



Foundation for Individual Rights in Education

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November 2, 2011

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

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

Dear President Haynes:

California State University–San Marcos (CSUSM) has continued its unlawful investigation of the expression in the student humor magazine *The Koala*. Yesterday, CSUSM Associate Dean of Students Gregory Toya interrogated a former student about current students' roles in producing a particular item in the September 27, 2011, issue of *The Koala*, which is protected expression. This investigation must end immediately.

The satirical political piece 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 Homecoming King candidate's head appeared over the head of one of the two women, with a question mark placed over the other woman's head.

As FIRE wrote you on October 28, 2011, this and the rest of 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, 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.

Although FIRE does not directly engage in litigation, you and CSUSM administrators must be aware that by continuing to investigate students for clearly protected expression, you are risking more than a legal defeat for this unjust prosecution. Violating well-established law regarding the First Amendment rights

of students at public universities leaves you at risk of losing qualified immunity, thereby opening you and other administrators to *personal liability* should one of the students seek monetary damages for the deprivation of his or her First Amendment rights.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam Kissel". The signature is fluid and cursive, with the first name "Adam" and last name "Kissel" clearly distinguishable.

Adam Kissel

Vice President of Programs

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