



*The Foundation for Individual  
Rights in Education presents*

# Spotlight on Speech Codes **2011:**

The State of Free Speech on  
Our Nation's Campuses





The mission of FIRE is to defend and sustain individual rights at America's colleges and universities. These rights include freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience — the essential qualities of individual liberty and dignity. FIRE's core mission is to protect the unprotected and to educate the public and communities of concerned Americans about the threats to these rights on our campuses and about the means to preserve them.





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“THE UNIVERSITY ATMOSPHERE OF SPECULATION, EXPERIMENT, AND CREATION IS ESSENTIAL TO THE QUALITY OF HIGHER EDUCATION. OUR PUBLIC UNIVERSITIES REQUIRE GREAT LATITUDE IN EXPRESSION AND INQUIRY TO FLOURISH .... FREE SPEECH ‘IS THE LIFEBLOOD OF ACADEMIC FREEDOM.’”

—*McCauley v. University of the Virgin Islands*, 618 F.3d 232, 243 (3d Cir. 2010) (internal citations omitted)



*“Sunlight is said to be the best  
of disinfectants.”*

*- Justice Louis Brandeis*

## INTRODUCTION

Each year, the Foundation for Individual Rights in Education (FIRE) conducts a rigorous survey of restrictions on speech at America’s colleges and universities. The survey and accompanying report explore the extent to which schools are meeting their legal and moral obligations to uphold students’ and faculty members’ rights to freedom of speech, freedom of expression, and private conscience.

As in past years, this year’s report finds that the majority of institutions are failing to meet these obligations. Yet, for the third year in a row, the percentage of institutions with policies that clearly and substantially prohibit constitutionally protected expression has fallen. This undeniable trend is exciting news for everyone concerned with the protection of free speech on campus. Nevertheless, much work remains to be done.



This year's report—*Spotlight on Speech Codes 2011: The State of Free Speech on Our Nation's Campuses*—examines the restrictions on speech in force at a large sample of American colleges and universities and identifies emergent trends within the data. The report also addresses recent developments regarding free speech in the university setting, drawing from FIRE's research on university policies and from cases that FIRE has handled over the past academic year.

Once again, some of the restrictions on speech that FIRE has discovered would be laughable if they were not such serious violations of the right to free speech. Highlights from this year's research include:

- Grambling State University's e-mail policy prohibits "the creation or distribution of any disruptive or offensive messages, including offensive comments about race, gender, hair color, disabilities, age, sexual orientation,

pornography, religious beliefs and practice, political beliefs, or national origin."<sup>1</sup>

- University of Massachusetts Amherst has a policy about "controversial rallies" requiring that if a rally is deemed controversial, it may only take place between 12 and 1 pm and must be held on the Student Union steps, and the sponsoring student group must designate at least six of its own members to act as a security team.<sup>2</sup>

- College of the Holy Cross vaguely prohibits speech "causing emotional injury through careless or reckless behavior."<sup>3</sup>

By bringing speech codes to the public's attention, FIRE hopes to keep the number of schools prohibiting protected speech in decline. After all, public scrutiny is perhaps the greatest defense against these abuses. As Justice Louis Brandeis famously wrote, "Sunlight is said to be the best of disinfectants."<sup>4</sup>



## METHODOLOGY

FIRE surveyed publicly available policies at institutions ranked among the top 100 “Best National Universities” and the top 50 “Best Liberal Arts Colleges,” as rated in the 2009 “Best Colleges” issue of *U.S. News & World Report*. FIRE also surveyed an additional 237 major public universities. Our research focuses in particular on public universities because, as explained in detail later in this report, public universities are legally bound to protect students’ right to free speech.

FIRE rates colleges and universities as “red light,” “yellow light,” or “green light” based on how much, if any, protected speech their written policies restrict. FIRE defines these terms as follows:



**Red Light:** A “red-light” institution is one that has at least one policy both clearly and substantially restricting freedom of speech, or that bars public access to its speech-related policies by requiring a university login and password for access. A “clear” restriction is one that unambiguously infringes on protected expression. In other words, the threat to free speech at a red-light institution is obvious on the face of the policy and does not depend on

how the policy is applied. A “substantial” restriction on free speech is one that is broadly applicable to important categories of campus expression. For example, a ban on “offensive speech” would be a clear violation (in that it is unambiguous) as well as a substantial violation (in that it covers a great deal of what would be protected expression in the larger society). Such a policy would earn a university a red light.

When a university restricts access to its speech-related policies by requiring a login and password, it denies prospective students and their parents the ability to weigh this crucial information. At FIRE, we consider this action by a university to be deceptive and serious enough that it alone warrants a “red-light” rating. In this year’s report, three institutions are rated “red light” for maintaining password protection on speech-related policies.<sup>5</sup>

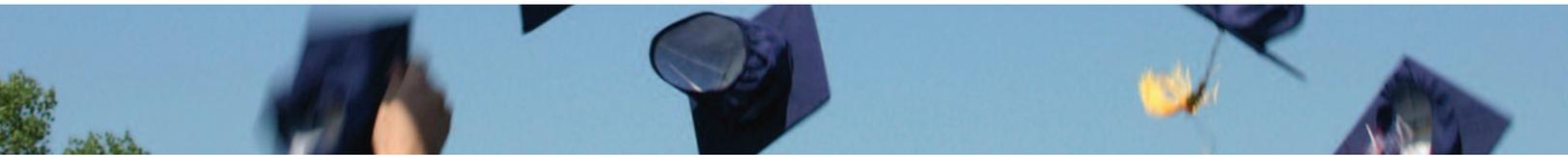


**Yellow Light:** A “yellow-light” institution maintains policies that could be interpreted to suppress protected speech or policies that, while clearly restricting freedom of speech, restrict only narrow categories of speech. For example, a policy banning “verbal abuse” has broad applicability and poses a

1 *Gambling State University Email Use Policy*, available at <http://www.thefire.org/index.php/article/12283.html>. Because university policies—or, more frequently, just the URLs for those policies—change on a regular basis, copies of all policies cited in this report are also available at <http://thefire.org/index.php/article/12524.html> and were current as of September 31, 2010.

2 “Controversial Rallies,” *University of Massachusetts Amherst Registered Student Organization Handbook*, available at <http://umasscsd.pbworks.com/Rallies> (last visited Nov. 28, 2010).

3 “Code of Student Conduct,” *College of the Holy Cross Student Handbook and Planner*, available at [http://www.holycross.edu/assets/pdfs/student\\_handbook.pdf](http://www.holycross.edu/assets/pdfs/student_handbook.pdf) (last visited Nov. 28, 2010).



substantial threat to free speech, but is not a clear violation because “abuse” might refer to unprotected speech, such as threats of violence or genuine harassment. Similarly, while a policy banning “posters promoting alcohol consumption” clearly restricts speech, it is limited in scope. Yellow-light policies are typically unconstitutional,<sup>6</sup> and a rating of yellow rather than red in no way means that FIRE condones a university’s restrictions on speech. Rather, it means that in FIRE’s judgment, those restrictions do not clearly and substantially restrict speech in the manner necessary to warrant a red light.

**Green Light:** If FIRE finds that a university’s policies do not seriously threaten campus expression, that college or university receives a



“green light.” A green light does not indicate that a school actively supports free expression; it simply means that the school’s written policies do not pose a serious threat to free speech.<sup>7</sup>

**Not Rated:** When a private university<sup>8</sup> states clearly and consistently that it holds a certain set of values above a commitment to freedom of speech, FIRE does not rate that university.<sup>9</sup>

Of the 390 schools surveyed in this report, FIRE rates 380 schools as red, yellow, or green light, and has not rated 10 schools.<sup>10</sup>

4 Louis D. Brandeis, “What Publicity Can Do,” *Harper’s Weekly*, Dec. 20, 1913.

5 Connecticut College, Edinboro University of Pennsylvania, and Stanford University.

6 For example, in 2004, the U.S. Court of Appeals for the Third Circuit found that a state law banning advertisers from paying to place advertisements for alcoholic beverages in university newspapers was unconstitutional. *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).

7 FIRE rated the following twelve institutions as “green light”: Black Hills State University, Carnegie Mellon University, Cleveland State University, Dartmouth College, Shippensburg University of Pennsylvania, The College of William and Mary, University of Nebraska–Lincoln, University of Pennsylvania, University of South Dakota, University of Tennessee–Knoxville, University of Utah, and University of Virginia.

8 The “Not Rated” list contains two public institutions, the U.S. Military Academy and the U.S. Naval Academy, both of which were named in *U.S. News & World Report’s* list of the top 50 liberal arts colleges. Although these institutions are public, First Amendment protections do not apply in the military context as they do in civilian society. Rather, the U.S. Supreme Court has held:

*The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service “is the subordination of the desires and interests of the individual to the needs of the service.”*

*Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (internal citations omitted). Therefore, since these institutions do not promise their students full freedom of speech (the *West Point Catalog*, for example, explicitly states that “[m]ilitary life is fundamentally different from civilian life” and requires “numerous restrictions on personal behavior”) and, like private universities, are not obligated to, FIRE has designated them as “Not Rated.”

9 For example, Worcester Polytechnic Institute (WPI) makes clear in its policies that students entering WPI are not guaranteed robust free speech rights. In particular, WPI’s student code of conduct explicitly states:

*The WPI community recognizes that membership in this particular academic community is freely sought and freely granted by and to its members, and that within this membership group certain specific behaviors that may be accepted by society in general cannot be accepted within an academic community without hindering the explicit goals of that academic community.*

An additional statement by the university’s Trustees states:

*Students enter WPI voluntarily. ... If they do not like some of the rules, regulations, traditions, and policies of WPI, they do not have to enter. But let it be understood that having been accepted and having decided to enter, they are expected to abide by the laws of our nation and comply with rules and policies of WPI.*

It would be clear to any reasonable person reading WPI’s policies that students are not entitled to unfettered free speech at WPI.

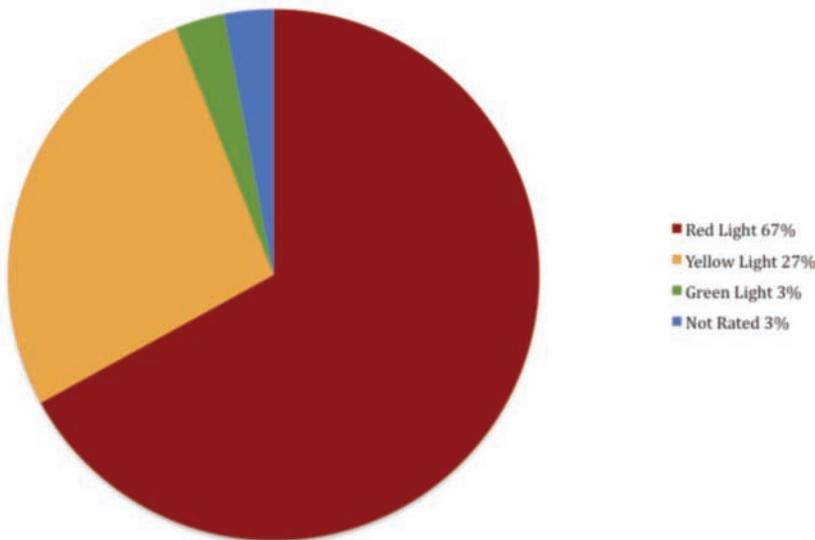
10 FIRE has not rated the following schools: Bard College, Baylor University, Brigham Young University, Pepperdine University, Saint Louis University, the U.S. Military Academy, the U.S. Naval Academy, Vassar College, Worcester Polytechnic Institute, and Yeshiva University.



## FINDINGS

Of the 390 schools reviewed by FIRE, 261 received a red-light rating (67%), 107 received a yellow-light rating (27%), and 12 received a green-light rating (3%). FIRE did not rate 10 schools (3%).<sup>11</sup> (See Figure 1.)

For the third year in a row, the percentage of public schools with a red-light rating has declined. Three years ago, 79% of public



*Figure 1: All Schools by Rating*

schools received a red-light rating. Two years ago, that number declined to 77%, and last year it dropped again to 71%. This year, 67% of public universities surveyed received a red-light rating. (See Figure 2.)

Since public universities are legally bound to protect their students' First Amendment rights, any percentage above zero is unacceptable, so much work remains to be done. However, we are encouraged by this ongoing positive

trend and are optimistic that, with continued hard work by free speech advocates on and off campus, this percentage will continue to drop.

The percentage of private universities earning a red-light rating also has declined this year—from 70% to 65%. While private universities are not legally bound by the First Amendment, most make extensive promises of free speech to their students and faculty. Speech codes impermissibly violate those promises.

Of the schools reviewed by FIRE over the past year, 104 were private and 286 were public. Of the private schools reviewed, 65% received a red-light rating, 24% received a yellow-light rating, 3% received a green-light rating, and 8% were not rated. (See Figure 3.)

Of public schools reviewed, 67% received a red-light rating, 29% received a yellow-light rating, and 3% received a green-light rating. Two schools—both military institutions, for a total of one percent of public schools surveyed—were not rated. (See Figure 4.)

This report also divides the United States into four geographic regions: the Northeast, the Midwest, the South, and the West.<sup>12</sup>

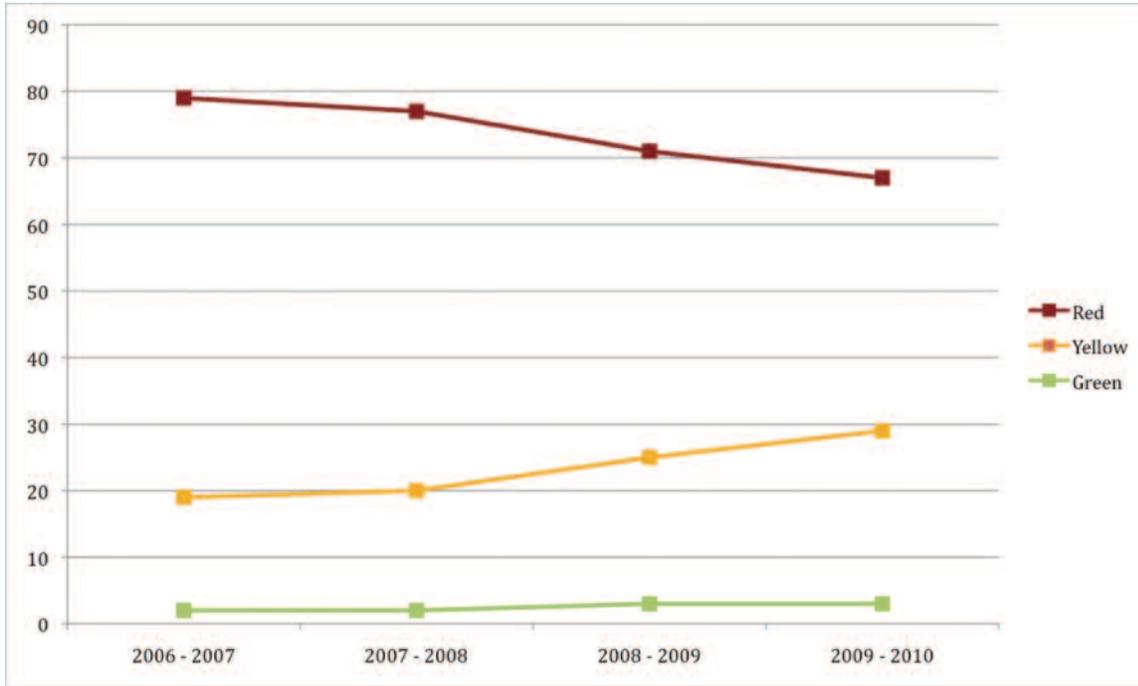


Figure 2: Public Schools by Rating

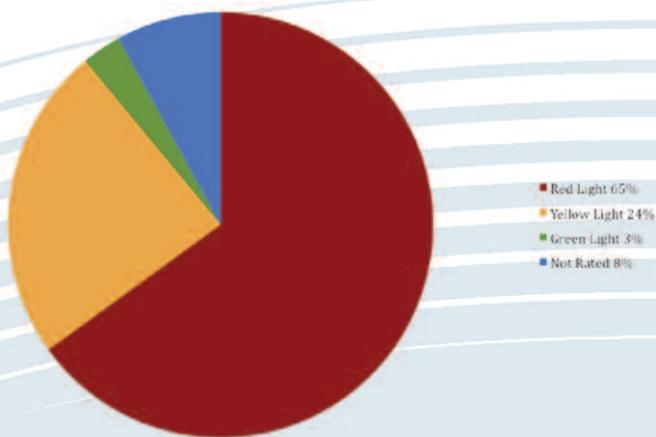


Figure 3: Speech Codes at Private Colleges and Universities

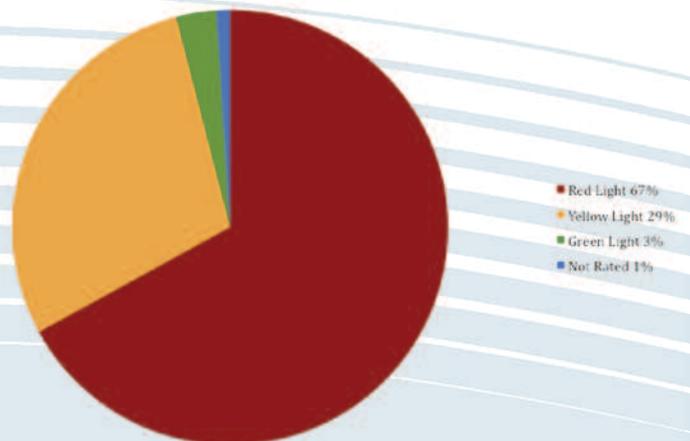


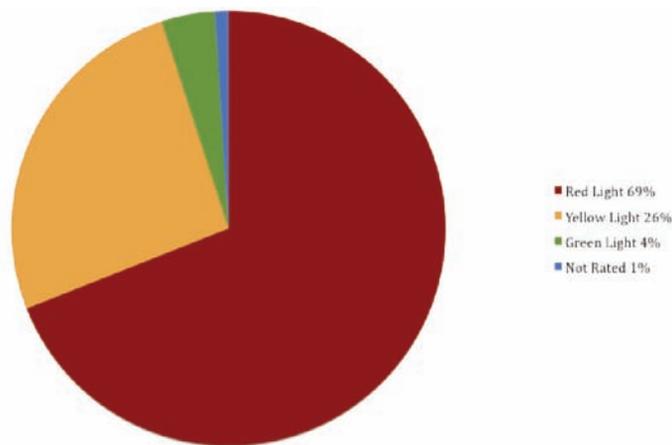
Figure 4: Speech Codes at Public Colleges and Universities

11 See Appendix B for a full list of schools by rating.

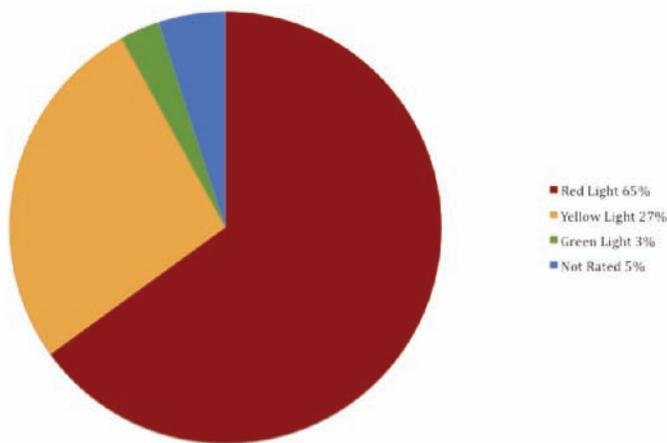
12 See Appendix A for a list of the U.S. states in each geographic region.



While the high percentage of red-light schools in each region suggests that the problem of speech codes is national in scope rather than confined to one area of the country, there is some geographic variation. The percentage of institutions having red-light speech codes varied from 64% in the West to 69.5% in the South. The West had the highest percentage of yellow-light institutions (32%). The Midwest had a high percentage of red-light institutions (69%) but also had the highest percentage of green-light institutions (4%).



*Figure 6: Speech Codes at Midwestern Colleges and Universities*



*Figure 5: Speech Codes at Northeastern Colleges and Universities*

The data also showed some relationship between enrollment levels and restrictions on speech.<sup>13</sup> Among schools with a total enrollment of fewer than 10,000 students, 65% received a red-light rating. Among schools with an enrollment of between 10,000 and 20,000 students, 67% were rated as red-light institutions, while 73% of schools with an enrollment of between 20,000 and 30,000 students received a red-light rating. However, that figure dipped again at the highest-enrollment institutions: 66% of schools with a total enrollment of over 30,000 students received a red-light rating. (See Figure 9.) Overall, these figures reveal that a striking number of students are affected by unconstitutional speech codes; the total number of students enrolled at red-light institutions is 3,979,714.

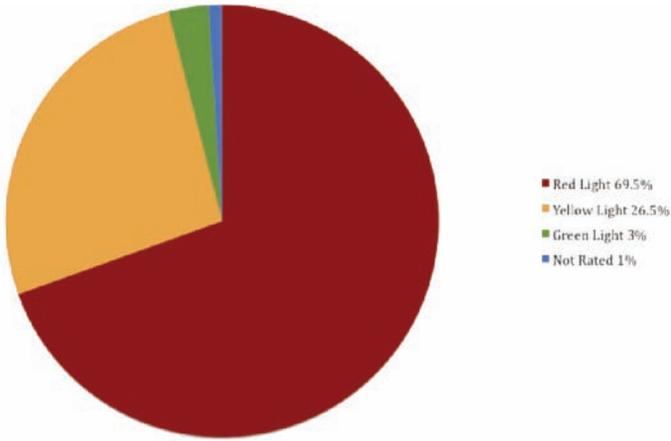
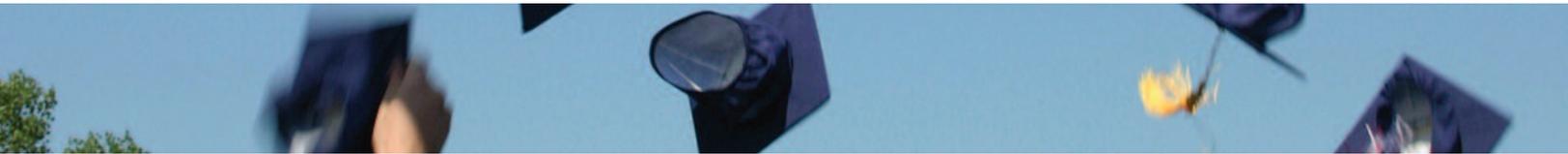


Figure 7: Speech Codes at Southern Colleges and Universities

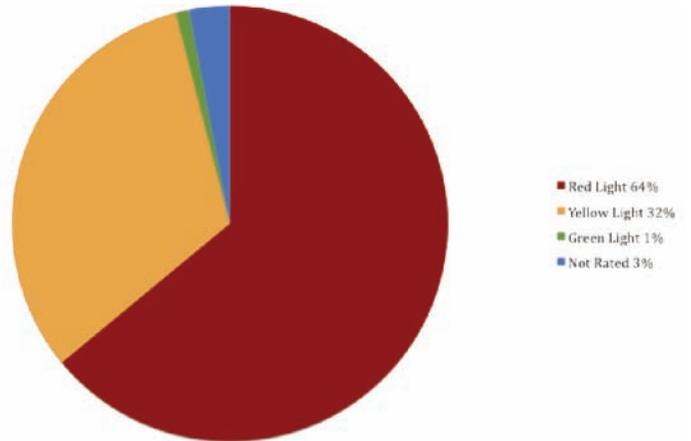


Figure 8: Speech Codes at Western Colleges and Universities

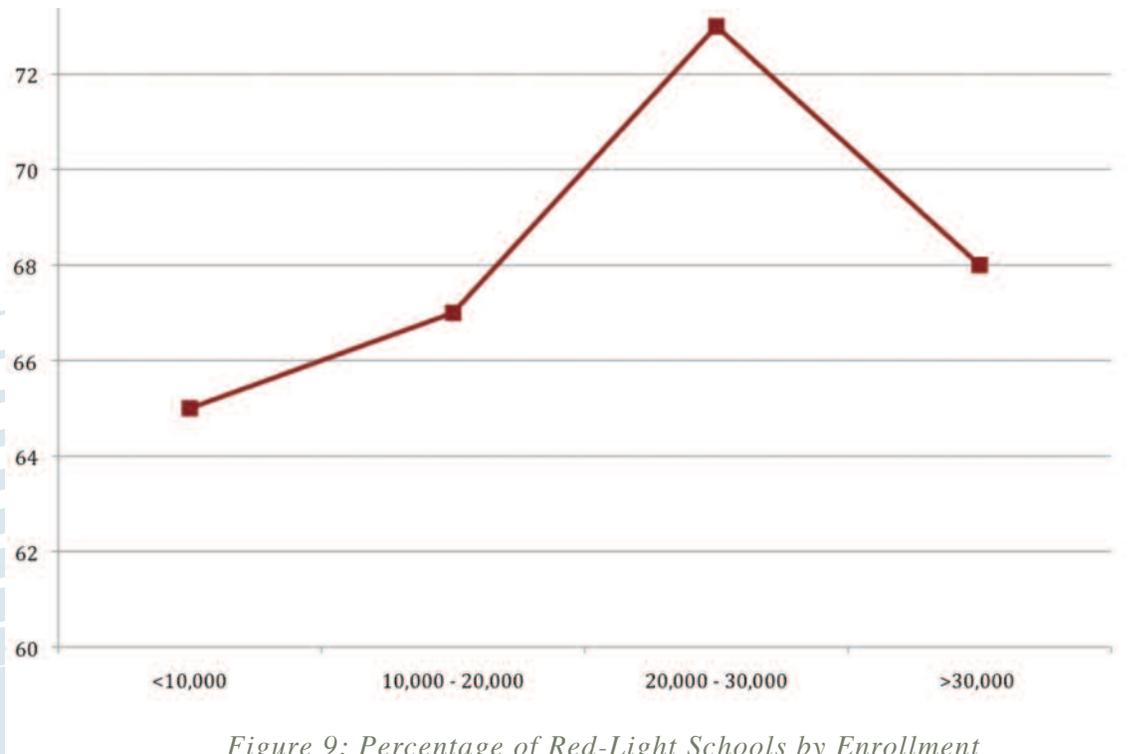


Figure 9: Percentage of Red-Light Schools by Enrollment

13 Enrollment data were obtained from college profiles available at <http://www.collegeboard.com>, except in several instances where those profiles excluded graduate enrollment, in which case the data were obtained from college profiles available at <http://en.wikipedia.org>. Where applicable, enrollment figures include both undergraduate and graduate enrollment.



## DISCUSSION

### SPEECH CODES ON CAMPUS: BACKGROUND AND LEGAL CHALLENGES

Speech codes—*university regulations prohibiting expression that would be constitutionally protected in society at large*—gained popularity with college administrators in the 1980s and 1990s. As discriminatory barriers to education declined, female and minority enrollment increased. Concerned that these changes would cause tension and that students who finally had full educational access would arrive at institutions only to be hurt and offended by other students, college administrators enacted speech codes.

In doing so, however, administrators ignored or did not consider the legal ramifications of placing such restrictions on speech, particularly at public universities. As a result, federal courts have overturned speech codes at numerous colleges and universities over the

past two decades, including one just this year at the University of the Virgin Islands.<sup>14</sup>

Despite the overwhelming weight of legal authority against speech codes,<sup>15</sup> however, the majority of institutions—including some of those that have been successfully sued—still maintain unconstitutional speech codes.<sup>16</sup> It is with this in mind that we turn to a more detailed discussion of the ways in which campus speech codes violate individual rights and what can be done to challenge them.

### PUBLIC UNIVERSITIES VS. PRIVATE UNIVERSITIES

The First Amendment prohibits the government—including governmental entities such as state universities—from interfering with the freedom of speech. A good rule of thumb is that if a state law would be declared unconstitutional for violating the First Amendment, a similar regulation at a state



college or university is equally unconstitutional.

The guarantees of the First Amendment generally do not apply to students at private colleges because the First Amendment regulates only government—not private—conduct.<sup>17</sup> Moreover, although acceptance of federal funding does confer some obligations upon private colleges, compliance with the First Amendment is not one of them.

This does not mean, however, that students and faculty members at private schools are not entitled to free expression. In fact, most private universities explicitly promise freedom of speech and academic freedom, presumably to lure the most talented students and faculty, since most people would not want to study or teach where they could not speak and write freely. According to Lafayette College policy, for example, “Lafayette College students are both citizens and members of the academic community. As citizens they enjoy the same

rights—for example, freedom of speech, peaceful assembly, and right of petition—and obligations that other citizens enjoy ....”<sup>18</sup> Similarly, Syracuse University’s Student Handbook provides that “Syracuse University is committed to the principle that freedom of expression is essential to the search for truth, and consequently welcomes and encourages the expression of different and varied opinions, and of dissent.”<sup>19</sup> Yet despite these promises, both of these universities—like many other private universities—prohibit a great deal of speech that elsewhere would be protected by the First Amendment.

#### WHAT EXACTLY IS ‘FREE SPEECH,’ AND HOW DO UNIVERSITIES CURTAIL IT?

What does FIRE mean when we say that a university restricts “free speech”? Do people have the right to say absolutely anything, or are only certain types of speech “free”?



Simply put, the overwhelming majority of speech is protected by the First Amendment. Over the years, the Supreme Court has carved out some narrow exceptions: speech that incites reasonable people to immediate violence; so-called “fighting words” (face-to-face confrontations that lead to physical altercations); harassment; true threats and intimidation; obscenity; and libel. If the speech in question does not fall within one of these exceptions, it most likely is protected speech.

The exceptions are often misused by universities to punish constitutionally protected speech. These are instances where the written policy at issue may be constitutional—for example, a prohibition on “incitement”—but its application may not be. In other instances, a written policy will purport to be a legitimate ban on something like harassment or threats, but will, either deliberately or through poor writing, encompass protected speech as well. Therefore, it is important to understand what

these narrow exceptions to free speech actually mean in order to recognize when they are being misapplied.

### Threats & Intimidation

The Supreme Court has defined “true threats” as only “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). The Court also has defined “intimidation,” in the constitutionally proscribable sense, as a “type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* at 360. Neither term would encompass, for example, a vaguely worded statement that is not directed at anyone in particular.

Nevertheless, particularly following the tragic 2007 shootings at Virginia Tech, universities

14 *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010).

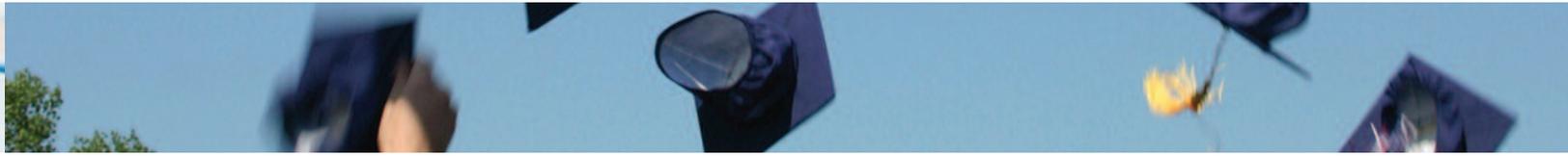
15 *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995); *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. Northern Kentucky University Board of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); *UWM Post, Inc. v. Board of Regents of the University of Wisconsin*, 774 F. Supp. 1163 (E.D. Wisc. 1991); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). In addition, several institutions have voluntarily rescinded their speech codes as part of settlement agreements.

16 Several universities that have been the target of successful speech code lawsuits—such as the University of Michigan and the University of Wisconsin—have revised the unconstitutional policies challenged in court but still maintain other equally unconstitutional policies.

17 Although the First Amendment does not regulate private universities, this does not mean that all private universities are legally free to restrict their students’ free speech rights. For example, California’s “Leonard Law,” Cal. Educ. Code § 94367, prohibits secular private colleges and universities in California from restricting speech that would otherwise be constitutionally protected. The Leonard Law provides, in relevant part: *No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.*

18 “Exercise of Rights of Citizenship,” *Lafayette College Student Handbook*, available at [http://studentlife.lafayette.edu/files/2010/02/Handbook10\\_INtEraCTiVe.pdf](http://studentlife.lafayette.edu/files/2010/02/Handbook10_INtEraCTiVe.pdf) (last visited Nov. 28, 2010).

19 “Protests and Demonstrations,” *Syracuse University Student Handbook*, available at <http://www.syr.edu/currentstudents/publications/pdfs/SU-StudentHndbk-low.pdf> (last visited Nov. 28, 2010).



have misapplied policies prohibiting threats and intimidation to infringe on protected speech. The most dramatic effect has been on speech and expression relating to firearms, which universities frequently treat as threatening simply by virtue of its subject matter, regardless of context.<sup>20</sup>

### Incitement

FIRE also has noticed an increased propensity among universities to restrict speech that deeply offends other students on the basis that it constitutes “incitement.” The basic concept, as administrators see it, is that offensive or provocative speech will anger those who disagree with it, perhaps so much that it moves them to violence. While preventing violence is an admirable goal, this is an impermissible misapplication of the incitement doctrine.

Incitement, in the legal sense, does not refer to speech that may lead to violence on the part of those opposed to or angered by it, but rather to speech that will lead those *who agree with it* to commit immediate violence. In other words, the danger is that certain speech will convince listeners who agree with it to take immediate unlawful action. To apply the doctrine to an opposing party’s reaction to speech is to convert the doctrine into an impermissible “heckler’s veto.” As the Supreme Court has said, speech cannot be prohibited because it “might offend a hostile mob” or be “unpopular with bottle throwers.”<sup>21</sup>

The precise standard for incitement to violence is found in the Supreme Court’s decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). There, the Court held that the state may not “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action.” 395 U.S. at 447 (emphasis in original). This is an exacting standard, as evidenced by its application in subsequent cases.

For instance, the Supreme Court held in *Hess v. Indiana*, 414 U.S. 105 (1973), that a man who had loudly stated, “We’ll take the fucking street later” during an anti-war demonstration did not intend to incite or produce immediate lawless action (the Court found that “at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time”), and was therefore not guilty under a state disorderly conduct statute. 414 U.S. at 108–09. The fact that the Court ruled in favor of the speaker despite the use of such strong and unequivocal language underscores the narrow construction that has traditionally been given to the incitement doctrine and its requirements of likelihood and immediacy. Nonetheless, college administrations have been all too willing to ignore this jurisprudence.



## *SPOTLIGHT ON: Standing Requirements in First Amendment Lawsuits*

As discussed throughout this year’s report, courts have struck down numerous unconstitutional speech codes at public universities, and any public university that still maintains unconstitutional speech codes—which 67% do—is vulnerable to litigation. The question is, who may file a lawsuit challenging an unconstitutional restriction on student speech?

The law requires that an individual have “standing” to challenge a statute or regulation before he or she can file a lawsuit asking a court to strike that regulation down. In general, for a person to have standing he or she must have suffered an actual injury under the regulation:

*For example, an advocacy group may not file a lawsuit challenging the constitutionality of a statute on its own; there must be a plaintiff who has actually been harmed by the statute.*<sup>1</sup>

When it comes to lawsuits challenging regulations on First Amendment grounds, however, the U.S. Supreme Court has carved out an “exception to the usual rules governing standing”:

*Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights.*<sup>2</sup>

Thus, when it comes to First Amendment rights, people “are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.”<sup>3</sup>

Accordingly, students to date have been able to challenge unconstitutional university speech codes because they fear that speaking out might subject them to punishment, without having to wait to actually be punished. For example, in the Third Circuit’s decision this year in *McCauley v. University of the Virgin Islands*, the student plaintiff successfully challenged not only the one regulation under which he actually had been punished, but several other unconstitutional speech codes in force at the university. The Third Circuit’s holding that student Stephen McCauley had standing to challenge those regulations, which “all have the potential to chill protected speech,”<sup>4</sup> is consistent with the traditional relaxation of standing requirements in First Amendment cases.

This year, however, a three-judge panel of the Ninth Circuit made a startling departure from these relaxed standing requirements for First Amendment plaintiffs when it held that a student at Los Angeles City College did not have

1 “Standing,” Nolo’s Plain-English Law Dictionary, <http://www.nolo.com/dictionary/standing-term.html>.

2 *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

3 *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

4 *McCauley v. University of the Virgin Islands*, 618 F.3d 232, 238 (3d Cir. 2010).

standing to challenge the college’s sexual harassment policy.<sup>5</sup>

Student Jonathan Lopez filed suit against the college after his professor refused to grade a speech Lopez gave—in a public speaking class—involving his Christian faith. The professor instead instructed Lopez to “Ask God what your grade is.” In his suit, Lopez challenged the constitutionality of the college’s sexual harassment policy, which included prohibitions on “[d]isparaging sexual remarks about your gender” and “actions and behavior that convey insulting, intrusive or degrading attitudes/comments about women or men.”<sup>6</sup> Particularly in light of the incident in his speech class, Lopez was concerned that expression of his religiously based views on gender and sexual orientation might run afoul of this policy.

The trial court ruled in Lopez’s favor, finding the policy unconstitutional. On appeal, however, the Ninth Circuit—whose jurisdiction includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington—ruled that Lopez did not have standing to challenge the policy because he “failed to make a clear showing that his intended speech on religious topics gave rise to a specific and credible threat of adverse action from college officials under the college’s sexual harassment policy.”<sup>7</sup> The Ninth Circuit

held this despite the fact that Lopez was reprimanded by a professor who specifically referenced the college’s speech policies, and that he was informed by the dean of academic affairs that several of his classmates were “deeply offended” by his speech.

The Ninth Circuit’s high bar to bringing suit stands in stark contrast to the relaxed standing requirements traditionally employed in First Amendment cases, and if it stands would severely limit students’ ability to challenge unconstitutional speech codes in the states within the Ninth Circuit’s jurisdiction. The plaintiff has petitioned the Ninth Circuit to rehear his case, and FIRE submitted a friend-of-the-court brief urging the court to grant his request. As of press time no decision has been made, and students’ First Amendment rights in the Ninth Circuit, and possibly elsewhere, hang in the balance.



<sup>5</sup> *Lopez v. Candaele*, 622 F.3d 1112 (9th Cir. 2010).

<sup>6</sup> *Lopez v. Candaele*, Civ. No. 09-0995 (C.D. Cal. Jul. 10, 2009).

<sup>7</sup> *Lopez*, 622 F.3d 1112 (9th Cir. 2010).



## Obscenity

The Supreme Court has held that obscene expression, to fall outside of the protection of the First Amendment, must “depict or describe sexual conduct” and must be “limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15 (1973).

This is a narrow definition applicable only to some highly graphic sexual material; it does not encompass curse words, even though these are often colloquially referred to as “obscenities.” In fact, the Supreme Court has explicitly held that profanity is constitutionally protected. In *Cohen v. California*, 403 U.S. 15 (1971), the defendant, Cohen, was convicted in California for wearing a jacket bearing the words “Fuck the Draft” in a courthouse. The Court overturned Cohen’s conviction, holding that the message on his jacket, however vulgar, was protected speech. In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), the Supreme Court determined that a student newspaper article entitled “Motherfucker Acquitted” was constitutionally protected speech. The Court wrote that “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in

the name alone of ‘conventions of decency.’” *Id.* at 670. Nonetheless, many colleges erroneously believe that they may legitimately prohibit profanity and other types of vulgar expression.

In April 2010, for example, Hinds Community College (HCC) student Isaac Rosenbloom was disciplined for remarking to a fellow student, after class but within earshot of his professor, that a grade was going to “fuck up” his GPA.<sup>22</sup> Rosenbloom, who supports his wife and two young children as an emergency medical technician, was barred from the class and denied financial aid for violating an unconstitutional college prohibition on “flagrant disrespect.” HCC policy also unconstitutionally bans profanity, cursing, and vulgarity.<sup>23</sup> Only after Rosenbloom hired an attorney with FIRE’s help and threatened litigation did HCC reverse course and clear his record.

Having discussed the most common ways in which universities misuse *legitimate* regulations to prohibit free expression, we turn to the innumerable *illegitimate* university regulations that restrict free speech and expression on their face. Such restrictions are generally found in several distinct types of policies.

## Harassment Policies

Actual harassment is not protected by the First Amendment. In the educational context,



the Supreme Court has defined student-on-student harassment as conduct “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). This is conduct far beyond the dirty joke or “offensive” student newspaper op-ed that is too often deemed “harassment” on today’s college campuses. Harassment is extreme and usually repetitive behavior—behavior so serious that it would interfere with a reasonable person’s ability to receive his or her education. For example, in *Davis*, the conduct found by the Court to be harassment was a months-long pattern of conduct including repeated attempts to touch the victim’s breasts and genitals and repeated sexually explicit comments directed at and about the victim.

Universities are legally obligated to maintain policies and practices aimed at preventing this type of genuine harassment from happening on their campuses. Unfortunately, they often misuse this obligation by punishing protected speech that is absolutely *not* harassment. The misuse of harassment regulations became so widespread that in 2003, the federal Department of Education’s Office for Civil

Rights (OCR)—the agency responsible for the enforcement of federal harassment regulations in schools—issued a letter of clarification to all of America’s colleges and universities.<sup>24</sup> Then-Assistant Secretary of Education Gerald Reynolds wrote:

*Some colleges and universities have interpreted OCR’s prohibition of “harassment” as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR’s jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.*

Reynolds wrote that “OCR’s regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution” and concluded that “[t]here is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment.”

In spite of this clarification, however, hundreds of universities persist in maintaining overly broad definitions of harassment that include large amounts of constitutionally protected speech. Examples include:

20 In 2008, for example, officials at Lone Star College in Texas prohibited a student group from distributing a satirical “Top Ten Gun Safety Tips” flyer as part of the school’s “club rush,” an event where student groups attempt to recruit new members. When FIRE wrote to the college about this impermissible censorship, the school’s general counsel responded that “the tragedy of Virginia Tech cannot be underestimated when it comes to speech relating to firearms—however ‘satirical and humorous’ the speech may be perceived by some.” See E-mail from Lone Star College System General Counsel Brian Nelson to Adam Kissel, Oct. 14, 2008, available at <http://www.thefire.org/article/9815.html>.

21 *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

22 See Letter from Adam Kissel to Clyde Muse, President, Hinds Community College, Apr. 27, 2010, available at <http://www.thefire.org/article/11882.html>.

23 See Discipline Charges for Isaac B. Rosenbloom, April 6, 2010, available at <http://www.thefire.org/article/11885.html>.

24 “First Amendment: Dear Colleague” Letter, July 28, 2003, available at <http://www.ed.gov/about/offices/list/ocr/firstamend.html>.



- The University of Alabama prohibits any expression, including “jokes,” that “insults” another student “because of his or her race, color, religion, ethnicity, national origin, sex, sexual orientation, age, disability, or veteran status.”<sup>25</sup>

- At the University of Florida, sexual harassment includes “[h]umor and jokes about sex that denigrate a gender.” It also includes “[s]exual innuendo” as well as “[s]uggestive or inappropriate photos, computer images, graphics, cartoons or other visual images.”<sup>26</sup>

These examples, along with many others, demonstrate that colleges and universities often fail to limit themselves to the narrow definition of harassment that is outside the realm of constitutional protection. Instead, they expand the term to prohibit broad categories of speech that do not even *approach* actual harassment, despite many such policies having been struck down by federal courts.<sup>27</sup> These vague and overly broad harassment policies deprive students and faculty of their free speech rights.

## Anti-Bullying Policies

In recent months, “bullying” has garnered a great deal of media attention, bringing pressure on legislators and school administrators—both at the K–12 and the college levels—to crack down even further on speech that causes emotional harm to other students. On October 26, 2010, OCR issued a letter on the topic of bullying, reminding educational institutions that they must address actionable harassment, but also that “[s]ome conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression.”<sup>28</sup> For such situations, the letter refers readers back to the 2003 “Dear Colleague” letter stating that harassment is conduct that goes far beyond merely offensive speech and expression. However, because it is primarily focused on bullying in the K–12 setting, the letter also urges an *in loco parentis* approach that is inappropriate in the college setting, where students are overwhelmingly adults.

The same problem exists in proposed anti-bullying legislation now under consideration in New Jersey. One of the law’s sponsors, New Jersey Senate Majority Leader Barbara

25 “Definition of Harassment,” *University of Alabama Student Handbook*, available at <http://www.studenthandbook.ua.edu/policyforstudents.html> (last visited Nov. 28, 2010).

26 “Sexual Harassment FAQs,” available at <http://www.ufsa.ufl.edu/students/sh/faq.shtml> (last visited Nov. 28, 2010).

27 See, e.g., *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008); *Doe v. Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (holding that University of Michigan’s discriminatory harassment policy was unconstitutionally broad); *Booher v. Board of Regents, Northern Kentucky University*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (holding that Northern Kentucky University’s sexual harassment policy was unconstitutionally broad).

28 “Dear Colleague” Letter, Oct. 26, 2010, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.



Buono, explained that the state’s efforts are based on the belief that “we must protect our kids and allow them to grow up free of the emotional pain that can lead them into despair that life is not worth living.”<sup>29</sup> The proposed law, however, addresses bullying not only among schoolchildren but also among adult “college and university students.”<sup>30</sup> An anti-bullying bill aimed exclusively at college students, the Tyler Clementi Higher Education Anti-Harassment Act, was introduced in Congress in November 2010.<sup>31</sup>

Universities have long attempted to argue, in defending overbroad harassment policies and other speech codes, that decisions regarding the free speech rights of students in the elementary and high school settings should apply in the college setting. The fact that legislators and even the U.S. Department of Education’s Office for Civil Rights now appear to be making the same argument when it comes to addressing “bullying” on campus is almost certain to lead to new restrictions on college students’ expressive rights in the coming years. This is a trend that FIRE will be following closely, and we will provide updates on developments in future reports.

## Policies on Tolerance, Respect, and Civility

Many schools invoke laudable goals like respect and civility to justify policies that violate students’ free speech rights. While a university has every right to actively promote a tolerant and respectful atmosphere on campus, a university that claims to respect free speech must not limit speech to only the inoffensive and agreeable.

Here are just two examples of restrictive policies on tolerance, respect, and civility from the past year:

- The University of Arkansas prohibits “jokes, statements, or other behavior, which does not respect the equality and dignity of others” in its residence halls.<sup>32</sup>
- Colorado College prohibits any act that causes any individual or group “**ridicule, embarrassment**, harassment, intimidation or other such result.” (Emphasis added.)<sup>33</sup>

## Internet Usage Policies

A great deal of student expression now takes place online, whether over e-mail or on sites like Facebook and Twitter. Numerous univer-

29 “NJ Lawmakers Unveil Bipartisan ‘Anti-Bullying Bill of Rights,’” NJToday.net, Oct. 25, 2010, available at <http://njtoday.net/2010/10/25/nj-lawmakers-unveil-bipartisan-%E2%80%98anti-bullying-bill-of-rights%E2%80%99/>.

30 *Id.*

31 The suicide of Rutgers student Tyler Clementi, whose roommate surreptitiously videotaped and broadcast footage of Clementi engaged in sexual activity with another man, has led to much discussion of bullying on college campuses. It is critical to note, however, that the unspeakable conduct which preceded Clementi’s suicide is already illegal; the students who allegedly taped and broadcast Clementi have been charged with criminal offenses and are facing prison.

32 “University Housing,” *University of Arkansas Student Handbook*, available at <http://handbook.uark.edu/chapters.php?chapter=2> (last visited Nov. 28, 2010).

33 “Respect,” *Pathfinder Student Handbook*, available at <http://www.coloradocollege.edu/resources/Pathfinder/ConductPolicies.asp> (last visited Nov. 28, 2010).



sities maintain policies—many of which were originally written before the Internet became one of students’ primary methods of communication—severely restricting the content of online expression.

FIRE frequently finds universities maintaining overly restrictive Internet usage policies and punishing students and faculty members for constitutionally protected speech online. For example, in May 2010, Clemson University charged a student with “computer misuse” for e-mailing an administrator using what the administrator perceived to be an “unacceptable” tone.<sup>34</sup>

The student, William Kirwan, was the president of an undergraduate student group at Clemson. He had an e-mail exchange with the group’s advisor, Laura McMaster, in which McMaster tried to persuade him to have his group participate in Clemson’s Fall Organizations Fair. Kirwan did not want to participate, and he wrote, in relevant part, that “I’m not going to let you bully the organization into doing the things you want us to do or perceive as important when they take away our resources from being able to concentrate on our mission.” He also stated that McMaster must be “smoking crack” to think that it was a good idea for the group “to participate in a recruiting event that acquired us zero members last year and provides no achievable benefit to the organization, while costing us money.”<sup>35</sup> Another administrator who had been copied on the e-mail replied that “your language and

tone is unacceptable in any setting, much less in this one where advisors who have NO agenda except to help you further the mission of your organization are offering insight.”<sup>36</sup> Less than a week later, Kirwan was charged with a host of offenses stemming from the content of his e-mails, including “computer misuse.”<sup>37</sup> Clemson eventually dropped the charges after FIRE intervened.

Examples of other impermissibly restrictive Internet usage policies in force during the 2009–2010 academic year include the following:

- Cal Tech prohibits using electronic information resources to “offend” anyone.<sup>38</sup>
- Claremont McKenna College prohibits the electronic transmission of any “derogatory” or “offensive” material, including “anything that might be construed as harassment or disparagement based on race, color, national origin, sex, sexual orientation, age, disability, or religious or political beliefs.”<sup>39</sup>

### Policies on Bias and Hate Speech

In recent years, colleges and universities around the country have instituted policies and procedures specifically aimed at eliminating “bias” and “hate speech” on campus. These sets of policies and procedures, frequently termed “Bias Reporting Protocols” or “Bias Incident Protocols,” often include speech codes prohibiting extensive amounts



of protected expression. The protocols often also infringe on students' right to due process, allowing for anonymous reporting that denies students the right to confront their accusers. Moreover, universities are often heavily invested in these bias incident policies, having set up entire regulatory frameworks devoted solely to addressing them.

Here are some examples of bias incident policies in force during the 2009–2010 academic year:

- At Eastern Michigan University, “bias incidents include name calling, offensive language, and inappropriate behavior or gestures.”<sup>40</sup>
- At Northwestern University, a bias incident is any “act of conduct, speech, or expression to which a bias motive is evident as a contributing factor.”<sup>41</sup>

Often, what universities classify as a “bias incident” is just as ridiculous as what these definitions might suggest. At Skidmore College, for example, one of the bias incidents reported during the 2009–2010 academic year was “Penis drawn on white board with the words: ‘the cockness monster was here.’”<sup>42</sup> At the University of Georgia, the university police are regularly called to investigate speech pursuant to the bias reporting protocol, including protected expression on whiteboards, and the officers file police reports and make sure that the speech is wiped off. In one such incident, the University of Georgia police were summoned after a bulletin board in the Boggs Hall dormitory was changed from reading “Welcome to Boggs 3rd Floor” to “Welcome to Boobs 3rd Floor.”<sup>43</sup> Indeed, the University of Georgia’s student newspaper, *The Red and Black*, investigated the reporting of bias incidents on campus and found that most of the reported bias incidents were “references to male and/or female anatomy.”<sup>44</sup> In addition to

34 See E-mail from Marty S. Kern to William Kirwan, May 13, 2010, available at <http://www.thefire.org/article/11923.html>.

35 The full texts of William Kirwan’s e-mails are available at <http://www.thefire.org/article/11923.html>.

36 *Id.*

37 See Disciplinary Charges Against William Kirwan, available at <http://www.thefire.org/article/11922.html>.

38 “Institute Policy on Acceptable Use of Electronic Information Resources,” available at <http://www.hr.caltech.edu/policies/AUP.html> (last visited Nov. 28, 2010).

39 “Acceptable E-mail Usage,” available at [http://www.claremontmckenna.edu/its/Policies/ITPolicies/PDF/Acceptable\\_E-Mail\\_Usage.pdf](http://www.claremontmckenna.edu/its/Policies/ITPolicies/PDF/Acceptable_E-Mail_Usage.pdf).

40 “Hate Crimes,” available at <http://www.emich.edu/hatecrimes/> (last visited Nov. 28, 2010).

41 “Hate Crimes and Bias Incidents,” *Northwestern University Student Handbook*, available at <http://www.northwestern.edu/handbook/handbook.pdf> (last visited Nov. 28, 2010).

42 Skidmore College Bias Incidents, 2009–2010, available at <http://www.thefire.org/index.php/article/12374.html>.

43 University of Georgia Police Reports on Acts of Intolerance, available at <http://www.redandblack.com/media/2010/10/10142010ndah.pdf>.

44 Jen Ingles, “Speech Policy May Hinder Rights,” *The Red and Black*, Oct. 14, 2010, available at <http://www.redandblack.com/2010/10/14/speech-policy-may-hinder-rights/>.



the obvious free-speech concerns, those paying hefty tuition bills to these institutions might be concerned that university funds and resources—*police* resources, no less—are being expended to investigate what amount to little more than juvenile attempts at humor.

### Policies Governing Speakers, Demonstrations, and Rallies

Universities have a right to enact reasonable, narrowly tailored time, place, and manner restrictions that prevent demonstrations and speeches from unduly interfering with the educational process. They may not, however, regulate speakers and demonstrations on the basis of content or viewpoint, nor may they maintain regulations that burden substantially more speech than is necessary to maintain an environment conducive to education.

### Security Fee Policies

In recent years, FIRE has seen a number of colleges and universities attempt to discourage the invitation of controversial speakers by levying additional security costs on the sponsoring student organizations. This is a clear violation of the right to free speech: any re-

quirement that students or student organizations hosting controversial events pay for extra security is unconstitutional because it affixes a price tag to events on the basis of their expressive content.

The U.S. Supreme Court addressed exactly this issue in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), when it struck down an ordinance in Georgia that permitted the local government to set varying fees for events based upon how much police protection the event would need. Criticizing the ordinance, the Court wrote that “[t]he fee assessed will depend on the administrator’s measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.” Deciding that such a determination required county administrators to “examine the content of the message that is conveyed,” the Court wrote that “[l]isteners’ reaction to speech is not a content-neutral basis for regulation. ... **Speech cannot be financially burdened, any more**



45 Facility Use and Solicitation Policy for Registered Student Organizations,” available at <http://studentlife.ou.edu/images/file/Facility%20Use%20and%20Solicitation%20Policy%20for%20Registered%20Student%20Organizations%20REV0810%281%29.pdf> (last visited Nov. 28, 2010).

46 Last year, FIRE intervened in similar situations at four universities: University of Arizona, University of California at Berkeley, University of Colorado at Boulder, and University of Massachusetts Amherst.



**than it can be punished or banned, simply because it might offend a hostile mob.”**  
(Emphasis added.)

Despite the clarity of the law on this issue, the impermissible use of security fees to burden controversial speech is all too common on university campuses. Many universities maintain policies setting forth vague criteria by which security costs will be assessed, inviting this type of viewpoint discrimination. For example, the University of Oklahoma’s policy on event security states that

*Student Life, in conjunction with the University of Oklahoma Chief of Police, or his or her designee, shall review security requirements for all events scheduled outdoors or in classroom facilities. When the director of Student Life determines that additional security beyond that normally provided is necessary, the director of Student Life shall so inform the [Registered Student Organization]. The RSO shall be responsible for the cost of additional security.*<sup>45</sup>

FIRE intervened at Temple University this past winter after Temple charged a student group an extra \$800 in security fees after the fact for hosting a speech by Dutch politician Geert Wilders, who is known for his controversial views about Islam. Although Temple ultimately withdrew the fee after repeated requests by FIRE and the student group, this was the latest in a series of incidents nationwide in which universities attempted to unconstitutionally charge students for security based on the controversial nature of the expression.<sup>46</sup>

## Free Speech Zone Policies

Many universities have regulations creating “free speech zones”—regulations that limit rallies, demonstrations, and speeches to small or out-of-the-way “zones” on campus. Many also require advance notice of any demonstration, rally, or speech. Such “prior restraints” on speech are generally inconsistent with the First Amendment.

From a practical standpoint, it is easy to understand why such regulations are burdensome. Demonstrations and rallies are often spontaneous responses to recent or still-unfolding events. Requiring people to wait 48 or even 24 hours to hold such a demonstration may interfere with the demonstrators’ message by rendering it untimely. Moreover, requiring demonstrators to obtain a permit from the university, without explicitly setting forth viewpoint-neutral criteria by which permit applications will be assessed, is an invitation to administrative abuse.

Recently, Tarrant County College (TCC) in Texas lost a federal lawsuit—and was ordered to pay \$240,000 in attorney fees—stemming from its unconstitutional free speech zone policy and its repeated attempts to ban an “empty holster protest” by a student group called Students for Concealed Carry on Campus (SCCC). The symbolic protest—part of a coordinated national effort by SCCC chapters across the country—was intended to signify opposition to state laws and school policies denying concealed handgun license holders



the same rights on college campuses that they may be granted elsewhere. When the group first applied to hold the protest in 2008, TCC nominally granted the request but prohibited the group members from actually wearing the empty holsters, wholly stripping the protest of its intended impact. The same result occurred when the group sought to hold the protest again the following year.

In November 2009, the group's student leaders filed a federal lawsuit seeking a temporary restraining order to prevent TCC from prohibiting the protest. The court found in favor of the students and ordered that they must be allowed to wear empty holsters on the public areas of TCC's campus. The court also enjoined the college from enforcing a "free speech zone" policy limiting free speech to a small area of campus and denying access to traditional public forums such as sidewalks, streets, and park areas.<sup>47</sup>

In December, following the district court's order, TCC voluntarily dismantled its free speech zone, but also introduced an unconstitutional ban on "cosponsorship," which prohibited students and faculty from holding campus events in association with any "off-campus person or organization" (such as, not coincidentally, the national organization Students for Concealed Carry on Campus). The

students' lawsuit was amended to challenge this new policy, and in a March 2010 ruling, the district court struck this restriction down, too, stating that "the Court cannot imagine how the provision could have been written more broadly."<sup>48</sup> In October 2010, the court ordered TCC to pay \$240,000 in attorney fees to the students' lawyers.<sup>49</sup>

Despite legal precedent holding free speech zones unconstitutional, numerous schools persist in maintaining them. For example:

- At Frostburg State University, "[t]hree areas of the campus have been designated as 'public forum' areas for use by approved student groups, off-campus organizations and individuals: 1) the area of the clock tower, 2) the University Drive triangle between Chesapeake Dining Hall and Annapolis Hall, and 3) the library quad. No other areas may be used for gatherings, speeches or distribution of literature unless first approved by the Office of the President."<sup>50</sup>
- At the University of Central Arkansas, just one space—" [t]he area adjacent to the southwest corner of Ferguson Chapel, not to exceed fifty (50) feet in any direction"—is available for unscheduled expressive activities. All other areas of the campus must be scheduled for such use and approved by the university.<sup>51</sup>

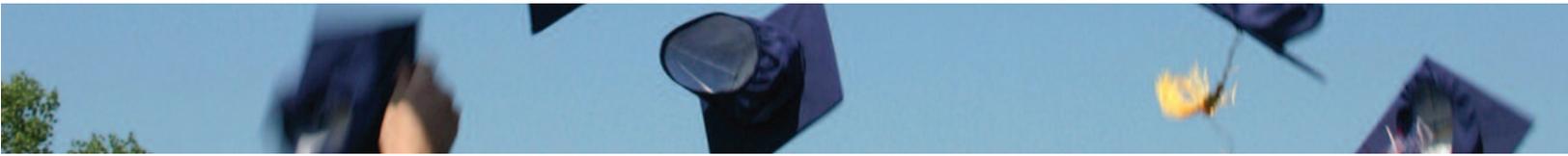
47 *Smith v. Tarrant County College District*, 670 F. Supp. 2d 534 (N.D. Tex. 2009).

48 *Smith v. Tarrant County College District*, 649 F. Supp. 2d 610, 635 (N.D. Tex. 2010).

49 *Smith v. Tarrant County College District*, 2010 U.S. Dist. LEXIS 108973 (N.D. Tex. Oct. 13, 2010).

50 "Policy on Communication of Information," available at <http://www.frostburg.edu/admin/ses/pathfinder/general-university-policies/policy-on-communication-of-information> (last visited Nov. 28, 2010).

51 "Free Speech Policy," *University of Central Arkansas Student Handbook & Daily Planner*, available at [http://www.uca.edu/student/dean/documents/Student\\_Handbook\\_2010-2011\\_FINAL.pdf](http://www.uca.edu/student/dean/documents/Student_Handbook_2010-2011_FINAL.pdf) (last visited Nov. 28, 2010).





## CONCLUSION

### WHAT CAN BE DONE?

The good news is that the types of restrictions discussed in this report can be defeated. The quickest way to effect change is through public exposure—universities are usually unwilling to defend their speech codes in the face of public criticism. For example, during the 2009–2010 academic year, Bryn Mawr College, James Madison University, Keene State College, the University at Buffalo (also known as the State University of New York at Buf-

falo), the University of Idaho, the University of Northern Colorado, and Westfield State College all revised speech codes that had been singled out and publicized through FIRE’s “Speech Code of the Month” feature.

Unconstitutional policies also can be defeated in court, especially at public universities. Speech codes have been struck down in federal courts across the country, including in California, Michigan, Pennsylvania, Texas, Wisconsin, and, most recently, the U.S. Virgin Islands. Any red-light policy in force at a public university is extremely vulnerable to a con-



stitutional challenge. Moreover, as speech codes are consistently defeated in court, administrators are losing virtually any chance of credibly arguing that they are unaware of the law, which means that they can be held personally liable when they are responsible for their schools' violations of constitutional rights.<sup>52</sup>

The suppression of free speech at American universities is a national scandal. But supporters of liberty should take heart: While many colleges and universities might seem at times to believe that they exist in a vacuum, the

truth is that neither our nation's government nor its citizens look favorably upon speech codes or other restrictions on basic freedoms.

<sup>52</sup> Azhar Majeed, "Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators for Violating Students' Speech Rights," *Cardozo Public Law, Policy & Ethics Journal*, Vol. 8, No. 3 (2010), p. 515.

# APPENDIX A

## STATES BY GEOGRAPHIC REGION

MIDWEST	NORTHEAST
Illinois Indiana Iowa Kansas Michigan Minnesota Missouri Nebraska North Dakota Ohio Oklahoma South Dakota Wisconsin	Connecticut Delaware District of Columbia Maine Maryland Massachusetts New Hampshire New Jersey New York Pennsylvania Rhode Island Vermont
SOUTH	WEST
Alabama Arkansas Florida Georgia Kentucky Louisiana Mississippi North Carolina South Carolina Tennessee Texas Virginia West Virginia	Alaska Arizona California Colorado Hawaii Idaho Montana Nevada New Mexico Oregon Utah Washington

# APPENDIX B

## SCHOOLS BY RATING

### RED LIGHT

Adams State College  
Alabama State University  
Alcorn State University  
American University  
Angelo State University  
Appalachian State University  
Arkansas State University  
Armstrong Atlantic State University  
Auburn University  
Auburn University Montgomery  
Bemidji State University  
Bloomsburg University of Pennsylvania  
Boston College  
Boston University  
Bowdoin College  
Brandeis University  
Bridgewater State College  
Brooklyn College, City University of New York  
Brown University  
Bryn Mawr College  
Bucknell University  
California Institute of Technology  
California State University - Chico  
California State University - Dominguez Hills  
California State University - Fresno  
California State University - Fullerton  
California State University - Long Beach  
California State University - Los Angeles  
California State University - Monterey Bay  
California State University - Sacramento  
California State University - San Bernardino  
California State University - San Marcos  
California State University - Stanislaus  
California University of Pennsylvania  
Carleton College  
Central Connecticut State University  
Central Michigan University  
Central Washington University  
Centre College  
Cheyney University of Pennsylvania  
Claremont McKenna College  
Clarion University of Pennsylvania  
Clark University  
Colby College  
Colgate University  
College of the Holy Cross  
Colorado College  
Columbia University  
Connecticut College  
Cornell University  
Davidson College  
Delaware State University  
Delta State University  
DePauw University  
Dickinson College  
East Carolina University  
East Stroudsburg University of Pennsylvania  
Eastern Kentucky University  
Eastern Michigan University  
Edinboro University of Pennsylvania  
Emory University  
Evergreen State College  
Fitchburg State College  
Florida Gulf Coast University  
Florida International University  
Florida State University  
Fordham University  
Fort Lewis College  
Franklin & Marshall College  
Frostburg State University  
Furman University  
George Mason University

Georgetown University  
 Georgia Institute of Technology  
 Gettysburg College  
 Governors State University  
 Grambling State University  
 Grand Valley State University  
 Harvard University  
 Howard University  
 Illinois State University  
 Indiana State University  
 Indiana University - Purdue University Indianapolis  
 Indiana University of Pennsylvania  
 Indiana University, Northwest  
 Indiana University, Southeast  
 Iowa State University  
 Jackson State University  
 Jacksonville State University  
 Johns Hopkins University  
 Kansas State University  
 Kean University  
 Kenyon College  
 Lafayette College  
 Lake Superior State University  
 Lehigh University  
 Lewis-Clark State College  
 Lincoln University  
 Louisiana State University - Baton Rouge  
 Macalester College  
 Mansfield University of Pennsylvania  
 Marquette University  
 Marshall University  
 Massachusetts College of Liberal Arts  
 McNeese State University  
 Mesa State College  
 Michigan Technological University  
 Middle Tennessee State University  
 Middlebury College  
 Millersville University of Pennsylvania  
 Mississippi State University  
 Missouri State University  
 Missouri University of Science and Technology  
 Montana State University - Bozeman  
 Montana Tech of the University of Montana  
 Morehead State University  
 Mount Holyoke College  
 Murray State University  
 New York University  
 Nicholls State University  
 North Carolina Central University  
 North Carolina School of the Arts  
 North Dakota State University  
 Northeastern Illinois University  
 Northeastern University  
 Northern Arizona University  
 Northern Illinois University  
 Northern Kentucky University  
 Northwestern Oklahoma State University  
 Northwestern State University  
 Northwestern University  
 Oberlin College  
 Ohio University  
 Oregon State University  
 Princeton University  
 Purdue University  
 Rensselaer Polytechnic Institute  
 Rhode Island College  
 Rice University  
 Richard Stockton College of New Jersey  
 Rutgers University - New Brunswick  
 San Diego State University  
 San Francisco State University  
 Sewanee, The University of the South  
 Slippery Rock University of Pennsylvania  
 Smith College  
 South Dakota State University  
 Southeastern Louisiana University  
 Southern Illinois University at Carbondale  
 Southwest Minnesota State University  
 St. Olaf College  
 Stanford University  
 State University of New York - Albany  
 State University of New York - Brockport  
 State University of New York - Fredonia  
 State University of New York - New Paltz  
 State University of New York - University at Buffalo  
 Stevens Institute of Technology  
 Stony Brook University  
 SUNY College of Environmental Science and Forestry  
 Swarthmore College  
 Syracuse University  
 Tennessee State University  
 Texas A&M University - College Station

Texas Southern University  
Texas Tech University  
The College of New Jersey  
The Ohio State University  
Trinity College  
Troy University  
Tufts University  
Tulane University  
Union College  
University of Alabama  
University of Alabama at Birmingham  
University of Alaska Anchorage  
University of Alaska Southeast  
University of Arizona  
University of Arkansas - Fayetteville  
University of California, Riverside  
University of California, Davis  
University of California, Irvine  
University of California, San Diego  
University of California, Santa Cruz  
University of Central Arkansas  
University of Chicago  
University of Cincinnati  
University of Connecticut  
University of Florida  
University of Georgia  
University of Hawaii at Hilo  
University of Houston  
University of Idaho  
University of Illinois at Chicago  
University of Illinois at Springfield  
University of Illinois at Urbana-Champaign  
University of Iowa  
University of Kansas  
University of Louisville  
University of Maine - Presque Isle  
University of Massachusetts Amherst  
University of Massachusetts at Lowell  
University of Miami  
University of Michigan - Ann Arbor  
University of Minnesota - Morris  
University of Minnesota - Twin Cities  
University of Mississippi  
University of Missouri - Columbia  
University of Missouri at St. Louis  
University of Nevada, Las Vegas  
University of Nevada, Reno  
University of New Hampshire  
University of New Mexico  
University of New Orleans  
University of North Alabama  
University of North Carolina - Greensboro  
University of North Dakota  
University of North Texas  
University of Northern Colorado  
University of Northern Iowa  
University of Notre Dame  
University of Oregon  
University of Richmond  
University of Rochester  
University of South Alabama  
University of South Carolina Columbia  
University of South Florida  
University of Southern California  
University of Southern Indiana  
University of Southern Mississippi  
University of Texas at Arlington  
University of Texas at Austin  
University of Texas at El Paso  
University of Toledo  
University of Tulsa  
University of Washington  
University of West Alabama  
University of Wisconsin - Eau Claire  
University of Wisconsin - Green Bay  
University of Wisconsin - La Crosse  
University of Wisconsin - Madison  
University of Wisconsin - Oshkosh  
Utah State University  
Utah Valley University  
Valdosta State University  
Vanderbilt University  
Wake Forest University  
Washington State University  
Washington University in St. Louis  
Wayne State University  
Wesleyan University  
West Chester University of Pennsylvania  
West Virginia University  
Western Illinois University  
Western Kentucky University  
Western Michigan University  
Western State College of Colorado

William Paterson University  
Winston Salem State University  
Worcester State College  
Youngstown State University

#### YELLOW LIGHT

Alabama A&M University  
Amherst College  
Arizona State University  
Athens State University  
Ball State University  
Barnard College  
Bates College  
Binghamton University, State University of New York  
Bowling Green State University  
California Polytechnic State University  
California State University - Bakersfield  
California State University - East Bay  
California State University - Northridge  
Case Western Reserve University  
Chicago State University  
Clemson University  
Colorado School of Mines  
Colorado State University  
Dakota State University  
Drexel University  
Duke University  
Eastern New Mexico University  
Elizabeth City State University  
Fayetteville State University  
Florida Atlantic University  
Framingham State College  
George Washington University  
Georgia State University  
Grinnell College  
Hamilton College  
Harvey Mudd College  
Haverford College  
Henderson State University  
Idaho State University  
Indiana University - Bloomington  
Indiana University - Kokomo  
Indiana University - Purdue University Columbus  
Indiana University - Purdue University Fort Wayne

Indiana University South Bend  
Indiana University, East  
James Madison University  
Keene State College  
Kentucky State University  
Kutztown University of Pennsylvania  
Lock Haven University of Pennsylvania  
Massachusetts Institute of Technology  
Metropolitan State University  
Miami University of Ohio  
Michigan State University  
Montclair State University  
New Jersey Institute of Technology  
North Carolina A&T State University  
North Carolina State University - Raleigh  
Northern Michigan University  
Occidental College  
Oklahoma State University - Stillwater  
Pennsylvania State University - University Park  
Pitzer College  
Pomona College  
Reed College  
Saginaw Valley State University  
Saint Cloud State University  
San Jose State University  
Scripps College  
Shawnee State University  
Skidmore College  
Southern Methodist University  
Temple University  
Texas Woman's University  
The City College of New York  
Towson University  
University of Alabama in Huntsville  
University of Alaska Fairbanks  
University of California, Berkeley  
University of California, Los Angeles  
University of California, Santa Barbara  
University of Central Florida  
University of Central Missouri  
University of Colorado at Boulder  
University of Delaware  
University of Denver  
University of Kentucky  
University of Maine

University of Maryland - College Park  
University of Massachusetts at Dartmouth  
University of Montana  
University of Montevallo  
University of North Carolina - Asheville  
University of North Carolina - Chapel Hill  
University of North Carolina - Charlotte  
University of North Carolina - Pembroke  
University of North Carolina - Wilmington  
University of Oklahoma  
University of Pittsburgh  
University of Rhode Island  
University of Southern Maine  
University of Vermont  
University of West Georgia  
Virginia Polytechnic Institute and State University  
Washington & Lee University  
Wellesley College  
Western Carolina University  
Westfield State College  
Whitman College  
Wichita State University  
Williams College  
Yale University

## GREEN LIGHT

Black Hills State University  
Carnegie Mellon University  
Cleveland State University  
Dartmouth College  
Shippensburg University of Pennsylvania  
The College of William and Mary  
University of Nebraska - Lincoln  
University of Pennsylvania  
University of South Dakota  
University of Tennessee - Knoxville  
University of Utah  
University of Virginia

## NOT RATED

Bard College  
Baylor University  
Brigham Young University  
Pepperdine University  
Saint Louis University  
United States Military Academy  
United States Naval Academy  
Vassar College  
Worcester Polytechnic Institute  
Yeshiva University

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