August 26, 2020

VIA EMAIL
Dr. Danielle McDonald
Dean of Students
University of South Florida
dmcdonald@usf.edu

Re: Unconstitutional First and Fourth Amendment Violations: Campus COVID-19 Policies

Dear Dr. McDonald:

We are writing to you on behalf of concerned citizens regarding certain COVID-19 policies at the University of South Florida (USF). These citizens fear that the COVID policies not only have the potential to violate students’ right of privacy, but are also unconstitutionally vague and will be used to censor student speech. Thus, the citizens seek clarification about the policies and the University’s plans to enforce them.

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 its COVID policies will set because it could be used to stifle free speech and to violate individual privacy.

Factual Background

As of this date, the University has several policies in place regarding COVID-19. First, the University’s Returning to Campus webpage provides information about testing for the virus. The University states that students will be randomly selected to undergo a COVID test. USF goes on to say that students can refuse random testing, but may be asked to self-isolate for two weeks or face discipline.

The Returning to Campus webpage also provides information about athletics and extracurriculars. The University states that student organizations “will need to submit plans for how they will share responsibility for maintaining a healthy campus community” before being permitted to return to face-to-face meetings. Similarly, the USF Student Guidance for Fall 2020 (Student Guidance) states, “In the current opening phase, organizations will only meet virtually.” However, the Student Guidance also states that intramural sports “will include emphasis on groups less than 10 for expanded outdoor activities and minimal indoor activities,” and sports clubs “will be assessed per sport.” The University requires intramurals and sports clubs to adhere to physical distancing and other COVID-related guidelines.

Finally, the University encourages students to report “any events or students compromising the safety of our community” to the Student Conduct and Ethical Development Office (Student Conduct Office). The Student Conduct Office provides a Referral Form where students can give the name, contact information, and a description of any concerns they have regarding any student’s behavior. The Form asks for a description of the incident and a list of all individuals involved; it does not even ask if a reported student has tested positive for COVID or has any COVID symptoms. The Student Conduct Office states that when a referral is made, a student will be notified and will have “an opportunity for a meeting.” But if the student refuses to attend the meeting, “the Conduct Officer reserves the right to have an In Absentia Review, at which point a disposition letter will be sent to a student” informing the student of the charges against him or her.

Analysis

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

A. USF’s referral policy is unconstitutionally vague and overbroad.

A policy violates the Constitution when it is so broad that it infringes on constitutionally protected activity. At USF, the category of students who can be referred to the Student Conduct Office is not clearly defined.

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5 www.facebook.com/USFDeanofStudents/posts/10159361746757788.
9 Healy v. James, 408 U.S. 169, 180 (1972).
Office for “compromising the safety of [the] community” is boundless. Through the Referral Form, a friend of a friend of a friend who has been exposed to a student who sneezes can be reported.

Similarly, a law or policy is unconstitutionally vague when it establishes a requirement or punishment without specifying what is required or what conduct is punishable. Students cannot be expected to comply with a vague school policy because they have no way of knowing exactly what is required or prohibited. USF fails to define what it means to compromise the safety of the community. Students have no way of predicting what conduct will be reported to the Student Conduct Office and what action the Office will take. 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 University’s referral policy 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.

B. Through its extracurricular policy, USF engages in content-based discrimination.

When a public university bans discussion of certain topics or prohibits a certain speech activity from occurring, the restriction is considered content-based. Unless a university can demonstrate a compelling government interest, content-based restrictions cannot survive judicial review. A university must show that its speech restriction is content-neutral and only restricts the time, place, or manner of speech. Furthermore, the United States Supreme Court has held that schools should adhere “to a rule of viewpoint neutrality” when it comes to student organizations, such as dispersing student activity fees equally among the various groups.10

At USF, like at all universities, students want to engage in an assortment of activities including sports, volunteer organizations, Greek life, and leadership opportunities. And like all universities, USF has no doubt faced difficult decisions regarding these activities in light of COVID-19. However, even in a global pandemic, a university must treat all student activities and organizations neutrally.

A university can only regulate the time, place, and manner of student activities, and it must apply these restrictions to all students equally. Thus, while it may be allowable for USF to ban all student activities from occurring inside or from taking place less than six feet apart, it is unlawful to ban some student activities while allowing others to move forward subject to COVID compliance. By allowing sports clubs and intramurals to participate in activities of less than ten people subject to social distancing, but denying that right to other student organizations, USF is effectively choosing one set of activities (sports) over the others (student organizations, volunteer and leadership opportunities, and so on). In doing so, USF engages in content-based discrimination in violation of students’ First Amendment rights.

C. USF’s referral policy will have 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.”\(^\text{11}\) Any action taken by university authorities that has a chilling effect on student speech is unconstitutional.\(^\text{12}\) 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.

The USF referral policy will have a chilling effect on student speech in a number of ways. First, the Referral Form places the authority to shut down activities in the hands of all students because they can simply report their peers for engaging in unsafe behavior. For example, the Student Guidance provides that lounge areas and study rooms will be open on campus with physical distancing in place. If a student sees the leaders of a student organization—who also happen to be study partners—gathered in a study room, that student could report the leaders for violating the student organization policy because those leaders are technically meeting face-to-face. Thus, student leaders will choose to avoid spending time together so that they are not reported to the Student Conduct Office, even if they only want to study together.

Next, the Student Conduct Office suggests that reported students have the option of meeting with administrators about the complaints made against them. But this option fails to give students a real choice; if a student refuses to participate in a meeting or investigation, the Conduct Officer will simply move forward and make a subjective assessment about whether to discipline the student.\(^\text{13}\) This chilling effect will no doubt deter students from attempting to meet with their peers, encourage students to join their organizations, or host potentially controversial events—either in-person or virtual. Investing time and money in their organization simply will not be worth the risk of facing an official investigation and suspension for “compromising” the USF community.

As we’ve seen these past few months, “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 college campuses. With a Referral 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 for engaging in unsafe behavior. Without stricter reporting guidelines and limits, it appears that free speech activities—virtual or face-to-

\(^{12}\) Id.
face—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?

II. Potential Fourth Amendment Violations

In addition to violating students’ First Amendment rights, the USF COVID policies will also violate their Fourth Amendment rights. Under the Fourth Amendment, individuals cannot be subjected to unreasonable searches and seizures. A search or seizure is unreasonable when the government lacks probable cause, based on a sufficient likelihood that a crime occurred. Even the lower standard of reasonable suspicion, used to justify random drug searches of high school students and Terry stops, requires “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”

The Supreme Court has addressed cheek swabs in the Fourth Amendment context. It held that a DNA cheek swab is only constitutional when a criminal has been arrested and charged with a serious crime supported by probable cause. The Court held that in all other circumstances—such as when there is no probable cause, the charge is not criminal, or the government uses the DNA to gather medical information about the criminal—a cheek swab is unconstitutional.

At USF, students are subject to random COVID tests. The University warns that if a student refuses, he could face discipline or forced quarantine. This is a direct infringement on students’ Fourth Amendment rights against unreasonable searches and seizures. Police cannot even impose a cheek swab on criminals absent a strong likelihood that a crime occurred; surely the University recognizes that the Fourth Amendment prohibits COVID swabs on students at random. USF also cannot justify these measures based on a reasonable suspicion standard. Short of a student refusing to wear a mask in the halls while simultaneously showing COVID symptoms, the University cannot point to facts and inferences that reasonably warrant stopping a student on campus—much less swabbing a student at random.

Finally, the University fails to inform students about how it will investigate students referred to the school for unsafe behavior. In addition to random testing, will USF subject reported students to an invasive COVID-19 swab? Will a student who sneezes be forced to undergo an invasive COVID test?

Request

SLF recognizes that colleges and universities must navigate these unprecedented times with student safety as a priority. However, USF’s policies leave citizens questioning what conduct is punishable, why some groups can gather under social distancing guidelines but not others, and when and how students will be forced to undergo investigations or COVID tests. SLF respectfully

14 Terry v. Ohio, 392 U.S. 1, 21 (1968); N.J. v. T. L. O., 469 U.S. 325 (1985) (finding that discovering a high school student smoking in a bathroom provided reasonable suspicion to search her purse for cigarettes).
16 Id. at 465.
17 Id. at 464, 465.
requests that you provide clarification regarding these policies. Specifically, SLF requests that you clarify what exactly the University deems “compromising” behavior, how the University plans to investigate reports made through the Referral Form, and when and how the University will impose penalties on students who are reported for compromising behavior or who refuse to undergo an investigation or COVID test. Finally, SLF requests that the University permit all students to engage in free speech activities, subject to reasonable time, place, and manner restrictions. It is especially during times of uncertainty that students must be able to gather and engage in discourse without fear of reprisal. We hope the University agrees.

Yours in Freedom,

Kimberly S. Hermann
General Counsel
Southeastern Legal Foundation

CC: Vynique Andrews (vynique@usf.edu)
Dean of Students Office (deanofstudents@usf.edu)