



May 23, 2017

Dr. Ronald L. Carter
President, Johnson C. Smith University
100 Beatties Ford Road
Charlotte, North Carolina 28216

Sent via U.S. Mail and Electronic Mail (rcarter@jcsu.edu)

URGENT

Dear President Carter:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned by the threat to freedom of expression and the right to counsel posed by a gag order recently imposed upon an unknown number of students at Johnson C. Smith University (JCSU) concerning the discovery of what the university alleges to be a "criminal conspiracy" involving hundreds of allegedly fraudulent transactions associated with food vendors on campus.

The following is our understanding of the facts, based on public reports.¹ Please inform us if you believe we are in error.

I. Facts

JCSU is investigating allegedly fraudulent transactions relating to the use of student meal cards at the university. There are, according to the university, more than three hundred potentially fraudulent transactions relating to an unknown number of students.

¹ Bruce Henderson & Anna Douglas, *JCSU probes 'criminal conspiracy' over student food service cards*, CHARLOTTE OBSERVER, May 19, 2017, <http://www.charlotteobserver.com/news/local/article151477007.html>; *'Flex card' scam uncovered at Johnson C. Smith University*, FOX 46, May 18, 2017, <http://www.fox46charlotte.com/news/breaking-news/255595497-story>.

Some students have received an email notifying them that they are being investigated for participation in a “criminal conspiracy” by which they “illegally received funds” from certain on-campus vendors. The email’s subject line refers to “fraud” and warns students that the alleged conduct violates both the university’s policies and “the laws of the United States and North Carolina.” Accordingly, both “criminal prosecution and disciplinary action may result.” The email then instructs, in capital letters, that the recipient is “HEREBY NOTIFIED THAT YOU MUST NOT DISCUSS THIS MATTER WITH ANY OTHER PERSON” and that “[d]oing so will have a negative impact on your case.”

This order has been sent to more than one student, but the precise number of students subject to the order is unknown. The university says that it has “contacted every student” whose card had so much as a “questionable transaction.”

II. Analysis

While JCSU is a private institution and thus not legally bound by the First, Fifth, or Sixth Amendments, it is both morally and contractually bound to honor the explicit, repeated, and unequivocal promises of freedom of expression and the right to advice of counsel that the university has made to its students.

For example, JCSU pledges to protect students’ freedom of expression, including a policy entitled “Freedom of Inquiry And Expression” in its student handbook, which reads, in relevant part:²

Students must be free to make inquiries and express their opinions if educational objectives are to be met. Thus, students have the right to engage in discussions, exchange thoughts and opinions, and speak freely on any subject in accordance with the guarantees of the state and federal constitutions.

Likewise, the university acknowledges the importance of a right to the presence of an attorney during its own disciplinary proceedings when there are “criminal proceedings” pending.³

Yet the order imposed upon students at JCSU contravenes these clear promises, threatening to chill students’ ability to consult with an attorney while facing accusations of criminal conduct.

The right to counsel is so fundamental that our Constitution requires the state to provide an attorney to certain defendants who cannot afford to retain one. *Gideon v. Wainwright*, 372 U.S.

² 2016-2017 STUDENT HANDBOOK, JOHNSON C. SMITH UNIVERSITY, 131, available at <https://www.jcsu.edu/uploads/b3/26/b326a1e9cd38c629d98fb4a5738e84c6/2016-2017-Student-Handbook-Amended-December-16-2017-.pdf>.

³ *Id.* at 159.

335, 342 (1963). The “right to the aid of counsel,” the Supreme Court has observed, is of “fundamental character.” *Powell v. Alabama*, 287 U.S. 45, 68 (1932). Likewise, the right to counsel is inextricably bound with the right to *communicate* with counsel, and courts have observed that the potential chilling effect on speech between client and counsel is of particular importance. *See, e.g., Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1209 (9th Cir. 2017) (noting courts analyze attorney-client communications “under various constitutional principles, including the First Amendment right to freedom of speech”).

These rights are closely guarded for good reason. Criminal charges bring the possibilities of confinement, arrest records, interrogation by law enforcement, and the potential for ruinous financial, psychological, and emotional costs. There is also the risk that an arrest record will impact a student’s employment or educational opportunities. And these are just some of the costs that may arise before charges are filed, or if a defendant is ultimately cleared of charges.

Even outside of a chilling effect on communications between student and counsel, the university’s prohibition on communications with *anyone* amounts to a prior restraint on speech. The Supreme Court views such restrictions on speech most unfavorably, observing that “[a]ny prior restraint on expression comes [...] with a ‘heavy presumption’ against its constitutional validity.” *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Restraints on speech are permissible only in “exceptional cases,” such as to protect the movement of armed forces during wartime. *Near v. Minnesota*, 283 U.S. 697, 715–16 (1931).

The gag order promulgated by JCSU does not appear to be closely tied to any critical interest, much less confined to protect that interest. We cannot fathom any interest whatsoever that could be served by such a broad restriction. It is, at best, a haphazard and misguided attempt to prevent students from talking about a matter of public concern. A direction that students not discuss allegations against them with anyone in no way reflects a serious commitment to students’ freedom of expression at a critical juncture.

III. Conclusion

The rights chilled by Johnson C. Smith University’s gag order are of a fundamental and urgent nature. The university must immediately rescind the order and make it clear that students are not prohibited from speaking about any aspect of these allegations. FIRE further calls upon the university to be mindful of its obligation to provide expedient due process to all involved.

Given the urgency of this matter, we respectfully request a response to this letter by the close of business on May 26, 2017.

Sincerely,



Adam Steinbaugh

Senior Program Officer, Individual Rights Defense Program