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Dean of Students
University of Maine
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Re: Unconstitutional First Amendment Policy on Campus: Bias Reporting System

Dear Vice President Dana:

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

Factual Background

On its website, the University of Maine maintains a webpage called "UMaine Bias Response Team."¹ The webpage states:

The University considers acts of hate and bias unacceptable and antithetical to its commitment to an inclusive and respectful community.

¹ <https://umaine.edu/biasreporting/>.

Through the UMaine Bias Response Team and its reporting system, we review bias-related incidents. Reporting an incident will lead to an outreach to those directly impacted and may also lead to an investigation.²

The University defines bias as “intentional or unintentional conduct that discriminates, stereotypes, excludes, harasses, or harms anyone in our community based on race, color, religion, sex, sexual orientation, including transgender status and gender expression, national origin, citizenship status, age, disability, or veteran status,” and it says that anyone can report a bias incident, including campus visitors.³ The University further explains that “biased statements” negatively impact the University. As a result, it maintains a Bias Response Team to “address the impacts of bias-related incidents, behaviors and actions.”⁴

Although the University acknowledges that some bias incidents “may be constitutionally protected speech and thus not subject to the university disciplinary process or a formal investigation,” it goes on to say that “the Bias Response Team will still address the negative impact of bias and hate-motivated behavior on the campus community” and that the Team will “assur[e] that institutional values are broadly known and reinforced.”⁵

The University urges students, staff, and visitors to report “any possible bias-related incidents or hate crimes” through its online reporting form.⁶ Reports go to the Title IX Coordinator and Senior Associate Dean of Students, the Director of Community Standards, Rights, and Responsibilities, and the Director of the Office of Diversity and Inclusion. Students can accuse each other anonymously of perceived bias based on gender, race, sexual orientation, and gender identity, and even socioeconomic class and culture, among other categories.⁷ Complainants can even select a specific member of the Bias Response Team to review the report.

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.

² *Id.*

³ <https://umaine.edu/biasreporting/faq/>.

⁴ <https://umaine.edu/biasreporting/bias-response-team/>.

⁵ *Id.*

⁶ https://cm.maxient.com/reportingform.php?UnivofMaineSystem&layout_id=39.

⁷ Compare *id.* with <https://umaine.edu/biasreporting/faq/>.

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

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

I. The University of Maine’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 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

As the University of Maine admits on its Freedom of Speech webpage, “The trouble with regulating hate speech is in the very attempt to define ‘hate speech’ and how that type of speech would be regulated in practice.”¹⁷ But the bias reporting system runs headfirst into that problem when it broadly define bias as “intentional or unintentional conduct that discriminates, *stereotypes*, excludes, harasses, or *harms* anyone in our community[.]”¹⁸ Although colleges have a duty to prevent unlawful discrimination and harassment, this definition goes too far by banning students from employing stereotypes or “harming” others. The University fails to define what it means by those terms. In this way, students are forced to hazard guesses about whether a joke is stereotypical or could “harm” a classmate, 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. Given the University’s vague definition of bias, 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, that does not mean a university can shield students from it by giving them a mechanism through which to report it. Through its reporting system, the University forces students to guess whether their speech could

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 *Brandenberg 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. *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).

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).

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://umaine.edu/communitystandards/freedom-of-speech-faqs/#hatespeech>.

¹⁸ <https://umaine.edu/biasreporting/faq/>; https://cm.maxient.com/reportingform.php?UnivofMaineSystem&layout_id=39.

be perceived as biased and reported to authorities. The University's definition of bias is therefore vague, overbroad, and unconstitutional.

II. The University of Maine'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.

Recent cases make clear that bias response teams and 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 bias incidents 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 Maine'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. One thing is clear: bias is "unacceptable."²³ Although only a "limited number of University officials" are notified, they are officials with significant authority to act on campus. And although the University acknowledges that constitutionally protected speech may not be punishable, it still vows to "address the negative impact of bias and hate-motivated behavior on the campus community" and "assur[e] that institutional values are broadly known and reinforced."²⁴ Nowhere does the University indicate whether students who are reported will be required to meet with the Bias Response Team, or be forced to comply with a lengthy investigation,

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).

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://umaine.edu/biasreporting/>.

²⁴ <https://umaine.edu/biasreporting/bias-response-team/>.

or take some action to remedy the perceived harm. In fact, “the 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.’”²⁵ Thus, any request to meet with the Bias Response Team will chill speech on campus. In these ways, the bias reporting system imposes an unconstitutional chilling effect on speech.

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

Members of the Bias Response Team at the University of Maine 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.²⁶ Viewpoint-based restrictions are never constitutional.²⁷ When a university bans discussion of certain topics, the restriction is considered content-based.²⁸ Content-based restrictions are presumptively unconstitutional.²⁹

The University’s bias reporting system and related policies give its Bias Response Team unbridled discretion to discriminate against content and viewpoint.³⁰ Although the team is made up of three administrators, the reporting form allows complainants to select a single administrator to review the report. Thus, there is nothing to prevent a complainant from selecting the administrator who she thinks is most likely to act on a report of bias. The bias reporting system gives just a single official broad discretion to insert his own views by assessing whether *he* considers something to be biased. There are no guidelines in place to curb that discretion. The Bias Response Team thus has authority to engage in unconstitutional viewpoint and content discrimination when it receives reports of bias.

The University appears to accept on its website that students cannot be punished for protected speech.³¹ But if that is true, why does the reporting system exist at all? The answer can only be that the bias reporting system is intended to silence students whose views do not conform to the masses through fear. By its very nature, the bias reporting system is intended to deter biased speech and prevent it from occurring again by “assuring that institutional values are broadly known and reinforced.”³² In this way, bias reporting systems inevitably infringe on students’ First Amendment rights because they create a chilling effect and allow university officials to take action to silence speech they disagree with.

²⁵ *Schlissel*, 939 F.3d at 765.

²⁶ *Rosenberger*, 515 U.S. at 820.

²⁷ *Id.*

²⁸ *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).

²⁹ *See, e.g., Papish*, 410 U.S. at 670.

³⁰ *See Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

³¹ <https://umaine.edu/biasreporting/bias-response-team/>.

³² *Id.*

Demand

“[C]olleges and universities are not enclaves immune from the sweep of the First Amendment.”³³ 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 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 and bias response team altogether from campus, as they chill expression rather than invite it. But at a minimum, the University must clarify that speech is protected and cannot be subject to any investigation or punishment. Only once on its website does the University make this suggestion, but it fails to explain what kind of speech is protected or what kinds of protections are afforded to it. The University should, at a minimum, link to its Freedom of Speech webpage in several places on its bias reporting system webpages. It must clarify that *any* constitutionally protected speech, including hate speech and offensive speech, cannot and will not be investigated or punished. And it must explain that any meeting requests with the Bias Response Team that stem from 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 Maine must do its part to ensure this freedom for *all* its students.

Yours in Freedom,

s/ Cece O’Leary

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³³ *Healy*, 408 U.S. at 180.