



September 25, 2025

Shelly Lowe
Office of the President
Institute of American Indian Arts
83 Avan Nu Po Road
Santa Fe, New Mexico 87508

Sent via U.S. Mail and Electronic Mail (president@iaia.edu)

Dear President Lowe:

Congratulations on your appointment as president of the Institute of American Indian Arts. Given your new role, FIRE,¹ the National Coalition Against Censorship (NCAC),² the Society of Professional Journalists (SPJ),³ and the Student Press Law Center (SPLC)⁴ wish to restate our concern with IAIA's continued refusal to rescind the sanctions imposed on student journalist David McNicholas for publishing criticism of IAIA officials in an independent campus zine. As you begin your tenure at IAIA, we urge you to remedy this matter by lifting any remaining sanctions on McNicholas and removing this incident from his record. We also urge you to revise IAIA policies to conform with the school's constitutional obligations.

In March 2024, McNicholas published two anonymous student submissions in the Young Warrior critical of IAIA officials.⁵ The submissions alleged that that a beloved IAIA student advisor resigned because she was bullied by her supervisors and suggested school officials had

¹ For more than 25 years, the Foundation for Individual Rights and Expression has defended freedom of expression and other individual rights on America's university campuses. You can learn more about our mission and activities at thefire.org.

² The National Coalition Against Censorship (NCAC) is a coalition of over 60 national non-profit organizations dedicated to protecting freedom of expression and fighting censorship with public education, legal advocacy, youth programming, and direct support for victims of censorship. The positions advocated in this letter do not necessarily reflect the views of NCAC's member organizations.

³ The Society of Professional Journalists (SPJ) is the nation's most broad-based journalism organization, dedicated to encouraging the free practice of journalism and upholding high ethical standards. Founded in 1909 as Sigma Delta Chi, SPJ champions journalists by recognizing outstanding achievement, protecting press freedom, promoting ethics, and preparing new generations of professionals.

⁴ The Student Press Law Center (SPLC) is the nation's only legal organization devoted exclusively to defending and advancing the free press rights of student journalists. Since 1974, we have helped students and their educators navigate the law, strengthen their reporting and stand up for press freedom. Learn more at splc.org.

⁵ *Untitled student editorials*, YOUNG WARRIOR, Mar. 21, 2024, at 10–11 (on file with author).

misappropriated grant money intended for food aid—both topics of widespread concern on campus at the time.⁶ IAIA Provost Felipe Colon charged McNicholas with “bullying” for publishing the submissions, and after an appeal and formal hearing, McNicholas was placed on Institute and Disciplinary Probation.⁷ He was initially barred from student housing as well, forcing him to live out of his van until the housing suspension was lifted on appeal.⁸

FIRE first wrote to your predecessor regarding this matter in January 2025, urging IAIA to lift the sanctions and revise its unconstitutional Anti-Bullying Policy.⁹ As we explained then, the First Amendment¹⁰ protects the freedom of the press to publish even “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”—including college administrators.¹¹ IAIA’s punishment of McNicholas, as well as the Anti-Bullying Policy he was charged with violating, violate the First Amendment. But IAIA has refused to remedy the situation.¹²

Since then, we have learned that IAIA has refused to allow the *Young Warrior* to post on campus bulletin boards because it is not an IAIA-funded publication, despite the fact that IAIA has never before limited bulletin board use to school-funded publications and IAIA’s bulletin board policy contains no such limitation.¹³ To be sure, IAIA may establish and enforce reasonable time, place, and manner restrictions on posting, but its rules must be viewpoint- and content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication.¹⁴

IAIA’s requirement that administrators approve *all* bulletin-board posting is neither narrowly tailored nor reasonable. Such prior restraints on speech are highly disfavored,¹⁵ as “permit systems represent a departure from our tradition of public discourse by requiring a citizen to

⁶ *Id.*

⁷ Email from Diana Ellenwood, Student Services Coordinator, to David McNicholas, student (Apr. 30, 2024, 3:27 PM) (on file with author).

⁸ Letter from Colon to McNicholas (Mar. 29, 2024) (on file with author).

⁹ See FIRE Letter to Robert Martin, president, from author (Jan. 2, 2025) (enclosed).

¹⁰ *Nally v. Graham*, 551 F.Supp.3d 1062, (D. Kan. 2021) (recognizing that the First Amendment applies to public tribal colleges); 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.’”) (internal citation omitted).

¹¹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

¹² See Letter from Patricia Salazar Ives, attorney, to author (Jan. 31, 2025) (enclosed); Letter from author to Salazar Ives (Apr. 9, 2025) (enclosed); Letter from Salazar Ives to author (May 13, 2025) (enclosed).

¹³ *Student Handbook 2023–2024*, INST. OF AMER. INDIAN ARTS, at 44 (on file with author). The bulletin board policy reads in full: “To post flyers on the IAIA bulletin boards, email a PDF of the flyer to nanaya@iaia.edu, who will approve it and email it back for you to print or bring no more than 15 copies of the flyer or poster to the Student Services offices, where they will sign and date the flyer. It is the initiator’s responsibility to post and remove flyers once the event is over.”

¹⁴ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); see also *Healy*, 408 U.S. at 192–93.

¹⁵ *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

seek approval ... to engage in speech.”¹⁶ Generally, public colleges and universities must maintain at least one location where *all* students may post freely without first obtaining administrator approval.¹⁷

More importantly, reasonable time, place, and manner restrictions may not be enforced selectively based on the speaker’s viewpoint or enacted for the purpose of targeting particular speakers.¹⁸ Yet the sudden introduction of a rule limiting posting only to school-funded publications, contrary to historical practice and written policy, strongly suggests viewpoint discrimination against McNicholas and the *Young Warrior*.

As four organizations dedicated to defending the First Amendment rights of student journalists like McNicholas to publish free from censorship, we strongly urge you to stand up for the rights of IAIA’s students by lifting the sanctions and erasing this incident from McNicholas’s record and revising the unconstitutional Anti-Bullying Policy and Posting Policy. As the former chair of the National Endowment for the Humanities—an institution that has faced many attempts by politicians to police artistic expression over the years—you are well positioned to lead decisively on matters of free expression at an arts institution like IAIA. You have an opportunity to reverse IAIA’s unconstitutional course here and make plain that your administration supports free expression and student journalism and will not tolerate censorship or retaliation against students’ protected speech.

FIRE once again renews our offer to assist IAIA with revising its policies, including its Anti-Bullying Policy and Posting Policy, to conform to the First Amendment—free of charge, in accordance with our charitable mission. We would be thrilled to publicly celebrate IAIA for revising its policies—which currently earn a “red light” rating from FIRE—to earn a “green light” rating.¹⁹ As you may be aware, this case has already garnered quite a bit of public attention. More than 500 people have signed on to our Take Action campaign pressing IAIA to lift McNicholas’s sanctions and revise its policies.²⁰

¹⁶ *Cuviello v. City of Vallejo*, 944 F.3d 816, 832 (9th Cir. 2019).

¹⁷ FIRE Letter to Colorado State Univ. (Mar. 7, 2024), <https://www.thefire.org/research-learn/fire-letter-colorado-state-university-march-7-2024>.

¹⁸ *Frederick Douglass Found., Inc. v. District of Columbia*, 82 F.4th 1122, 1150 (D.C. Cir. 2023) (“[S]elective enforcement of a neutral and facially constitutional law may run afoul of the First Amendment if the government’s prosecutorial choices turn on the content or viewpoint of speech.”); *Bus. Leaders In Christ v. Univ. of Iowa*, 991 F.3d 969, 985–86 (8th Cir. 2021) (selective enforcement of a facially neutral non-discrimination policy against a student group based on its views violates the group’s free speech rights).

¹⁹ See, e.g., *Dartmouth earns FIRE’s top rating for free speech*, FIRE (Sept. 16, 2024), <https://www.thefire.org/news/dartmouth-earns-fires-top-rating-free-speech>; *Victory: Skyline College amends free speech policies, students may engage in expressive activity on campus without prior permission*, FIRE (Dec. 29, 2017), <https://www.thefire.org/news/victory-skyline-college-amends-free-speech-policies-students-may-engage-expressive-activity>; Ross Marchand, *New policy gives Cornell head start on New Year’s gains*, FIRE, Jan. 8, 2025, <https://www.thefire.org/news/new-policy-gives-cornell-head-start-new-years-gains>.

²⁰ See *The Institute of American Indian Arts Can’t Ignore the First Amendment*, FIRE (Feb. 24, 2025), <https://www.thefire.org/get-involved/take-action/institute-american-indian-arts-cant-ignore-first-amendment>.

We request a substantive response to this letter no later than October 9.

Sincerely,



Jessie Appleby
Program Counsel, FIRE



Emily Bloch
President, SPJ



Lee Rowland
Executive Director, NCAC



Gary Green
Executive Director, SPLC

Cc: Felipe Colon, Provost

Encl.



January 2, 2025

Robert Martin
Office of the President
Institute of American Indian Arts
83 Avan Nu Po Road
Santa Fe, New Mexico 87508

Sent via U.S. Mail and Electronic Mail (president@iaia.edu)

Dear President Martin:

FIRE, a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by the Institute of American Indian Arts' punishment of student David McNicholas for alleged bullying based on his decision, as senior editor of the *Young Warrior* student magazine, to publish anonymous student submissions critical of some IAIA administrators. While the critical commentary clearly offended some readers, including the named administrators, the submissions and related social media activity do not meet the legal standards for defamation or harassment and are protected by the First Amendment. IAIA must rescind any remaining sanctions on McNicholas, remove the incident from his record, and revise its anti-bullying policy to conform with constitutional requirements.

As *Young Warrior's* senior editor, McNicholas chose to publish two anonymous student submissions in its March 21 issue reacting to the March 18 resignation of IAIA Student Success Advisor Karen Redeye.² The first was an anonymously submitted op-ed urging students to speak up against the IAIA administration's "oppression" because "things are not going well" when "good people [like Redeye] have no choice but to leave or sacrifice their own mental, emotional [sic] well-being."³ It identified Redeye's supervisors as Student Success Department Interim Director Lorissa Garcia and Dean of Students Nena Martinez Anaya, and accused

¹ For more than 20 years, the Foundation for Individual Rights and Expression (FIRE) has defended freedom of expression and other individual rights on America's college campuses. You can learn more about our mission and activities at thefire.org.

² *Untitled student editorials*, YOUNG WARRIOR, Mar. 21, 2024, at 10–11 (on file with author). The recitation here reflects our understanding of the pertinent facts. We appreciate that you may have additional information and invite you to share it with us. To that end, please find enclosed an executed privacy waiver authorizing you to do so.

³ *Id.* at 10.

Garcia of bullying Redeye.⁴ The second item at issue was an image of a flyer that read, “Karen Redeye keeps pantries full[.] Nena Martinez robs them[.] Redeye Redemption[.]”⁵

On March 21, IAIA Provost Felipe Colon notified McNicholas that he was investigating two complaints of alleged bullying filed against McNicholas.⁶ The first complaint, filed by an anonymous student, alleged that McNicholas published the anonymous student op-ed in the *Young Warrior* without properly contextualizing the article’s claims about Redeye’s resignation. According to the complaint, this could ostensibly lead readers to interpret the letter’s “gossip and heresy opinions” as fact.⁷ Claiming that readers interpreting the letter’s “damaging and defamatory content” as facts “could be damaging to other people,” the complaint alleged that publishing the letter without sufficient context or a disclaimer violated the IAIA Student Handbook Anti-Bullying Policy.⁸

The second complaint, filed by an unnamed IAIA staff member, alleged that “the *Young Warrior* and [McNicholas] as Senior Editor have published derogatory and unfounded misinformation about them, their actions, roles, and alleged responsibility regarding the resignation of [] Redeye” and “the publication of these libelous allegations is a direct violation of the IAIA Student Handbook Anti-Bullying Policy and is damaging their professional and personal reputation and relationships with others.”⁹

On March 27, Interim Director Garcia also filed a complaint against McNicholas echoing the allegation made in the March 21 staff complaint.¹⁰ Garcia further alleged that McNicholas, as the Associated Student Government Public Relations Officer, used the ASG Instagram account to “promote and distribute [the] derogatory and unfounded misinformation and rumors about” Garcia’s role in Redeye’s resignation. Garcia based this allegation on the claim that the ASG account “liked” a student’s post of an image of the “Redeye Redemption” flyer published in the *Young Warrior*.¹¹ (IAIA also punished the student who posted the flyer, which resulted in the student leaving school and incurring significant financial hardship and housing insecurity.)¹²

⁴ *Id.* (“And people like Lorissa Garcia have time in their day to BULLY someone like Karen? It smells like jealousy, and it smells like OPPRESSION...”). Anaya retired from her position in May 2024. Email from Felipe Colon, Provost, to IAIA Students et al. (Apr. 23, 2024, 12:03 PM) (on file with author). Garcia resigned shortly after.

⁵ *Untitled student editorials*, *supra* note 2 at 11.

⁶ Email from Colon, to David McNicholas, student (Mar. 21, 2024, 5:28 PM) (on file with author).

⁷ *Id.*

⁸ *Id.*

⁹ Letter from Colon to McNicholas (Mar. 29, 2024) (on file with author). Also on March 21, Colon contacted the members of the IAIA Associated Student Government—including McNicholas—regarding the alleged involvement of ASG members in “bullying, defamation, and possibly legally actionable slander and liable [sic] against members of the IAIA staff and in violation of the IAIA Student Handbook Anti-Bullying Policy.” Email from Colon to Laura Ten Fingers et al. (Mar. 21, 2024, 11:31 AM) (on file with author).

¹⁰ Letter from Colon to McNicholas, *supra* note 9.

¹¹ *Id.*

¹² Insofar as our arguments also apply to this student, we further ask that IAIA rescind any sanctions or restrictions imposed on this student and remove any notice of this disciplinary action from this student’s record.

After meeting with McNicholas on March 29,¹³ Colon determined that the three complaints' allegations were valid and imposed sanctions on McNicholas. McNicholas was ordered to issue written and public apologies to Garcia and Anaya for "having defamed and slandered them" in violation of the IAIA Anti-Bullying Policy,¹⁴ publish retractions in the *Young Warrior* and on the ASG Instagram account.¹⁵ McNicholas was also placed on "Institute and Disciplinary Probation" through the 2024–2025 academic year and was suspended from student housing through the Fall 2024 semester.¹⁶

Following Colon's decision on McNicholas, Redeye emailed you regarding the reasons for her abrupt resignation, explaining she "resigned from IAIA due to repeated lack of support from [her] superiors, maltreatment, and bullying from direct supervisors" that "elevated to the point of affecting [her] physically."¹⁷ Citing the new evidence in Redeye's email that reinforced the factual underpinnings of the published items, McNicholas appealed the sanctions.¹⁸ But the Student Hearing and Review Panel declined to hear the appeal, inexplicably citing the lack of new evidence as one of its reasons.¹⁹

IAIA formed a new panel to hear the appeal because the original panel had not complied with the requirements of IAIA policy.²⁰ After a formal hearing on May 3, the new panel affirmed the Institute and Disciplinary Probation but lifted the other sanctions.²¹

¹³ Also present at the meeting were Counselor Eliza Combs and Professor Kim Parko. Email from Colon to McNicholas (Mar. 29, 2024, 10:57 AM) (on file with author).

¹⁴ Letter from Colon to McNicholas, *supra* note 9 ("You will issue an IAIA Community public apology to Dean Anaya and Ms. Lorissa Garcia including a statement admitting to your role in spreading harmful gossip in print and via social media, and to your violation of the IAIA Anti-Bullying Policy.").

¹⁵ *Id.* ("You will submit to the *Young Warrior* Club a retraction to be printed in the next issue of the *Young Warrior* and to the IAIA-ASG a retraction on the 'iaiaasg' Instagram account, admitting to the inappropriate publishing and promotion of hurtful gossip, defamatory statements, and slander.").

¹⁶ *Id.* The residential suspension also bars McNicholas from visiting student housing. *See Student Handbook 2023–2024*, INST. OF AMER. INDIAN ARTS, at 72 (on file with author) ("A suspension from residential housing places a student on restricted status Persona Non-Grata (PNG) from the housing area. Individuals with PNG status may not enter the residential units or housing areas for any reason. Students found on the premises risk being arrested for trespassing.").

¹⁷ Email from Redeye to Martin et al. (Mar. 29, 2024, 4:32 PM) (on file with author).

¹⁸ David McNicholas, *Request for Hearing*, INST. OF AM. INDIAN ARTS (Mar. 30, 2024) (on file with author).

¹⁹ The reasons cited for declining the appeal were that "McNicholas took responsibility for the actions that were the basis for the complaint," did not offer new evidence, and his actions met the definition of bullying in the IAIA Student Handbook. Email from Colon to McNicholas (Apr. 4, 2024, 5:16 PM) (on file with author).

²⁰ Email from Colon to McNicholas (Apr. 10, 2024, 4:53 PM) (on file with author). The original panel lacked an ASG member, as required by the student handbook. *See Student Handbook 2023–2024*, *supra* note 16 at 74.

²¹ Email from Diana Ellenwood, Student Services Coordinator, to McNicholas (Apr. 30, 2024, 3:27 PM) (on file with author).

As a public, tribal college,²² IAIA's actions and decisions—including its pursuit of disciplinary sanctions,²³ interactions with student journalists,²⁴ and maintenance of policies implicating student and faculty expression²⁵—must comply with the First Amendment's requirements.

The First Amendment protects the freedom of the press to publish vehement criticism of government officials (including college administrators) like that contained in the anonymous editorial submissions printed in the *Young Warrior*. In fact, such criticism is at the core of the Constitution's guarantee of expressive rights.²⁶ The "bedrock principle underlying" freedom of speech is that it may not be restricted on the basis that others find it offensive.²⁷ As the Supreme Court has explained, "debate on public issues should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."²⁸ This is particularly true in the context of an institution of higher education,²⁹ where "conflict is not unknown"³⁰ and "dissent is expected and, accordingly, so is at least some disharmony."³¹

Even allegedly damaging "misinformation and rumors" are protected speech unless the expression meets the high standards for unprotected defamation.³² McNicholas's and the *Young Warrior*'s publication of the anonymous student submissions came nowhere near the standard for defamation, specifically that the publisher published false material knowing of its falsity or with reckless disregard for its truth or falsity.³³ The First Amendment protects "those

²² *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.'" (internal citation omitted); see also *Nally v. Graham*, 551 F.Supp.3d 1062, (D. Kan. 2021) (recognizing that the First Amendment applies to public tribal colleges).

²³ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

²⁴ *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

²⁵ *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

²⁶ See, e.g., *Bridges v. California*, 314 U.S. 252, 270 (1941) ("[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.").

²⁷ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag is protected by the First Amendment based on the "bedrock principle" that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

²⁸ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

²⁹ *Papish*, 410 U.S. at 667–68 (student newspaper's use of vulgar headline, "Motherfucker Acquitted," and front-page "political cartoon ... depicting policemen raping the Statue of Liberty and the Goddess of Justice" were protected speech).

³⁰ *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003).

³¹ *Higbee v. E. Mich. Univ.*, 399 F.Supp.3d 694, 704 (E.D. Mich. 2019).

³² *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011) (holding signs outside of soldiers' funerals reading "Thank God for Dead Soldiers," "Thank God for IEDs," and "Fags Doom Nations" was expression protected by the First Amendment); *N.Y. Times Co.*, 376 U.S. at 271 (First Amendment protection generally "does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered'" (internal citation omitted)).

³³ *N.Y. Times Co.*, 376 U.S. at 279–80; see also *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991) (actual malice is a subjective standard that requires the accuser to prove by clear and convincing evidence that the speaker "'in fact entertained serious doubts as to the truth of his publication,' or acted with a 'high degree of

negligent or careless false statements that are inevitable in free debate”³⁴ so as to ensure that “the freedoms of expression ... have the ‘breathing space’ that they ‘need to survive.’”³⁵ The First Amendment imposes such a high standard to establish defamation regarding public officials precisely to prevent what happened at IAIA—public officials abusing defamation law to shut down critical debate about the governance of public institutions.³⁶ Here, the IAIA has not met its burden of establishing falsity, let alone McNicholas’s awareness of falsity.³⁷ Indeed, Redeye’s email complaining of her treatment at the hands of administrators demonstrates that McNicholas had good reason to believe the student submissions were based in truth.³⁸

Finally, IAIA’s Anti-Bullying Policy itself is unconstitutional.³⁹ In order for so-called “bullying” to be punishable, it must rise to the level of actionable harassment. The Supreme Court has established a strict definition of actionable harassment, limiting it to expression that discriminates on the basis of protected status AND is severe, pervasive, and objectively offensive, among other things.⁴⁰ Even if some speech that would be penalized under the Anti-Bullying Policy is unprotected—for instance, speech that actually communicates a true threat of violence or meets the standard for discriminatory harassment—the terms of the policy sweep in a stunningly wide variety of protected expression.⁴¹ By classifying even the friendly “taunting” of a sports rivalry or the gentle “teasing” of friends as punishable bullying,⁴² the Anti-Bullying Policy’s potential for unconstitutional applications far outweighs IAIA’s legitimate objectives of protecting students and staff from discrimination or abuse.

By using subjective and ill-defined terms such as “embarrassing,” “inappropriate,” and “offensive” to describe prohibited speech, IAIA’s policy is also unconstitutionally vague, failing to provide fair notice of precisely what is prohibited. That can only encourage arbitrary and discriminatory enforcement—such as that seen in IAIA’s punishment of McNicholas.⁴³

awareness of ... probable falsity” (internal citations omitted)); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (failure to investigate does not demonstrate actual malice).

³⁴ *Love v. Rehfus*, 946 N.E.2d 1, 15 (Ind. 2011).

³⁵ *N.Y. Times Co.*, 376 U.S. at 271–72 (internal citation omitted).

³⁶ *Id.* (“Criticism of [public officials’] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.”).

³⁷ In defamation, the plaintiff (or accuser) bears the burden of showing falsity. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

³⁸ See Email from Redeye to Martin, *supra* note 17 (explaining that Redeye resigned because her direct supervisor bullied her).

³⁹ Among other things, the policy identifies as bullying “teasing, name-calling, inappropriate sexual comments, taunting,” “damaging the reputation or relationship of others, excluding someone intentionally, telling others not to be friends or associate with someone, spreading rumors about someone, and embarrassing someone in public,” “making inappropriate hand gestures,” “offensive text messages or emails, rumors sent by e-mail or posted on social networking sites, and embarrassing pictures, videos, websites, or fake profiles.” *Student Handbook 2023–2024*, *supra* note 16 at 29.

⁴⁰ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001).

⁴¹ *United States v. Stevens*, 559 U.S. 460, 473 (2010) (regulation violates the First Amendment for overbreadth if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s legitimate sweep”) (quotations and citations omitted).

⁴² See *Student Handbook 2023–2024*, *supra* note 16 at 29.

⁴³ *United States v. Williams*, 553 U.S. 285, 304 (2008).

Students will undoubtedly refrain from engaging in protected speech in order to avoid “crossing a line” they have no hope of seeing, which can only result in a broad, and unlawful, chilling of campus speech.

McNicholas’s decision to publish and promote the student submissions to the *Young Warrior* is clearly protected. To be sure, the First Amendment does not shield either party from criticism by the aggrieved IAIA officials or others in the broader community. But IAIA may not punish McNicholas for dubious charges of bullying or restrict his right to publish critical commentary about IAIA officials. We request a substantive response to this letter no later than January 16, confirming IAIA will rescind any sanctions or restrictions on McNicholas, remove any notice of this disciplinary action from his record, and revise its Anti-Bullying Policy to conform to the First Amendment. We would be happy to assist IAIA in revising its Anti-Bullying Policy—free of charge, in accordance with our charitable mission.

Sincerely,

A handwritten signature in black ink, reading "Jessie Appleby". The signature is written in a cursive, flowing style.

Jessie Appleby
Program Officer, Campus Rights Advocacy

Cc: Felipe Colon, Provost

Encl.

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OF COUNSEL:
JOHN F. MCCARTHY, JR.*

REPLY TO SANTA FE OFFICE

January 31, 2025

VIA ELECTRONIC AND U. S. MAIL

Jessie Appleby
Program Officer, Campus Rights Advocacy
Foundation for Individual Rights and Expression
510 Walnut Street, Suite 900
Philadelphia, PA 19106
Jessie.appleby@thefire.org

**RE: LETTER FROM THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION,
JANUARY 2, 2025**

Dear Ms. Appleby:

As I said in my January 22, 2025 email to you, I and my law firm represent the Institute of America Indian Arts (IAIA). This letter is on behalf of IAIA and in response to your January 2, 2025 letter, in which you ask IAIA to rescind any sanctions or restrictions on David McNicholas, remove any notice of this disciplinary action from his record, and revise its Anti-Bullying Policy.

First, please know that student disciplinary actions and proceedings are not part of a student's official academic file. They are maintained in the Dean of Students Office and protected under the Family Educational Rights and Privacy Act (FERPA). The records will not be released except as required by applicable law.

Second, the IAIA Student Services Committee (SSC) reviews and revises IAIA Student Handbook policies annually and is scheduled to review the IAIA Anti-Bullying Policy this semester. IAIA appreciates your offer to assist with the review of the Anti-Bullying Policy and will contact you if the SSC desires FIRE's assistance.

Third, IAIA will not rescind the sanctions and restrictions placed on Mr. McNicholas. Those sanctions were imposed on him pursuant to established IAIA procedures, including his appeal to the Student Hearing & Review Panel (SHARP), an independent committee comprised of faculty, staff and peers. SHARP modified the preliminary determination of the Provost, including rescinding the sanctions related to bullying, however upon reviewing the evidence presented by Mr. McNicholas, SHARP did determine his actions in publishing unsubstantiated and damaging

Jessie Appleby
Program Officer, Campus Rights Advocacy
Foundation for Individual Rights and
Expression
January 31, 2025
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complaints and statements against Interim Director Lorissa Garcia and Dean of Students Nena Martinez Anaya “greatly harmed students and staff alike.” SHARP determined this was in violation of IAIA’s Student Code of Conduct, which specifically prohibits students from “[e]xhibiting behavior that threatens any person, harms, or causes to place in harm any person, damages another’s reputation, or conducting oneself in a ... disorderly manner.”

IAIA disagrees with your analysis and conclusion that the discipline and restrictions placed on Mr. McNicholas violate the First Amendment. Mr. McNicholas was not disciplined because he published critical commentary about IAIA officials, as you state; he was disciplined for publishing harmful, hurtful, unsubstantiated and damaging statements about the persons and reputations of members of the IAIA community. There is a big difference between critical commentary and the spreading of unsubstantiated and injurious statements claiming illegal activity. For instance, the statement: “Nena Martinez robs [pantries.]”. Regarding that statement, which Mr. McNicholas has admitted to writing, Mr. McNicholas has acknowledged that he acted without “integrity” and should “have done more research and sought out balance in the story told by the anonymous letter.” He further admitted that he “underestimated [his] effect on young warriors... [i.e.,] impressionable young students at IAIA.” *Accountability Statement Toward and Understanding of Responsibility and Rights*, David John Baer McNicholas, p. 3. The actions he took were contrary to the Indigenous values of respect, truth, responsibility and accountability that are taught and practiced at IAIA.

The United States Supreme Court has held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562 (1988). Only when the decision to limit school sponsored speech “has no valid educational purpose” is the First Amendment implicated. *Id.* 273, 108 S.Ct. 562. The Tenth Circuit Court of Appeals “has held that *Hazelwood* allows educators to make viewpoint-based decisions about school-sponsored speech.” *Pompeo v. Bd. of Regents of the University of New Mexico*, 852 F.3d 973, 982 (2017). The Court “reasoned that if school officials ‘were required to be viewpoint neutral,’ they ‘would be required to [publish speech] with inflammatory and divisive statements.’” *Id.* (citations omitted.) In the context of school-sponsored speech, the Court recognized “that courts ‘must entrust[] to educators these decisions that require judgements based on viewpoint.’” *Id.* at 986.

In Mr. McNicholas’ case, his publishing an anonymous complaint against IAIA employees and stating that one of them “robbed” the pantry were inflammatory and divisive. The concept of “pedagogical” in *Hazelwood*, “merely means that the activity is related to learning’ and ‘is by no

Jessie Appleby
Program Officer, Campus Rights Advocacy
Foundation for Individual Rights and
Expression
January 31, 2025
Page 3

means confined to the academic for it includes discipline, courtesy, and respect for authority.” *Id.* at 987 (citations omitted.) Educational institutions are allowed to “determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech.” *Id.* at 988 (citations omitted). Requiring Mr. McNicholas to meet basic standards of journalistic professionalism is not unreasonable nor is it a violation of his First Amendment rights. *See id.*, at 989 (“Teaching student to avoid inflammatory language when writing for an academic audience qualifies as a legitimate pedagogical goal.”) This was especially true given that his “speech” was in the *Young Warrior*, a student publication that began through IAIA’s writing class, whose readers “might ‘reasonably perceive to bear the imprimatur of the school.’” *Hazelwood*, U.S. at 271, 273, 108 S.Ct. at 562, and that Mr. McNicholas unilaterally chose to distribute the unfounded claim of “robbery” via social media in his role as the ASG Public Relations Officer, again adding unwarranted legitimacy to a baseless and damaging claim.

Accordingly, Mr. McNicholas’ sanctions and restrictions at IAIA will remain in place.

Sincerely,

Patricia Salazar Ives

April 9, 2025

Patricia Salazar Ives
Cuddy & McCarthy, LLP
P.O. Box 4160
Santa Fe, New Mexico 87502-4160

Sent via U.S. Mail and Electronic Mail (pives@cuddymccarthy.com)

Dear Ms. Salazar Ives:

FIRE appreciates your response to our letter concerning the sanctions imposed on student David McNicholas for printing material critical of Institute of American Indian Arts officials in the *Young Warrior* student magazine. Unfortunately, your response only deepens our concerns that IAIA not only punished McNicholas for protected expression, but also lacks any regard for its constitutional obligations as a public, tribal institution.

Your response states that McNicholas “was disciplined for publishing harmful, hurtful, unsubstantiated and damaging statements about the persons and reputations of members of the IAIA community,” and not merely “critical commentary about IAIA officials.”¹ That is not a legal or moral justification for IAIA’s actions. As we previously explained, the First Amendment protects publishing “harmful, hurtful, unsubstantiated and damaging statements about the persons and reputations of members of the IAIA community” unless they meet the standards for unprotected defamation or discriminatory harassment.²

Yet IAIA has not even attempted to meet its threshold burden of demonstrating the falsity of the published material, let alone McNicholas’s knowledge of its falsity, as required to support a claim that he could be punished for his speech.³ Nor do the published allegations’ seriousness or IAIA’s claim of harm justify punishment for material that does not constitute unprotected

¹ Letter from Patricia Salazar Ives, attorney, to Jessie Appleby (Jan. 31, 2025) (on file with author).

² *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (protected public debate includes “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”); *see also Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973) (student newspaper’s use of vulgar headline, “Motherfucker Acquitted,” and front-page “political cartoon ... depicting policemen raping the Statue of Liberty and the Goddess of Justice” were protected speech); *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011) (holding signs outside of soldiers’ funerals reading “Thank God for Dead Soldiers,” “Thank God for IEDs,” and “Fags Doom Nations” was expression protected by the First Amendment).

³ *N.Y. Times Co.*, 376 U.S. at 279–80; *see also Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991) (actual malice is a subjective standard that requires the accuser to prove by clear and convincing evidence that the speaker “‘in fact entertained serious doubts as to the truth of his publication,’ or acted with a ‘high degree of awareness of ... probable falsity’” (internal citations omitted)); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (failure to investigate does not demonstrate actual malice).

defamation.⁴ As the Supreme Court held long ago, “Criticism of [public officials’] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.”⁵

McNicholas’s statements that he “acted without ‘integrity’ and should ‘have done more research and sought out balance’” are also irrelevant to the constitutionality of IAIA’s actions.⁶ To be sure, the veracity of these statements is doubtful given that they were written after McNicholas experienced months of severe criticism and sanctions from his own school. Nevertheless, IAIA may not, as a public, tribal institution, discipline students for protected speech it claims lacks integrity or is “contrary to the Indigenous values of respect, truth, responsibility, and accountability that are taught and practiced at IAIA.”⁷

Second, the school-sponsored speech doctrine articulated in *Hazelwood School District v. Kuhlmeier* does not apply because the *Young Warrior* is an independent student publication that is neither formally affiliated with IAIA nor subject to the oversight of IAIA faculty.⁸ School-sponsored speech refers to expressive activities that “may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, *so long as they are supervised by faculty members and designed to impart knowledge or skills* to student participants and audiences.”⁹ Thus, “a school may *in its capacity as publisher of a school newspaper or producer of a school play*” restrict speech that is “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences”—so long as its restrictions are “reasonably related to legitimate pedagogical concerns.”¹⁰ The key element in determining whether student speech qualifies as school-sponsored is “the level of involvement the school had in organizing or supervising the contested speech,” because “certain expressive activities may be closely tied to the school, yet *not* school-sponsored speech bearing the school’s imprimatur.”¹¹

⁴ *Thompson v. Ragland*, 23 F.4th 1252, 1259–60 (10th Cir. 2022) (university may not restrict student’s speech urging classmates to submit negative performance evaluations on the basis that “negative evaluations would disrupt [the professor’s] career and her relationship with her students, as well as [the university’s] efforts in employing faculty to conduct the class”); *see also Seamons v. Snow*, 84 F.3d 1226, 1237–38 (10th Cir. 1996) (school’s “fear of a disturbance stemming from the disapproval associated with [the student’s] unpopular viewpoint regarding hazing in the school’s locker rooms” was insufficient reason to restrict student’s speech).

⁵ *N. Y. Times Co.*, 376 U.S. at 271–72.

⁶ *See* letter from Salazar Ives, *supra* note 1 (quoting David McNicholas, *Accountability Statement Toward and Understanding of Responsibility and Rights* (on file with author)).

⁷ IAIA’s repeated attempts to silence student criticism and cover up its own administrators’ alleged wrongdoing certainly belie its stated commitment to practicing “the Indigenous values of respect, truth, responsibility, and accountability.”

⁸ *See* 484 U.S. 260 (1988). *Hazelwood* explicitly reserved the question “whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level, *id.* at 273 n. 7, where “the students and their school’s relation to them are different and at least arguably distinguishable from their counterparts” in high schools, *Bd. of Regents of the Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 238 n. 4 (2000) (Souter, J., concurring).

⁹ *Hazelwood*, 484 U.S. at 270–71 (emphasis added).

¹⁰ *Id.* at 271–72, 273 (emphasis added).

¹¹ *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1228 (10th Cir. 2009) (emphasis added); *see also Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 925 (10th Cir. 2002), as amended on denial of reh’g and reh’g en banc (Aug. 16, 2002); *Planned Parenthood of S. Nev., Inc. v. Clark Cnty. Sch. Dist.*, 941 F.2d 817, 828–29 (9th Cir. 1991) (en

Contrary to IAIA's assertion, the student submissions printed in the *Young Warrior* are not school-sponsored speech. The *Young Warrior* is a private student publication, created and managed by McNicholas.¹² IAIA faculty did not supervise the publication's operations or play any role in its editorial process.¹³ It is not IAIA's official student newspaper,¹⁴ nor a recognized student group,¹⁵ and receives no funding from the school.¹⁶ In fact, it is not formally affiliated with IAIA at all.¹⁷ IAIA is not the *Young Warrior's* publisher but its *subject*.¹⁸ As a result, the content of the *Young Warrior* falls within the category of student speech that IAIA must "tolerate" under *Tinker*, rather than the speech IAIA may choose "affirmatively to promote" under *Hazelwood*.¹⁹

banc) (school officials' editorial control over the athletic programs, including "specifically approv[ing] the speech at issue," would lead the public to perceive that the speech bore "the imprimatur of the school").

¹² McNicholas founded the *Young Warrior* based on an idea discussed during an extracurricular writing club. It did not originate as part of an academic course at IAIA, as you asserted.

¹³ Faculty oversight is a necessary but not sufficient condition to classify a student publication as school-sponsored speech. See *Corder*, 566 F.3d at 1228; *Fleming*, 298 F.3d at 925.

¹⁴ Even an official student publication overseen by a faculty advisor may not qualify as school-sponsored speech. See, e.g., *Kincaid v. Gibson*, 236 F.3d 342, 352 (6th Cir. 2001) (college yearbook was not school-sponsored speech because it was not a "closely-monitored classroom activity in which an instructor assigns student editors a grade, or in which a university official edits content," but a student publication for which the faculty advisor maintained a "hands off" approach to content); *Draudt v. Wooster Cty. Sch. Dist. Bd. of Educ.*, 246 F.Supp.2d 820, 829 (N.D. Ohio 2003) (high school newspaper was not school-sponsored speech even though it was published as part of an academic course for which students received course credit and grades because students had broad editorial reign subject only to the faculty advisor's approval, outside writers contributed to the paper, the paper was widely distributed in the community, and high school students are less impressionable than elementary school students); *Lueth v. St. Clair Cnty. Cmty. Coll.*, 732 F. Supp. 410, 1414–15 (E.D. Mich. 1990) (official student newspaper was not school-sponsored speech because it was "not operated under the guise of a specific academic course" nor "created under the direction of a faculty member," but run entirely by students); *Romano v. Harrington*, 725 F.Supp. 687 (E.D.N.Y. 1989) (high school student newspaper funded by the school, but published as an extra-curricular activity under the direction of a faculty advisor, was not necessarily school-sponsored speech).

¹⁵ The expression of recognized student groups is generally protected by the First Amendment. See *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (recognizing student groups' speech endorsing religion at a public high school as private speech protected by the First Amendment, not government speech forbidden by the Establishment Clause); *Fleming*, 298 F.2d at 925 ("Expressive activities that do not bear the imprimatur of the school could include a variety of activities conducted by outside groups that take place on school facilities after school, such as club meetings.").

¹⁶ Institutional funding is not decisive, as student expression funded by the school often does not qualify as school-sponsored speech. See generally *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217 (2000).

¹⁷ Cf. *Morse v. Frederick*, 551 U.S. 393, 423 (2007) ("*Hazelwood* ... allows a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ.") (Alito, J., concurring).

¹⁸ Student expression is not subject to a school's authority merely because its topic is the school itself. See *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

¹⁹ *Hazelwood*, 484 U.S. at 270–71 ("The question whether the First Amendment requires a school to tolerate particular student speech—the question ... addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular speech."); *Pompeo v. Bd. of Regents of the Univ. of N.M.*, 852 F.3d 973, 982 (10th Cir. 2017) ("[S]chool-sponsored speech' ... is 'speech that a school affirmatively promotes, as opposed to speech that it tolerates.'"); see also *Seamons*, 84 F.3d at 1237 ("[I]f the speech involved is not fairly considered part of the school curriculum or school-sponsored activities, then it may only be regulated if it would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"). While the *Young Warrior's* expression clearly falls on the *Tinker* side of the *Tinker-Hazelwood* dichotomy between private student speech and school-sponsored speech, it is unclear whether *Tinker's* "substantial disruption" standard itself is appropriate for higher education. See *Southworth*, 529 U.S. at 238 n. 4 (Souter, J., concurring) ("[Our] cases dealing with the right of teaching institutions to limit expressive freedom of students

Nothing in the Tenth Circuit’s jurisprudence, including *Pompeo v. Board of Regents of the University of New Mexico*, changes that analysis. More than twenty years ago, the Tenth Circuit expressly limited application of *Hazelwood* in the higher education context to only “speech that occurs in a classroom as part of a class curriculum.”²⁰ The court has reaffirmed that decision on multiple occasions, and has never extended *Hazelwood* to reach non-curricular speech in the collegiate setting.²¹ Thus, IAIA faculty may require McNicholas to satisfy particular journalistic standards in his academic coursework, such as “avoid[ing] inflammatory language when writing for an academic audience.”²² But IAIA may not require that McNicholas refrain from “inflammatory and divisive” speech outside the classroom—even when its restrictions are intended to teach proper journalistic standards.²³

IAIA’s conduct here is a particularly stark illustration of a “reckless or callous indifference to the federally protected rights of others.”²⁴ As a public tribal institution, IAIA is obligated to respect the First Amendment rights of its students. In this case, it has fallen woefully short of the mark. IAIA must lift any remaining sanctions on McNicholas and revise its policies to align with its First Amendment obligations.

We request a substantive response to this letter no later than April 23.

Sincerely,



Jessie Appleby
Program Counsel, Campus Rights Advocacy

Cc: Robert Martin, President

Encl.

have been confined to high schools, whose students and their school’s relation to them are different and at least arguably distinguishable from their counterparts in college education.”).

²⁰ *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) (“[T]he *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum.”). The only exception the court has recognized is a professional school’s enforcement of professional standards on speech outside the classroom. See *Hunt v. Bd. of Regents of Univ. of N.M.*, 792 F. App’x 595, 604 (10th Cir. 2019)

²¹ See *Pompeo*, 852 F.3d at 982 (assigned class paper was school-sponsored speech); *Hunt*, 792 F. App’x at 604 (professional schools may enforce customary professional standards on a graduate student outside the classroom); *Thompson v. Ragland*, 23 F.4th 1252, 1259 (10th Cir. 2022) (student’s email to classmates expressing dissatisfaction with a professor and urging them to submit negative evaluations was not school-sponsored speech).

²² *Pompeo*, 852 F.3d at 989; cf. *Mergens*, 496 U.S. at 237 (defining “curriculum” as “the whole body of courses offered by an educational institution or one of its branches” (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 557 (1976))).

²³ *Papish*, 410 U.S. at 667 (university’s punishment of student for distributing newspaper on campus containing “indecent speech” in violation of university policy violated the First Amendment); cf. *E. High Gay/Straight All. v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1194 (D. Utah 1999) (rejecting argument that, “by establishing a limited public or nonpublic forum for ‘curriculum-related’ student clubs, a school thereby ‘lends its name and resources to the dissemination of student speech’ and converts ‘school-tolerated’ student expression within that forum under *Tinker* into ‘school-sponsored speech’ under *Hazelwood*”).

²⁴ *Smith v. Wade*, 461 U.S. 30, 56 (1983).

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REPLY TO SANTA FE OFFICE

May 13, 2025

BY ELECTRONIC MAIL ONLY

Jessie Appleby
Program Counsel, Campus Rights Advocacy
FIRE
510 Walnut Street, Suite 900
Philadelphia, PA 19106
jessie.appleby@thefire.org

RE: DAVID McNICHOLAS

Dear Ms. Appleby:

This is in response to your April 9, 2025 letter. While we understand your concerns, we disagree with your claims and position. David McNicholas made false statements in the *Young Warrior*, an IAIA sponsored student publication, that caused harm, hurt, damage, and disruption to individuals and to the IAIA Community. Mr. McNicholas' own statements during IAIA's established appeals process demonstrate that he acted inappropriately and in apparent disregard for the rights of others.

Accordingly, IAIA will continue to uphold the sanctions imposed on Mr. McNicholas.

Sincerely,

Patricia Salazar Ives

cc: President Robert Martin