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VIA EMAIL

Dr. Patricia A. Whitely
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University of Miami
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Dr. Ryan C. Holmes
Associate Vice President for Student Affairs
Dean of Students
University of Miami
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Re: Unconstitutional First and Fourth Amendment Violations: Reporting COVID-19
Concerns about Others

Dear Dr. Whitely and Dr. Holmes:

We are writing to you on behalf of concerned citizens regarding the University of Miami's Canes Care for Canes COVID-19 Reporting Form (Reporting Form or Form). These citizens fear that this Form not only has the potential to violate students' right of privacy, but could also be unconstitutionally vague and a means to censor student speech. Thus, the citizens seek clarification about the Reporting Form and the University's plans to enforce the reports it receives.

Southeastern Legal Foundation (SLF) is a nonprofit public interest law firm and policy center dedicated to advocating limited government, protecting American freedom, and defending individual liberties. Through our 1A Project, we educate the public about students' First Amendment rights on college campuses. This letter seeks to inform the University about the dangerous, unconstitutional precedent this reporting scheme will set because it could be used to stifle free speech and to violate individual privacy.

Factual Background

As of this date, the University's Student Health Service COVID-19 webpage provides a link to "report concerns about unsafe behaviors of student groups or individual students."¹ That link directs students to a Reporting Form where they can provide the name, contact information, and a description of any concerns they have regarding any student's behavior or symptoms related

¹ <https://studenthealth.studentaffairs.miami.edu/covid-19/index.html>

to COVID-19.² The Form also asks which organizations the reported student is involved in. In a recent press release to students, the University warned that, whether on or off campus, “events simply cannot happen.”³ The University then went on to declare, “If you are aware of or witness unsafe behavior, we encourage you to submit a report—anonously if you wish—to our ’Canes Care for ’Canes team.” Finally, the University threatens students with a “zero-tolerance policy,” including suspension or the removal of privileges, if students fail to comply with University guidelines.

Analysis

1. Potential First Amendment Violations

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.”⁴ Indeed, freedom of speech and academic inquiry are “vital” on college campuses, because only through thoughtful debate and discourse can real education occur.⁵ Colleges have a duty to protect student health and safety, especially during uncertain times like these. However, even in unprecedented times, students’ First Amendment rights remain unchanged. That means colleges and universities cannot engage in viewpoint or content-based discrimination, cannot enact vague and overbroad policies, and cannot chill student expression.

The University of Miami’s Reporting Form could be invoked to infringe on student speech. First, the Form appears to be vague and overbroad. A policy violates the Constitution when it is so broad that it infringes on constitutionally protected activity. The category of students who can be reported in the Form is boundless. Under these terms, a friend of a friend of a friend who has been exposed to a student who sneezes can be reported. Moreover, the Form is vague. Students have no way of knowing what will be reported and what the school will do when a symptom is reported. For instance, if a student complains of a headache, will she be subjected to an investigation? Will the school ask her to leave campus for two weeks? Will her roommate meet the same fate? What about her peer who sits on the other side of the lecture hall from her? Additionally, the University warns against “unsafe behavior” without defining what that means. In this way, the Form is unconstitutionally vague and overbroad because it provides no clear guidelines for students, both who file reports and who are the subjects of the reports.

As we’ve seen these past few months, “cancel culture” is a pandemic itself that plagues social media. One need only utter a sentiment 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 college campuses. With a Reporting Form at students’ fingertips, students wishing to prevent a controversial speaker from visiting campus or to stop a student organization from garnering

² https://cm.maxient.com/reportingform.php?UnivofMiami&layout_id=2.

³ <https://messages.miami.edu/messages/2020/08/08-14-20-conduct-of-off-campus-students.html>.

⁴ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

⁵ *Healy v. James*, 408 U.S. 169, 180 (1972).

interest in their cause can simply report members of that organization as symptomatic. This is especially true where the University asks which clubs and organizations a reported student is involved in. Without stricter reporting guidelines and limits, it appears that such events could be shut down entirely with the press of a button. This may sound unlikely, but then again, who would have predicted 2020 to turn out as it has?

Finally, 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.”⁶ Any action taken by university authorities that has a chilling effect on student speech is unconstitutional.⁷ 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. At the University of Miami, the chilling effect of the Reporting Form is twofold. First, it threatens official discipline if students are found to be in violation of University “policies and guidelines.” Next, the Reporting Form places the authority to shut down events in the hands of *all* students because they can simply report student organizations for COVID symptoms to detract from planned speech activities. This twofold chilling effect will no doubt deter students from advertising and hosting potentially controversial speech activities; investing time and money in these gatherings simply will not be worth the risk of facing an official investigation and suspension.

2. Potential Fourth Amendment Violations

In addition to violating students’ First Amendment rights, the Reporting Form could also violate their Fourth Amendment rights. Under the Fourth Amendment, individuals cannot be subjected to unreasonable searches and seizures. The Supreme Court has even considered that right in the context of cheek swabs.⁸ The Court has held that a criminal arrested and charged with a serious crime can be subjected to a DNA cheek swab, so long as the charges are supported by probable cause, meaning there must be sufficient likelihood that the crime occurred.⁹ However, a swab is unconstitutional if there is no probable cause, the charge is not criminal, or if the DNA is used to gather medical information about the criminal.¹⁰

Will the University of Miami, upon receiving a report of a symptomatic student or an off-campus gathering, subject those students to an invasive COVID-19 swab? Surely the University understands that this action would violate the Fourth Amendment. However, the question remains: how exactly does the University plan to investigate and enforce reports made through the Form?

⁶ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

⁷ *Id.*

⁸ *Maryland v. King*, 569 U.S. 435 (2013).

⁹ *Id.* at 465.

¹⁰ *Id.* at 464, 465.

Request

SLF respectfully requests that you provide clarification regarding the Reporting Form. Specifically, SLF requests that you clarify what exactly the University deems “unsafe behavior,” how the University plans to investigate reports made through the Form, and when and how the University will impose penalties on students who are reported for “unsafe behavior.”

Yours in Freedom,



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