



March 24, 2017

VIA U.S. Postal Service

Dr. Greg Postel
University of Louisville
Office of the President
Grawemeyer Hall
Louisville, KY 40292

Re: Legal Obligations of Kentucky Colleges and Universities Under SB 17

Dear Dr. Postel:

We are writing to update you on recent changes to Kentucky law that affect your obligations regarding campus speech and student organization policies, and to offer our assistance in ensuring your policies comply with the legal requirements of Kentucky law and the United States and Kentucky constitutions.

By way of introduction, Alliance Defending Freedom (ADF) is an alliance-building, non-profit legal organization that advocates for the right of people to freely live out their faith.¹ Our alliance comprises over 3,100 allied attorneys including 41 in Kentucky. ADF's Center for Academic Freedom is dedicated to ensuring freedom of speech and association for students and faculty so that everyone can freely participate in the marketplace of ideas without fear of government censorship.

As you may be aware, on March 16, 2017, Governor Bevin signed into law Senate Bill 17, modifying Kentucky Revised Statutes chapter 164, and imposing affirmative obligations on all public postsecondary educational institutions.

¹ Alliance Defending Freedom has achieved successful results for its clients before the United States Supreme Court, including four victories before the highest court in the last six years. See *e.g. Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015) (unanimously upholding ADF's client's free-speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (striking down federal burden's on ADF's client's free-exercise rights); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer policy promulgated by a town represented by ADF); *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (upholding a state's tuition tax credit program defended by a faith-based tuition organization represented by ADF).

Specifically, “public postsecondary education institution[s] shall ensure” the following on their campuses:

1. Students’ viewpoints (including those expressed in class assignments) are not discriminated against because of the viewpoint or content of the expression.
2. Student speakers (for example, graduation speakers) are chosen in a viewpoint-neutral manner.
3. Religious and political student organizations are treated equally in public forums as any other student organizations.
4. Student organizations, including religious and political student organizations, are permitted to select leaders and maintain member standards based on the organization’s beliefs and mission without penalty or censure.
5. Outdoor areas of campus are public forums for student speech and student speech may not be restricted without a compelling government interest unrelated to the speech’s content, where the restriction is narrowly tailored and “leaves open ample alternative options for the communication for the information.”

SB 17 generally restates core First Amendment principles, prohibiting (1) limitation of student speech to restrictive “speech zones,” (2) requiring advance approval for student literature distribution and speech, (3) imposing overbroad “harassment”² policies or other speech codes that may chill or be used to punish constitutionally protected speech, (4) preventing student organizations from associating around shared religious, political, or any other ideas and choosing leaders who share those views, and (5) otherwise discriminating against students or student organizations because of their religious or political viewpoints in allocating benefits and privileges, student activity funding, or in any other way.

² When evaluating prohibitions on harassment, universities should keep in mind that the Supreme Court ruled that actionable student-on-student harassment is limited to conduct “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). This standard allows schools to protect students from harassment while also honoring core principles of free speech. Any policies prohibiting harassment should adhere to this standard in order to avoid chilling First Amendment protected speech.

In order to meet your legal obligations under Kentucky Revised Statutes chapter 164, as modified by SB 17, you should conduct an immediate review of your institution's policies and, if necessary, revise them to conform to this law and the United States and Kentucky Constitutions. Failure to do so may also expose officials to a heightened risk that they may be held personally liable for constitutional violations that are also prohibited by state law.

The Center for Academic Freedom has significant expertise in the area of educational institutions' policies relating to free speech and freedom of association. At your request, we, in conjunction with our allied attorneys in Kentucky, would be pleased to assist you, *pro bono*, in reviewing your policies to ensure they comply with the applicable statutory and constitutional requirements.

If you have any questions, please feel free to contact us.



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Very truly yours,



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CC: (Leslie Chambers Strohm, General Counsel for Dr. Greg Postel)

ENCLOSURE: Unofficial Draft of Senate Bill 17