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June 3, 2013

Tim Kissock
General Counsel
Missouri Western State University
4525 Downs Drive
St. Joseph, MO 64507

Re: Speech Social Media Policy
Our File No.:13-5816

Dear Mr. Kissock:

I am writing to register the ACLU's objection to the Department of Nursing and Allied Health's new social media policy.

On December 7, 2012, the Department of Nursing and Allied Health added a new social media policy to its Student Handbook that includes the following provisions:

Standards of Social Media for Health Professions Students

- Health professions students must recognize his/her ethical and legal obligations to always maintain the privacy and confidentiality of the client. Transmission of any client or institution-related image that might be reasonably anticipated to violate the client's rights or the institution's privacy or would cause embarrassment is prohibited.
- Any images of health professions students in uniform posted on social media sites must reflect a positive image.
- Health professions students must not post unfavorable remarks about any academic or clinical institution, faculty, staff or patients.
- Health professions students must not use any form of social media to make threatening, harassing, profane, obscene, sexually explicit, racially derogatory or homophobic posts. This also includes making comments about individuals or groups with disabilities or individuals or groups with certain religious or political views.

The Supreme Court's "cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar v. Vincent*, 454 U.S. 263, 268-69 (1981). *See also Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment

protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'"); *Papish v. Board of Curators*, 410 U.S. 667, 671 (1973) ("the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech"). There can be little doubt that the First Amendment protects the speech of college students on social media sites .

The Department of Nursing and Allied Health's new social media policy is unconstitutional. First, the policy constitutes a prior restraint on speech, which is presumptively unconstitutional. *Vance v. Universal Amusement Co.,* 445 U.S. 308, 317 (1980) ("*Any* system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity").

Second, the policy is substantially overbroad because it restricts a substantial amount of protected activity as compared to the rule's legitimate applications. See *United States v. Stevens*, 130 S.Ct. 1577, 1589-90 (2010). The public interest "that students in publicly supported schools not be held to vague standards" is not outweighed by the public interests in patient privacy and professionalism. *Byrnes v. Johnson County Community College*, No. 10-2690-EFM-DJW, 2011 U.S. Dist. LEXIS 5105, 15-16, (D. Kan. Jan. 19, 2011).

Some portions of the policy that relate to patient privacy and confidentiality may be valid, but most of the policy's provisions are unrelated to patient privacy and are thus unconstitutional.

Third, the policy is unconstitutionally vague because it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" and because "it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Students in public schools cannot "be held to vague standards that are interpreted in arbitrary and unpredictable ways that ultimately hinge on the personal interpretations, feelings, and personal morals of those who are imposing them." *Byrnes,* No. 10-2690-EFM-DJW, 2011 U.S. Dist. LEXIS 5105, 9, 16, (D. Kan. Jan. 19, 2011).

Portions of the policy that are specifically and narrowly tailored to patient privacy and confidentiality may be valid, but most of the policy's provisions are unrelated to patient privacy and are thus unconstitutional. For example, the part of the policy providing that "Health professions students must not post unfavorable remarks about any academic or clinical institution, faculty, staff or patients" is unconstitutionally vague and overbroad. It would prohibit a student from posting an on-line review stating that a faculty member or a particular class is terrible or a waste of time. There is simply no legitimate governmental interest in prohibiting such speech. Similarly, the prohibition of the "Transmission of any . . . institution-related image that . . . would cause embarrassment" is vague and overbroad. Whether a particular image might cause embarrassment is in the eye of the beholder, and the policy provides no standards for university enforcers to apply in deciding whether an image "would cause embarrassment." The Supreme Court has long held that "[t]he First Amendment prohibits

the vesting of such unbridled discretion in a government official." Moreover, prohibiting "Health professions students [from] us[ing] any form of social media to make threatening, harassing, profane, obscene, sexually explicit, racially derogatory or homophobic posts . . . include[ing] . . . comments about individuals or groups with disabilities or individuals or groups with certain religious or political views" is grossly overbroad. That restriction would prohibit a student from positing a comment about any individual's political views or beliefs. Such speech falls with the core protections of the First Amendment. And much of the prohibited speech – though perhaps distasteful to some people – is protected by the First Amendment. For instance, the First Amendment protects profanity. *See, e.g., Cohen v. California*, 403 U.S. 15 (1971) (jacket bearing the words "Fuck the Draft" not obscene). Even the prohbitition of threatening or harassing speech throws the University into a constitutional briar patch. *See generally* Erwin Chemerinsky, *Unpleasant Speech on Campus, Even Hate Speech, Is a First Amendment Issue,* 17 Wm. & Mary Bill of Rights J.765 (2009).

I ask that the Department of Nursing and Allied Health rescind its unconstitutional social media policy. If you have any questions about this matter, please call me.

Sincerely,

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