



Foundation for Individual Rights in Education

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October 28, 2011

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President Karen S. Haynes
California State University–San Marcos
Office of the President
333 S. Twin Oaks Valley Road
San Marcos, California 92096

Sent via U.S. Mail and Facsimile (760-750-4033)

Dear President Haynes:

As you can see from the list of our Directors and Board of Advisors, FIRE unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals from across the political and ideological spectrum on behalf of liberty, free speech, legal equality, due process, the right of conscience, and academic freedom on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is deeply concerned about the threat to freedom of expression presented by California State University–San Marcos' (CSUSM's) decision to investigate at least one student on charges of "harassment" and "[d]isorderly, lewd, indecent, or obscene behavior" due to the protected content of an explicitly satirical periodical at CSUSM. CSUSM, a public university, is morally and legally bound to uphold the promises of free speech in the United States and California constitutions. By pursuing this investigation, CSUSM betrays these promises, violates the First Amendment rights of those being investigated, chills expression, and inhibits the marketplace of ideas on campus.

This is our understanding of the facts. Please inform us if you believe we are in error.

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 Governor Arnold Schwarzenegger's breakup with Maria Shriver.

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.” ██████ 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.

Any disciplinary investigation related to the content and peaceful distribution of *The Koala* is morally and legally unacceptable. The speech involved is not harassment or sexual misconduct, nor is the peaceful distribution of protected expression punishable as “conduct.”

Specifically, the Supreme Court has 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) (emphasis added). By definition, this includes only extreme and usually repetitive behavior—behavior so serious that it would prevent a reasonable person from receiving his or her education. For example, in *Davis*, the conduct found by the Court to be actionable harassment was a months-long pattern of conduct including repeated attempts to touch the victim’s breasts and genitals *and* repeated sexually explicit comments directed at and about the victim.

To be clear: discriminatory harassment, 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. Again, under any reasonable reading of this exacting legal definition, *The Koala* and its peaceful distribution do not constitute harassment and are thus instances of protected speech. Given that the Supreme Court has clearly defined the boundary separating protected speech from actionable harassment in the educational context, CSUSM may not selectively ignore this definition in choosing to prosecute a student for harassment.

Put simply, to be legally punishable for 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, as defined by law. Nothing in the September 27 issue of *The Koala* comes near the level of severity or pervasiveness that that would justify a sexual harassment charge against anyone responsible for the expression. Indeed, it would be difficult for anything printed in a single issue of a magazine to reach the necessary level of severity and pervasiveness to be considered harassment.

The principle of freedom of speech 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 peaceful public reading and display of the entire content of *The Koala* to adult audiences on campus would constitute protected expression. This includes any description of the content of the magazine to passersby in the hope that they will take copies. Since the time of Thomas Paine, it has been inconsistent with basic American conceptions of liberty to punish the peaceful distribution of pamphlets or other printed matter. CSUSM may not interpret its ban on “[d]isorderly, lewd, indecent, or obscene **behavior**” (emphasis added) as a ban on hawking protected publications; this would be unconstitutional. There is no First Amendment exception for the distribution of “lewd” or “indecent” speech to adults on a college campus. Moreover, speech unprotected as “obscene” must meet the exacting test announced by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), which outlined three questions that must be asked and answered to determine if particular material is obscene:

- Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest (an inordinate interest in sex);
- Whether the work depicts or describes, in a patently offensive way, sexual conduct;
- Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The Koala, a humor magazine that additionally addresses a number of political subjects, does not meet this test and is not obscene.

CSUSM's investigation appears to have no merit whatsoever and must immediately end. The investigation of protected speech is a violation of the rights of the person being investigated. *Sweezy v. New Hampshire*, 354 U.S. 234, 245, 248 (1957). Thus, merely waiting for each person's disciplinary meeting to run its course does not absolve you or CSUSM of the moral and legal responsibility to immediately end the investigations of the protected speech described above. The First Amendment demands that in cases like these, once it is clear that the speech is protected, the investigation must end immediately.

It is a longstanding American tradition to fight "bad" speech with more speech, not investigation, censorship, or punishment. We urge you to show the courage to correct CSUSM's error in investigating the protected speech and peaceful distribution of *The Koala*. Since no harassment or other infraction has occurred, the disciplinary investigations can hardly be understood as any more than a politically motivated witch hunt. Indeed, student and faculty enemies of *The Koala* are on just such a hunt, having created a website named "Call Out The Koala" (see <http://calloutthekoala.com>). The First Amendment protects both *The Koala* and the writers of "Call Out The Koala," despite the latter's demand that CSUSM take unconstitutional action against the magazine.

"Call Out The Koala" is free to make its demand that CSUSM "[r]equire that, in order to be distributed at CSUSM, each Koala issue must accurately identify the tabloid's owner, publisher, editors, writers, graphic artists, business address and contact information," but CSUSM may not accede to this unconstitutional demand, for the First Amendment clearly supports the right to anonymous speech. The Supreme Court has ruled that "[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible Accordingly, an author's decision to remain anonymous ... is an aspect of freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341-42 (1995). Under the vengeful conditions operating on the CSUSM campus against *The Koala*, it is no wonder that those associated with the magazine have chosen to remain anonymous.

FIRE asks you to show the moral courage necessary to take the correct action here. The disciplinary investigations must end immediately, and the students' records must be cleared of any reference to this matter. FIRE further requests that you publicly declare that this investigation into *The Koala* is over, so that speech will no longer be chilled on campus. While we hope this situation can be resolved amicably and swiftly, we are committed to using all of our resources to see this situation through to a just and moral conclusion.

With this letter we enclose a signed FERPA waiver from [REDACTED] permitting you to fully discuss his case with FIRE.

Please respond by November 11, 2011. We look forward to hearing from you.

Sincerely,



Adam Kissel

Vice President of Programs

Encl.

cc:

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