://bit.ly/3aUbCPd>.

⁵ *Social Media Guidelines*, Tulane University Communications & Marketing (Aug. 17, 2020), <https://bit.ly/3hrD4pQ>.

⁶ See Maria Copeland, *Tulane Cancels Event About Book Condemning White Supremacy Amid Student Backlash*, Campus Reform (Aug. 6, 2020), <https://bit.ly/3b5xE1H>.

⁷ See Walter Isaacson, *‘Life of a Klansman’ Tells Ugly Truths About America, Past and Present*, NEW YORK TIMES (Aug. 4, 2020), <https://nyti.ms/2QiBL0G>.

⁸ Robby Soave, *Tulane Canceled a Talk by the Author of an Acclaimed Anti-Racism Book After Students Said the Event Was ‘Violent,’* REASON (Aug. 6, 2020), <https://bit.ly/3hDj8QQ>.

A. Tulane Should Amend Its Technology Services Acceptable Use Policies and Social Media Guidelines.

Tulane has adopted policies and guidelines that govern students' use of campus technology⁹ and even their personal social media accounts.¹⁰ Under the "Acceptable Use Policy" for technology, students are required to "communicate only in ways that are kind and respectful ... [and] to not intentionally access, transmit, copy, or create material that violates applicable laws or the University's code of conduct (such as messages that are pornographic, threatening, rude, discriminatory, or meant to harass)."¹¹ Similarly, under the "Social Media Guidelines," students are instructed not to "post material that is profane, libelous, obscene, threatening, abusive, harassing, hateful, defamatory or embarrassing to anyone."¹² The guidelines continue: "Posts that would be considered 'hate speech' or that incite or endorse violence may result in an investigation by the Office of Student Conduct and/or the Office of Human Resources & Institutional Equity."¹³

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).

These policies are precisely the type of content-based regulation that have no business on a college campus. They afford the university broad discretion to discipline student speech that is deemed "abusive," "rude," "discriminatory" or "hateful" based on any number of characteristics. Examples of speech that could be chilled by such policies are easy to see. A student urging a tougher immigration policy, including building a wall along the southern border, may be interpreted as making "discriminatory" statements on the basis of ethnicity and national origin. A student expressing his views on traditional marriage may be interpreted as making "hateful" statements on the basis of sexual orientation. A student advocating for one side or the other of the Israeli-Palestinian conflict may be interpreted as making

⁹ *Acceptable Use Policy*, Tulane University, <https://bit.ly/3ldZEVc>.

¹⁰ *Social Media Guidelines*, Tulane University Communications & Marketing (Aug. 17, 2020), <https://bit.ly/3hrD4pQ>.

¹¹ *Acceptable Use Policy*, Tulane University, <https://bit.ly/3ldZEVc>

¹² *Social Media Guidelines*, Tulane University Communications & Marketing (Aug. 17, 2020), <https://bit.ly/3hrD4pQ>.

¹³ *Id.*

“harass[ing]” statements on the basis of religion or national origin. The possibilities for suppressing such speech are nearly limitless. Tulane should, at a minimum, amend these policies to eliminate the threat of disciplinary action based on the content of student speech.

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

In its Code of Student Conduct, Tulane provides of list of actions that “violate Tulane University standards of conduct” that can result in student discipline.¹⁴ These forbidden actions include “[h]arassment, intimidation, or cyberbullying,” and “[d]iscrimination or harassment in employment practices or educational programs/activities on the basis of race, color, sex, religion, national origin, age, disability, genetic information, sexual orientation, gender identity, gender expression, pregnancy, marital status, military status, veteran status, or any other status or classification protected by federal, state or local law.”¹⁵

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).

Tulane’s “harassment” prohibition suffers from these same flaws. It is expansive, 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 “intimidati[ng]” or “bullying.” 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). Tulane should revise its “harassment” policy to ensure that students are free to express themselves without fear of punishment.

¹⁴ *Code of Student Conduct*, Tulane University, at 19 (2020-21), <https://bit.ly/3gnEAb9>.

¹⁵ *Id.* at 20, 21.

C. Tulane Should Amend Its Demonstration Guidelines

Tulane’s Demonstration Guidelines mandate that “[d]emonstrations must be registered at least two business days prior to the demonstration,” and they urge students to “register the demonstration as early as possible.”¹⁶ Following registration, Tulane maintains the discretion “to schedule a meeting to review demonstration details, needs, and guidelines and to finalize approval of the demonstration.”¹⁷ Tulane also permits demonstrations in only three locations, which together comprise a fraction of the campus.¹⁸ If students don’t register demonstrations at least two days in advance—or they choose to demonstrate outside Tulane’s narrowly prescribed protest zones—they can face “individual disciplinary action.”¹⁹

Students should have the right to demonstrate and speak freely without pre-approval from authorities. In particular, students should be “free to stimulate [their] audience with spontaneous and emotional appeals.” *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). Moreover, making student demonstrations “contingent upon the uncontrolled will of an official, as by requiring a permit or license which may be granted or withheld in the discretion of such official,” presents the opportunity for censorship. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969).

Tulane’s Demonstration Guidelines contradict these basic principles of free speech. The Guidelines stifle political speech by preventing students from demonstrating spontaneously in response to the news of the day. Requiring students to submit paperwork, obtain approval from authorities, and wait days before demonstrating undeniably diminishes core political speech. In addition, by reserving to itself the discretion to deny a demonstration, Tulane maintains the right to deny demonstration requests based on the content of the demonstration. And even when the requests are approved, Students must remain in a small area of campus. Students deserve better.

* * *

Tulane may believe it is doing its students a service by preventing them from speech that it deems “harassing,” “intimidat[ing],” “rude,” or “embarrassing.” 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

¹⁶ See *Demonstration Guidelines*, Tulane University Campus Services (Mar. 2017), <https://bit.ly/3aUbCPd>.

¹⁷ *Id.*

¹⁸ *Id.*


¹⁹ *Id.*

“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, hurtful, or embarrassing. 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 the speaker.” That sentiment is nowhere truer than on the campuses of American colleges and universities.

Tulane has long claimed to promote free speech and expression on its campus. But, as its history and current policies show, Tulane has not lived up to those lofty ideals. Tulane should amend its Anti-Harassment Policy and its Technology Services Acceptable Use Policies, Social Media Guidelines, and Demonstration Guidelines to show students, potential students, and alumni that their free speech rights will be protected on Tulane’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 "Mark King". The signature is fluid and cursive, with a large, stylized "K" and "G".

President
Speech First

Enclosure