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November 29, 2011

Russlynn Ali
Assistant Secretary for Civil Rights
Office for Civil Rights
United States Department of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington, DC 20202-1100

Sent via U.S. Mail and Facsimile (202-453-6012)

Dear Assistant Secretary Ali:

The Foundation for Individual Rights in Education has learned that California State University–San Marcos (CSUSM) students have filed a complaint with the United States Department of Education's Office for Civil Rights (OCR) regarding the protected content of an explicitly satirical periodical at CSUSM. We are deeply concerned by the threat to freedom of expression posed by the possibility of a federal investigation of the publication in question. We are equally concerned by the prospect of OCR undertaking disciplinary action against CSUSM if the university does not punish protected expression.

This is our understanding of the facts. On September 27, 2011, Volume 2, Issue 1 of humor magazine *The Koala* was published and distributed on CSUSM's campus. On the cover page of the issue, the magazine describes itself as "Crushing Your Hopes And Dreams With Comedy." The magazine uses humor to address a wide variety of topics including animal rights, sex, and the scandals of public figures, such as former California Governor Arnold Schwarzenegger's separation from Maria Shriver. A satirical political piece in the issue asked students to vote online for one of four women to be Homecoming Queen to accompany a woman who had been running for Homecoming King. The article included a photo of two topless women on a bed. In the image, a second photo of the female Homecoming King candidate's head had been very obviously superimposed over the head of one of the two women, with a question mark placed over the other woman's head.

On or about October 20, 2011, student [redacted] and several other students who may be affiliated with *The Koala* were sent disciplinary letters from Associate Dean of Students Gregory Toya. The letter to [redacted] notified him that

he was charged with two student conduct code violations because of unspecified conduct on September 27: "Disorderly, lewd, indecent, or obscene behavior at a University related activity, or directed toward a member of the University community," and "Conduct that threatens or endangers the health or safety of any person … including physical abuse, threats, intimidation, harassment, or sexual misconduct." [redacted] was required to schedule a disciplinary appointment on pain of further discipline, including a hold on his student record that would limit his access to registration and could effectively end his academic career at CSUSM. On November 1, CSUSM Associate Dean of Students Gregory Toya interrogated a former student about current students' roles in producing the item in the September 27, 2011, issue of *The Koala* described above.

As FIRE explained in a letter sent to CSUSM President Karen S. Haynes on October 28, 2011, the content in *The Koala* is protected expression. It is not sexual harassment. The Supreme Court of the United States has clearly 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, 633 (1999). Discriminatory harassment in the educational setting, properly understood and as defined by the Supreme Court, refers to conduct that is (1) unwelcome; (2) discriminatory; (3) on the basis of gender or another protected status, like race; (4) directed at an individual; and (5) "so severe, pervasive, and objectively offensive, and … [that] so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Id.* at 652.

To be legally punishable for discriminatory harassment, a student must be *far* more than simply rude or offensive. Rather, he or she must be actively engaged in a specific type of discrimination to such a degree that the student effectively bars another student from equal access to the university's resources. Nothing in the September 27 issue of *The Koala* approaches the level of severity or pervasiveness that that would justify a sexual harassment charge against anyone responsible for the expression or for its peaceful distribution. As such, both are instances of protected speech. Neither CSUSM nor OCR may selectively ignore this definition in choosing to mete out discipline for this protected expression, either to the students involved or to CSUSM for respecting the students' First Amendment rights and declining to punish them.

We remind you that the First Amendment does not exist to protect only non-controversial speech; indeed, it exists precisely to protect speech that some members of a community may find controversial or offensive. The right to free speech includes the right to say things that are deeply offensive to many people, and the Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends people. In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973), the Court upheld the First Amendment right of a college student to distribute on campus a publication that had the headline "Motherfucker Acquitted" and included indecent but non-obscene speech (among other things, the newspaper reproduced a political cartoon depicting policemen raping the Statute of Liberty), writing that 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.'"

Indeed, many types of jokes—including parody and satire—exist precisely to challenge, to amuse, and even to offend, and such speech is unambiguously protected under the First Amendment. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Supreme Court ruled that

the First Amendment protects even the most blatantly ridiculing, outlandishly offensive parody—in that case, a satirical advertisement suggesting that the Reverend Jerry Falwell lost his virginity in a drunken encounter with his mother in an outhouse. In *Texas v. Johnson*, 491 U.S. 397, 414 (1989), the Court explained the rationale behind these decisions well, saying that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Under such principles, there can be no question that whoever is responsible for the content of *The Koala* may not be punished for "harassment" or "sexual misconduct." Indeed, the relevant features of *The Koala*'s satirical article parallel the facts at issue in *Hustler v. Falwell.*

Your office has previously recognized the fact that a university's legal obligation to prevent discriminatory harassment under the federal anti-discrimination statutes enforced by OCR in no way necessitates the punishment of speech protected by the First Amendment. In a 2003 "Dear Colleague" letter authored by former Assistant Secretary Gerald A. Reynolds, OCR explicitly noted that "OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment" and that the agency is "committed to the full, fair and effective enforcement of these statutes *consistent with the requirements of the First Amendment*." (Emphasis added.) This clear and necessary commitment must guide your assessment of the current situation.

FIRE also reminds OCR of the United States Court of Appeals for the Ninth Circuit's recent holding in *Rodriguez v. Maricopa County Community College District*, 605 F.3d 703 (9th Cir. 2010). In *Rodriguez*, the Ninth Circuit found that Maricopa County Community College District and Glendale Community College were correct *not* to punish a professor for offensive but protected speech in emails sent to a university listserv. Despite the fact that the Equal Employment Opportunity Commission had found that a complaint filed by coworkers about the emails and the university's failure to discipline the professor established sufficient grounds to bring suit under Title VII, in an opinion authored by Chief Judge Alex Kozinski for a unanimous panel that included retired Supreme Court Justice Sandra Day O'Connor (who delivered the majority opinion in *Davis*), the Ninth Circuit held that the professor's emails constituted protected speech and thus could not be punished. Chief Judge Kozinski wrote:

> Plaintiffs no doubt feel demeaned by [Professor Walter] Kehowski's speech, as his very thesis can be understood to be that they are less than equal. But that highlights the problem with plaintiffs' suit. Their objection to Kehowski's speech is based entirely on his point of view, and it is axiomatic that the government may not silence speech because the ideas it promotes are thought to be offensive. "There is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe*, 240 F.3d at 204; see also *United States v. Stevens*, No. 08-769, slip op. at 7 (U.S. April 20, 2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.").
>
> Indeed, precisely because Kehowski's ideas fall outside the mainstream, his words sparked intense debate: Colleagues emailed responses, and Kehowski replied; some voiced opinions in the editorial pages of the local paper; the administration issued a press release; and, in the best tradition of higher learning,

> students protested. The Constitution embraces such a heated exchange of views, even (perhaps especially) when they concern sensitive topics like race, where the risk of conflict and insult is high. Without the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched. The right to provoke, offend and shock lies at the core of the First Amendment.

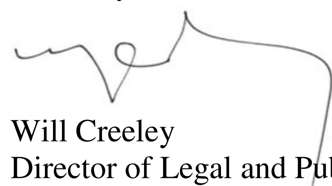
Id. at 707–08 (some internal citations omitted). Chief Judge Kozinski further noted the unique importance of this aspect of the First Amendment on campus:

> This is particularly so on college campuses. Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular. Colleges and universities—sheltered from the currents of popular opinion by tradition, geography, tenure and monetary endowments—have historically fostered that exchange. But that role in our society will not survive if certain points of view may be declared beyond the pale. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)). We have therefore said that "[t]he desire to maintain a sedate academic environment … [does not] justify limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms." *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975).

Id. at 708–09. While *Rodriguez* involved the question of unlawful harassment in the workplace context, the Ninth Circuit's clear enunciation of the importance of protecting even offensive speech applies with no less force with regard to the question of *The Koala* now before OCR. We ask that your office heed both Chief Judge Kozinski's observations and OCR's own prior guidance in deciding not to investigate or punish CSUSM for declining to initiate disciplinary proceedings on the basis of speech protected by the First Amendment.

Please respond by December 13, 2011. We look forward to hearing from you.

Sincerely,



Will Creeley
Director of Legal and Public Advocacy

cc:
Arthur Zeidman, Regional Director, Office for Civil Rights, United States Department of Education, San Francisco Office
Karen S. Haynes, President, California State University–San Marcos

Eloise Stiglitz, Vice President for Student Affairs, California State University–San Marcos
Gregory Toya, Associate Dean of Students, California State University–San Marcos
Bridget Blanshan, Dean of Students & Associate Vice President for Student Development Services, California State University–San Marcos
David Blair-Loy, Legal Director, ACLU Foundation of San Diego & Imperial Counties