ALLIANCE DEFENDING
FREEDOM
FOR FAITH. FOR JUSTICE

October 14, 2015

Via U.S. Mail & E-mail
Ms. Kathy Hamilton
Board Chairman
College of DuPage
425 Fawell Boulevard
Glen Ellyn, IL 60137

Re: Violation of Student's First Amendment Rights

Dear Ms. Hamilton,

Alliance Defending Freedom ("ADF") represents Joseph Enders regarding the College of DuPage's (the "College") violation of Mr. Enders' First Amendment rights.

By way of introduction, ADF is an alliance-building, non-profit legal organization that advocates for the right of people to live out their faith freely. We are dedicated to ensuring that students and faculty have the ability to freely exercise their First Amendment rights on public university campuses without fear of censorship or punishment. While we often litigate to defend these freedoms, today we write to urge you to revise the College's unconstitutional speech policy.

Mr. Enders is a political science major at the College. He is also in the process of forming a Turning Point USA ("TPUSA") student chapter at the College. TPUSA's mission is to promote the principles of fiscal responsibility, free markets, and limited government. On September 18, 2015, as part of his efforts to begin a TPUSA chapter, Mr. Enders was on the public sidewalk outside of the Culinary and Hospitality Center talking with students about their potential interest in participating in the soon-to-be-formed TPUSA chapter and handing out pocket copies of the United States Constitution. Mr. Enders was accompanied by Nathan Harris, a student at the College, and Kara Hamilton, a TPUSA representative. After approximately 15 minutes, the three were approached by a campus police officer. The officer informed them that they were violating College policy and ordered them to leave. The officer stated that they were required to have a permit from the Student Life office before they were allowed to stand on a public sidewalk and talk with other students about important issues, such as their constitutional rights. After a brief conversation, Mr. Enders and the others complied with the officer's orders and began walking towards the Student Life office. Mr. Enders was carrying an American flag. The officer instructed Mr. Enders that he was not allowed to bring an American flag into the Student Life building. Mr. Enders complied with the officer's order and took the American flag to his vehicle.

A majority of the confrontation was caught on video tape. Here is a transcript of a portion of the conversation:

> **Officer**: You can't have everybody out here doing this. Ok. Otherwise, you'd have stuff lined up all along here everybody having a different view and a different point. So, you can't do that.
>
> **Kara**: So, like free speech?
>
> **Officer**: It's not free speech, Ma'am. Nobody is stopping you from free speech. But, you can't solicit out here and what basically you are, you are trying . . .
>
> **Joe**: What are we soliciting?
>
> **Officer**: You are soliciting your opinions. Okay and that's . . . You need to go get a permit and just go inside.
>
> **Joe**: Is that a commodity in any way? Is speech a commodity?
>
> **Officer**: Well, you are handing out pamphlets and stuff like that. That's exactly what it would be.
>
> **Nate**: What's the permit for exactly?
>
> **Officer**: Why don't you go talk to the student life. But, you can't do it out here. Otherwise, I am going to have to lock you up.

It is difficult to watch the video or read the transcript without coming away shocked at the blatant violations of Mr. Enders' constitutional rights. The officer told Mr. Enders, in no uncertain terms, that he was forbidden from "soliciting [his] opinions"[1] on the College's campus without a permit, and that he would be locked up if he continued to do so. As if that were not enough, the officer then instructed Mr. Enders that he was not allowed to bring an American flag into the Student Life offices. The First Amendment does not tolerate this blatant suppression of speech.

On September 28, ten days after being threatened with arrest for exercising his First Amendment rights without a permit, Mr. Enders attended the Board of Trustees meeting. Mr. Enders informed the Board about the incident and requested that the Board revise its policy so that no other students' First Amendment rights would be violated. To its credit, it is my understanding that the Board indicated that it would be reviewing and revising the College's policies to ensure that they no longer restrict the First Amendment rights of students on campus.

Mr. Enders is committed to ensuring that the College revises its policy so that no other student is ever again threatened with being arrested and locked up for simply exercising his or her freedom of speech on campus. Mr. Enders has retained

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[1] To be clear, Mr. Enders' activities do not constitute solicitation. *See Lela v. Board of Trustees of Community College District No. 516*, (N.D. Ill. January 27, 2015) (holding that the handing out of leaflets discussing the morality of homosexuality is not solicitation and did not violate the college's policy against solicitation).

ADF to make sure that College follows through with its stated intention to revise its policies. To that end, I am hereby offering to assist the College, free of charge, in reviewing and revising its speech policies to ensure that they comply with the College's obligations under the First Amendment. ADF has assisted numerous colleges and universities throughout the country in drafting such policies.

The College's current policy is unconstitutional because it requires prior permission before students are allowed to exercise their First Amendment rights, and it grants unfettered discretion to College officials in determining whether to grant permission to speak. The College's revised policy must recognize that its campus is generally a public forum for students. The historic view of the university as a "voluntary and spontaneous assemblage . . . for students to speak and to write and to learn" has persisted with respect to the modern American university.[2] "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"[3] Indeed, the "campus of a public university, at least for its students, possesses many of the characteristics of a public forum."[4]

Federal courts across the country have found that the outdoor areas of a university campus are public fora.[5] For example, in *Roberts v. Haragan*, the court found that to the extent that Texas Tech's campus has "park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University's students, irrespective of whether the University has so designated them or not."[6] The court went even further and found that these areas were "the 'irreducible public forums' on campus," and the university was free to designate further areas for student expression, but could not designate less.[7] Similarly, in *Burbridge v. Sampson*, students in the South Orange County Community College District challenged restrictive policies pertaining to student speech in outdoor areas of campus. The college had opened its facilities generally for speech, so the court

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[2] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995).
[3] *Healy v. James*, 408 U.S. 169, 180 (1972).
[4] *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981).
[5] *See OSU Student Alliance v. Ray*, 699 F.3d 1053, 1062–63 (9th Cir. 2012) (holding Oregon State University campus is designated public forum for students); *Flint v. Dennison*, 488 F.3d 816, 831 (9th Cir. 2007) (noting campus is a public forum); *Bowman v. White*, 444 F.3d 967, 979 (8th Cir. 2006) (finding outdoor areas of University of Arkansas are designated public forums); *Justice for All v. Faulkner*, 410 F.3d 760, 768–69 (5th Cir. 2005) (finding University of Texas is a designated forum for students); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, 2012 WL 3636932 (S.D. Ohio Aug. 22, 2012) (finding outdoor areas of University of Cincinnati are designated public fora); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 861 (N.D. Tex. 2004) (holding park areas, sidewalks, streets, and common areas of Texas Tech University are traditional public forums for students); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 582 (S.D. Tex. 2003) (finding campus is a public forum for students); *Khademi v. S. Orange Cnty. Cmty. Coll. Dist.*, 194 F. Supp. 2d 1011, 1024 (C.D. Cal. 2002) (finding the generally available areas of a community college campus are public fora because they are open to the public); *Burbridge v. Sampson*, 74 F. Supp. 2d 940 (C.D. Cal. 1999) (finding a community college campus to be a public forum because it is open to the public).
[6] *Roberts*, 346 F. Supp. 2d at 861.
[7] *Id.* at 862.

had "no doubt" that they had been opened to the public and analyzed the restrictions using strict scrutiny.[8]

The College's current policy requiring permission before a student speaks constitutes an unconstitutional prior restraint. Prior restraints on speech are disfavored and carry a heavy presumption of unconstitutionality because they censor speech before it occurs.[9] This presumption is "justified by the fact that 'prior restraints on speech . . . are the most serious and least tolerable infringement on First Amendment rights.'"[10] "[R]easonable time, place, [and] manner restrictions" on speech are permissible.[11] Because the College is a public forum for students, any regulation requiring authorization from an administrator before expressive activity may occur is a prior restraint on speech. Advanced notice requirements for student speech, like the College's, often fail strict scrutiny because they disable spontaneous and anonymous speech, which is often "the most effective kind of expression."[12] The "simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with applicable regulations discourages citizens from speaking freely."[13]

The College's policy granting unfettered discretion to campus officials to admit or deny the speech application is also unconstitutional. The Supreme Court consistently condemns regulations on speech that vest discretion in an administrative official to grant or withhold a permit based upon broad criteria unrelated to the proper regulation of public places.[14] If the permit scheme involves the appraisal of facts, exercise of judgment, and formation of an opinion, the danger of censorship is too great to be permitted.[15] Left with only vague or non-existent criteria on which to base their decision, government officials "may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker."[16] Even if there is no evidence to point to a content-based motive for an administrator's application of college regulations, the very fact that the regulations are so open-ended as to allow the administrator to enforce them based on content is enough for them to fail constitutional scrutiny. The College's current policy is vague and grants unfettered discretion to the administrator. Thus, the policy must be revised to address this problem.

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[8] *Burbridge*, 74 F. Supp. 2d at 947–48.
[9] *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).
[10] *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994) (quoting *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1975)).
[11] *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).
[12] *Grossman*, 33 F.3d at 1206; *see Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 166–67 (2002) (holding permit requirement violates First Amendment because it prohibits anonymous speech); *NAACP, W. Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984) ("all advance notice requirements tend to inhibit speech").
[13] *NAACP*, 743 F.2d at 1354.
[14] *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969).
[15] *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992).
[16] *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988).

Based upon the comments made at the Board of Trustees' meeting, I am hopeful that the Board will follow through with its commitment to revise its policies voluntarily without the need to resort to litigation. Please be advised that if the Board fails to revise its policies, Mr. Enders will have no choice but to take further legal action against the College for its violation of his constitutional rights.

I look forward to working with you to revise these policies so that the College will truly be a marketplace of ideas where students of all different backgrounds and beliefs will be free to communicate their opinions and ideas without fear of censorship or punishment.

Sincerely,

Tyson C. Langhofer
Senior Counsel
ALLIANCE DEFENDING FREEDOM

CC: NOEL STERETT, ESQ.(VIA E-MAIL)
WHITMAN BRISKEY, ESQ. (VIA E-MAIL)
JOSEPH ENDERS (VIA E-MAIL