FIRE
Foundation for Individual Rights in Education

July 1, 2016

Liza Karsai, Executive Director
Uniform Law Commission
111 N. Wabash Avenue, Suite 1010
Chicago, Illinois 60602

Sent via U.S. Mail and Electronic Mail (lkarsai@uniformlaws.org)

Dear Ms. Karsai:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

We write to you today to thank the Uniform Law Commission (ULC) for its efforts to protect student privacy and to share our concerns with the Employee and Student Online Privacy Protection Act (ESOPPA) as currently drafted.

FIRE's primary concern with the final version of ESOPPA, up for consideration by the full ULC Committee at your upcoming annual meeting, is that the bill's exceptions are so broad that they may negate the laudable intent of the legislation. Under the model legislation, public educational institutions would have the authority to compel students to grant administrators access to their protected personal online accounts—for example, Facebook, Snapchat, or email accounts—whenever the school claims it needs access for the purpose of "ensuring compliance, or investigating non-compliance, with federal or state law or an educational institution policy."

In FIRE's nearly 17 years of defending student rights, we have repeatedly seen state laws and institutional policies addressing bullying or harassment written so broadly that they infringe upon a wide range of protected speech. For instance, Troy University in Alabama has a harassment policy that states, "Examples of harassment include *gestures*, *remarks, jokes*, taunting, *innuendos, display of offensive materials*, threats, imposition of academic penalties, hazing, stalking, shunning, or exclusion related to the discriminatory or harassing grounds"

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(emphasis added).[1] Allowing institutions to access social media or email accounts simply because of a report that a student performed a "gesture" or engaged in "innuendo" would not only undermine any protective purpose of the bill but also serve as a hall pass for virtually unlimited and unwarranted snooping into the private lives of students.

Furthermore, granting college administrators new rights to access private communications in order to enforce federal or state law presents the same problem—and is also unnecessary. If alleged misconduct implicates criminal laws, law enforcement officials may already access evidence on personal online accounts when they obtain a warrant or subpoena.[2] Supplanting the warrant requirement would be a terrible (and likely unconstitutional) mistake.

Indeed, the language of the bill permits expansive government searches into students' private electronic communications without accounting for any of the protections afforded under the Fourth or Fifth Amendments to the United States Constitution. The Supreme Court of the United States acknowledged in *Riley v. California*, 134 S. Ct. 2473 (2014), that searches of electronic devices and communications are particularly intrusive, and thus must comply with the Constitution, because of the vast amount of personal information contained in those mediums.

FIRE is further concerned that the model legislation's provision designed to restrict the scope of information accessible to college administrators (and employers, as discussed below) will prove ineffective. The bill draft tries to limit educational institutions' access to some of the content of students' personal online accounts by requiring any institution accessing the contents of those accounts to "reasonably attempt to limit its access to content that is relevant to the specified purpose." Yet it will be impossible for even the best-intentioned institutions to separate the relevant content from the irrelevant without significantly intruding on students' privacy rights, as the only way to determine relevancy in many cases will be to access all the content and read it in order to make such a determination. Because of this, the provision will do little in practice to prevent college administrators from reviewing the most private student communications.

Finally, while the focus of this letter has been on the effect the model bill would have on students, it's worth noting that the provisions of the legislation aimed at employers would present the same problems for faculty members of colleges and universities.

In light of these concerns, we urge the ULC to reject the current version of ESOPPA and amend it to account for its serious shortcomings. We share the ULC's commitment to protecting the privacy rights of college students and faculty, and we would be happy to help

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[1] Troy University, *Policy on Harassment and Discrimination,* THE ORACLE, 16 (2015), http://trojan.troy.edu/oracle/assets/documents/2015-2016_Oracle.pdf.

[2] 18 U.S.C. § 2703 (Stored Communications Act).

the committee with edits to address our concerns. Thank you for your attention to our input. We can be reached at (215) 717-3473 if we can be of any assistance.

Respectfully submitted,

Joseph Cohn
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cc:

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