



SOUTHEASTERN LEGAL FOUNDATION
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August 17, 2020

VIA EMAIL

Dr. Anne Reber
Dean of Student Life
Texas A&M University
a-reber@tamu.edu

Re: Unconstitutional First and Fourth Amendment Violations: Reporting COVID-19
Concerns about Others

Dear Dr. Reber:

We are writing to you on behalf of concerned citizens regarding the Texas A&M 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 Texas A&M'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 Texas A&M 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 Texas A&M COVID-19 webpage provides a link to a COVID-19 Report Form.¹ That link directs students to a Reporting Form where they can provide the name, symptoms, and contact information for any student they believe: (1) tested positive for COVID; (2) may have COVID; (3) was exposed to someone who tested positive for COVID; or (4)

¹ <https://www.tamu.edu/coronavirus/index.html>.

“unknown.”² Later, the Form asks whether a student was in contact with a positive or suspected COVID case, and it allows students to answer yes, no, or “unknown.” Finally, the Form asks for a list of all individuals “in possible close contact starting from 48 hours before symptoms started.”

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.”³ Indeed, freedom of speech and academic inquiry are “vital” on college campuses, because only through thoughtful debate and discourse can real education occur.⁴ 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.

Whereas Texas A&M policy does not appear to infringe on student speech outright, the Reporting Form could be invoked to do so indirectly. For example, 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 Reporting 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? In this way, the Reporting Form is unconstitutionally vague and overbroad because it provides no clear guidelines for students, both who file reports and who are the subject 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 interest in their cause can simply report members of that organization as symptomatic. 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?

² https://redcap.tamhsc.edu/surveys/?s=N38DRD4EMK&_ga=2.151042621.561894599.1597432053-401878094.1597432053.

³ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

⁴ *Healy v. James*, 408 U.S. 169, 180 (1972).

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.”⁵ Any action taken by university authorities that has a chilling effect on student speech is unconstitutional.⁶ 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 Texas A&M, 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 will no doubt deter students from advertising and hosting potentially controversial events; investing time and money in these events simply will not be worth the risk of facing penalties like two-week quarantine or investigations by health services.

2. Potential Fourth Amendment Violations

In addition to violating students’ First Amendment rights, the Texas A&M Form could also violate their Fourth Amendment rights. Under the Fourth Amendment, individuals cannot be subject to unreasonable searches and seizures. The Supreme Court has even considered that right in the context of cheek swabs.⁷ 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.⁸ 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.⁹

Will Texas A&M, upon receiving a report of a symptomatic student, subject that student to an invasive COVID-19 swab? Surely the university understands that this action would violate the Fourth Amendment. However, the question remains: how does Texas A&M plan to investigate and enforce reports made through the Reporting Form?

Request

SLF respectfully requests that you provide clarification regarding the Reporting Form. Specifically, SLF requests that you clarify whether and how Texas A&M plans to investigate reports made through the Form, and whether and how Texas A&M plans to enforce measures against students who are reported as having COVID symptoms.

⁵ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

⁶ *Id.*

⁷ *Maryland v. King*, 569 U.S. 435 (2013).

⁸ *Id.* at 465.

⁹ *Id.* at 464, 465.

Texas A&M Dean of Student Life
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Yours in Freedom,

A handwritten signature in black ink that reads "Kimberly S. Hermann". The signature is written in a cursive, flowing style.

Kimberly S. Hermann
General Counsel
Southeastern Legal Foundation

CC: COVID-19 Operations Center and Reporting Committee (COVID19Process@tamu.edu)
Student Health Services (info@shs.tamu.edu)
Lisa Boyd-Devers (lboyddevers@tamu.edu)