FIRE
Foundation for Individual Rights in Education

January 16, 2019

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Sent via U.S. Mail and Electronic Mail (Rodriguez_Raul@rsccd.edu and Rose_Linda@sac.edu)

Dear Chancellor Rodriguez and President Rose:

As you know from our letter of November 28, 2018, the Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

We are writing to you today to express our ongoing concerns about a number of unconstitutional Rancho Santiago Community College District (the "District") and Santa Ana College ("Santa Ana") policies. These policies infringe on the First Amendment rights of District students and were brought to our attention after students Andrew Rivas, Boston Bolles, and Jocabed Torres were charged with violating the District's Standards of Student Conduct (the "Conduct Code") and the Santa Ana Inter-Club Council Constitution (the "Club Council Constitution"). The District and college must immediately revise the Conduct Code and policies governing expressive activity on campus to ensure that students are able to exercise their First Amendment rights without threat of punishment.

I. Background

A complete discussion of the facts giving rise to the charges against Rivas, Bolles, and Torres may be found in our November 28 letter.[1] On November 28, 2018, Santa Ana held a Due Process Hearing on the matter. On November 30, President Rose sent FIRE a letter indicating that the hearing panel would issue a decision within two weeks.[2] On December 14, President Rose informed Rivas, Bolles, and Torres by letter that the hearing panel found they had not violated either the Conduct Code[3] or the Club Constitution.[4]

Nonetheless, Rivas, Bolles, Torres, and the Santa Ana chapter of the national student organization Young Americans for Liberty ("YAL") plan to engage in activism on campus again this semester, including holding additional "free speech ball" events. The students remain understandably concerned that they could again be charged with violating the Conduct Code or that Santa Ana administrators will interfere with their protected expressive activities by enforcing Santa Ana's and the District's speech regulations.

The YAL members' concerns are reasonable because Santa Ana's and the District's policies allow administrators to punish students for engaging in protected speech. As discussed below, the Conduct Code is riddled with unconstitutional content-based restrictions on speech. As the students learned last semester, administrators can easily employ these overbroad and vague policies to police speech that they disagree with or find offensive. Until the Conduct Code is amended to remove the unconstitutional provisions, District students will be unable to engage in expressive activity on campus without the threat of discipline. Moreover, the students remain concerned that their activism will be impeded or punished if they fail to comply with Santa Ana's regulations on the time, place, and manner of speech on campus, as explained below. These regulations must also be amended to remove the ongoing threat to these and all students' expressive rights.

II. Policies

Both the District and Santa Ana maintain a number of policies that interfere with students' expressive rights and violate each institution's obligations under the First Amendment.

A. District Policies.

First, the District's policies governing the time, place, and manner of student speech infringe upon students' constitutional rights. Board Policy 3900 ("Speech: Time, Place and Manner") impermissibly declares the District Campuses to be "non-public forums, except for those areas that are designated public forums available for the exercise of expression use [sic] by

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[1] Letter from Marieke Tuthill Beck-Coon to Linda D. Rose (Nov. 28, 2018) (attached).
[2] Letter from Linda D. Rose to Marieke Tuthill Beck-Coon (Nov. 30, 2018) (on file with author).
[3] RANCHO SANTIAGO CMTY. COLL. DIST., Board Policy 5500 Standards of Student Conduct (July 21, 2014), *available at* https://www.rsccd.edu/Trustees/Documents/Board%20Policies/BPs-Chapter%205/BP%205500%20Standards%20of%20Student%20Conduct.pdf.
[4] SANTA ANA COLL. OFFICE OF STUDENT LIFE, Inter-Club Council Constitution (May 2, 2018), *available at* https://www.sac.edu/StudentServices/StudentLife/Documents/ICC%20Documents/SAC%20Inter-Club%20Council%20Constitution%20FINAL.pdf.

students, employees and members of the public."[5] This unconstitutional designation of the campuses is contradicted by the District's Administrative Regulation 3900 ("Speech: Time, Place, and Manner"), which provides that "any individual or group may use exterior spaces, including lawns, plazas, quadrangles, patios, or related open spaces on the College campuses and District grounds for the exercise of academic freedom and Free Expression."[6]

Next, four sections of the Conduct Code are facially unconstitutional because they are content-based regulations of expression that permit administrators to punish students for engaging in speech protected by the First Amendment.[7] These unconstitutional sections proscribe:

> M. Expression which is libelous, slanderous, obscene or which incites students so as to create a clear and present danger of commission of unlawful acts on district premises, or violation of district regulations, or the substantial disruption of the orderly operation of the college.
>
> N. Engaging in lewd, indecent, or obscene behavior on district property or at any district sponsored function.
>
> R. Continuous disruptive behavior or willful disobedience, habitual profanity or vulgarity, open and persistent abuse of college personnel, or open and persistent defiance of the authority of college personnel, which includes physical as well as verbal abuse, including the use of racial epithets and hate speech;
>
> S. Disruptive written or verbal communication, vulgarity, open and persistent abuse of other students which include verbal abuse, racial epithets and hate speech. Engaging in intimidating conduct or bullying against another student through words or actions, including direct physical contact; verbal assaults, such as teasing or name-calling; social isolation or manipulation; and cyberbullying.

In sum, the District maintains numerous constitutionally defective restrictions on its students' speech and expressive conduct.

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[5] RANCHO SANTIAGO CMTY. COLL. DIST., Board Policy 3900 Speech: Time, Place, and Manner (July 13, 2014), *available at* https://www.rsccd.edu/Trustees/Documents/Board%20Policies/BPs-Chapter%203/BP%203900%20Speech%20-%20Time%20Place%20and%20Manner.pdf.

[6] RANCHO SANTIAGO CMTY. COLL. DIST., Administrative Regulation 3900 Speech: Time, Place, and Manner (May 7, 2018), *available at* https://www.rsccd.edu/Trustees/Documents/ARs/ARs-Chapter%203/AR%203900%20Speech%20-%20Time%2c%20Place%2c%20and%20Manner.pdf.

[7] To the extent these Conduct Code provisions regulate speech, they are also inconsistent with District Administrative Regulation 3900, which provides: "No restrictions shall be placed on the subject matter, topics, or viewpoints expressed by students, employees, or members of the public as long as it does not include expression which advocates for the use of force or law violation, where such advocacy is directed to inciting or producing lawless action on District property and is likely to incite or produce such action, or the unreasonable disruption of classroom or college activities or operations."

B. Santa Ana Policies.

Santa Ana has followed the District's lead, enacting its own constitutionally defective policies.

First, Santa Ana's Free Expression policy AR5420 states that "the areas available to students and the community are limited public forums" and that "[t]he District reserves the right to revoke that designation and apply a non-public forum designation at its discretion."[8] This designation is incorrect as a matter of both constitutional law and District Administrative Regulation 3900. Santa Ana also appears to maintain a free speech area on its campus, the location of which "may change without notice."[9]

Next, the Club Council Constitution impermissibly restricts students' expressive rights. Article III, Section B of the Bylaws states that club advisors must attend all club meetings and events. This creates a prior restraint on student expression by preventing students from engaging in any expressive activity or exercising their right to free association on campus unless their advisor is present. There is no doubt that Santa Ana intends for this policy to apply to students' expressive activity on campus, as Rivas, Bolles, and Torres were charged with violating the Conduct Code because they engaged in expressive activity without a chaperone present.[10]

Finally, Santa Ana maintains an unconstitutional prior restraint by requiring that all student organizations obtain permission at least three weeks before engaging in any "club related activities."[11] This requirement is clearly intended to apply even to peaceful, non-disruptive expressive activity by a few student club members in a publicly accessible area of campus, as Rivas, Bolles, and Torres' charge letter noted that "[n]o paperwork was submitted to the Office of Student Life stating that Young Americans for Liberty were meeting or facilitating any club activity or event on November 19th . . . ."[12]

The District and Santa Ana's policies violate students' First Amendment rights and must be revised to ensure they are constitutionally compliant.

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[8] SANTA ANA COLL., Free Expression – AR5420 (Nov. 8, 2010), https://www.sac.edu/AdminServices/Documents/Free%20Expression%20-%20AR5420.pdf. Santa Ana also hosts an old version of the District Policy on its website. *See* RANCHO SANTIAGO COMM. COLL. DIST., BP 3900 Speech: Time, Place, and Manner (Jan. 13, 2014), *available at* https://www.sac.edu/AdminServices/Documents/BP%203900%20Speech%20-%20Time%20Place%20and%20Manner.pdf.

[9] SANTA ANA COLL., Administrative Services – Free Speech Area (last visited Jan. 4, 2019), https://www.sac.edu/AdminServices/Pages/free-speech.aspx.

[10] Letter from Santa Ana Office of Student Life to Andrew Rivas Regarding Due Process Hearing (Nov. 21, 2018) (on file with author).

[11] SANTA ANA COLL., Activity Approval/Permit For Use of Facilities By Student Groups (Mar. 23, 2017) *available at* https://www.sac.edu/StudentServices/StudentLife/Pages/Activity-Forms.aspx. The webpage hosting the form states: "This form must be used for ALL club related activities, either on or off campus (i.e. meetings, tabling, field trips, etc.)."

[12] Letter to Andrew Rivas, *supra* n.10.

III. Analysis

It has long been settled law that the First Amendment is binding on public colleges. *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); *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, "free speech is of critical importance because it is the lifeblood of academic freedom").[13]

A. The District and Santa Ana Policies Are Not Permissible Time, Place, or Manner Restrictions.

1. The District campuses are public forums.

The open, outdoor areas of public college campuses like those in the District are public forums. *See Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."); *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1063 (9th Cir. 2012) (holding that Oregon State University campus is at minimum a designated public forum); *Justice for All v. Faulkner*, 410 F.3d 760, 768–69 (5th Cir. 2005) (open outdoor areas of University of Texas at Austin found to be designated public fora as to students); *Hays Cty. Guardian v. Supple*, 969 F.2d 111, 116 (5th Cir. 1992) ("The undisputed facts show that the outdoor grounds of the campus such as the sidewalks and plazas are designated public fora for the speech of university students."); *Shaw v. Burke*, No. 17-cv-2386, 2018 U.S. Dist. LEXIS 7584, at *22 (C.D. Cal. Jan. 17, 2018) ("open, outdoor areas of universities . . . are public fora[,]" regardless of a college's regulations to the contrary); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, No. 12-cv-155, 2012 U.S. Dist. LEXIS 80967, at *29–30 (S.D. Ohio June 12, 2012) (open, outdoor areas of campus are designated public fora for students); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 862–63 (N.D. Tex. 2004) ("[T]o the extent [Texas Tech University] has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University's students, irrespective of whether the University has so designated them or not. These areas comprise the irreducible public forums on the campus.").

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[13] District students' expressive rights are also protected by the California Constitution and California law. *Griset v. Fair Political Practices Com.*, 8 Cal. 4th 851, 866 n.5 (1994) ("As a general matter, the liberty of speech clause in the California Constitution is more protective of speech than its federal counterpart."); Educ. Code, § 66301, subd. (a) (Neither the "governing board of a community college district, nor an administrator of any campus of those institutions, shall *make or enforce* a rule subjecting a student to disciplinary sanction solely on the basis of conduct that is speech or other communication that, when engaged in outside a campus of those institutions, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.") (emphasis added).

Thus, the District's and Santa Ana's policy language labeling these areas of campus as "non-public forums" or "limited forums" cannot stand either on its face or in light of district Administrative Regulation 3900's designation of exterior spaces for expressive purposes. The United States Court of Appeals for Ninth Circuit made this point clear in *OSU Student Alliance*, where it held that the campus of Oregon State University was "at least a designated public forum" because an Oregon Administrative Rule states that "University grounds are open to the public and the university community for speech activities . . . ." 699 F.3d at 1062. The Ninth Circuit explained that the adoption of university-level policies restricting the use of the grounds did not convert the campus into a limited public forum. *Id.* at 1063. The District's Administrative Regulation 3900, like the Oregon Administrative Rule at issue in *OSU*, evinces a clear intent to open up the outside areas of the District campuses to student expression, and the District and Santa Ana cannot now purport to grant lesser access through contrary regulation. *See OSU*, 699 F.3d at 1062–63. Instead, the District and Santa Ana must remove the language from Board Policy 3900 and Free Expression policy AR5420 purporting to designate these outdoor areas as non-public or limited fora.

2. Santa Ana's free speech area is unconstitutional.

Santa Ana may not confine students' expressive rights to a small "free speech area." While a college may establish "reasonable time, place, and manner" restrictions on speech and expressive activity in a public forum, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), they must be "justified without reference to the content of the regulated speech, . . . [and] narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

Quarantining student expression to small areas of campus is neither reasonable nor narrowly tailored. Courts have repeatedly held that similar restrictions on student expression cannot withstand constitutional scrutiny. In *Williams*, 2012 U.S. Dist. LEXIS 80967, at *29–30, a federal district court enjoined the University of Cincinnati from, *inter alia*, limiting all "demonstrations, picketing, or rallies" to a small free speech area. The court rejected the university's argument that all areas outside the free speech area were limited public forums, noting that the university "has simply offered no explanation of its compelling interest in restricting all demonstrations, rallies, and protests from all but one designated public forum on campus." *Id.* at *19–25. Moreover, when a college asserts a government interest in the restriction, the court reasoned that the college must assert more than"[m]ere speculation that speech would disrupt campus activities . . . because 'undifferentiated fear or apprehension of a disturbance is not enough to overcome the right to freedom of expression on a college campus.'" *Id.* (quoting *Healy*, 408 U.S. at 191); *see also Roberts*, 346 F. Supp. 2d at 861 (finding that "park areas, sidewalks, streets, or other similar common areas" are public forums for students, and that Texas Tech University's requirement that students obtain permission before conducting expressive activities outside designated free speech areas was not narrowly tailored to serve the university's interests).

More recently, in *Shaw*, 2018 U.S. Dist. LEXIS 7584, at *26, the Federal District Court for the Central District of California held that restricting student expression to a small free speech area was not narrowly tailored because it did not achieve the defendant administrators' asserted interests in avoiding disruption and maintaining the attractiveness of campus "without unnecessarily impeding students' First Amendment rights." *Id.* Moreover, small free speech areas fail to leave open ample alternative channels of communication because, as the *Shaw* court explained, that students are able to express themselves in one area does not remedy the fact that they are unable to express themselves in other areas. *Id.* at *27.

Santa Ana's free speech area is unconstitutional because limiting student expressive activity to certain areas of campus is not a narrowly tailored time, place, or manner regulation of the sort that will pass constitutional muster. The fact that Santa Ana is apparently unable or unwilling to permanently designate the location of the free speech area is a strong indication that the movable area is not tethered to any substantial governmental interest. Rather than maintain an unconstitutional free speech area, Santa Ana should abide by Administrative Regulation 3900, which specifies that the exterior areas of District campuses are open to free expression, subject only to a defined list of restrictions aimed at specific disruption or safety considerations, such as prohibiting blocking ingress and egress from buildings.

B. The Conduct Code Is Unconstitutionally Vague and Overbroad.

Four sections of the Conduct Code impermissibly allow administrators to punish students for engaging in speech protected by the First Amendment based on the content of their speech. The sections of the code banning "habitual profanity or vulgarity,"[14] the use of "racial epithets and hate speech,"[15] and "bullying. . . , including . . . verbal assaults, such as teasing or name calling,"[16] facially violate the First Amendment rights of District students. Santa Ana administrators' unwieldy application of the Code section banning "obscene" speech[17] likewise violates students' rights.

College policies using overbroad, subjective categories of prohibited speech "provide[] no shelter for core protected speech." *DeJohn*, 537 F.3d at 318. The First Amendment "does not leave us at the mercy of *noblesse oblige*," and instead requires that restrictions on speech be carefully designed to ensure that as little speech as possible is restricted. *United States v. Stevens*, 559 U.S. 460, 480 (2010). Overbroad or subjective policy language allows administrators the kind of unbridled discretion that inevitably leads to uneven, arbitrary, and viewpoint-based enforcement, which the First Amendment does not permit. *See Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (invalidating an ill-defined ban on "political" attire in non-public forum because the "indeterminate prohibition" precluded fair enforcement); *Grayned v. City of Rockford*, 408 U.S. 104, 113 n. 22 (1972) (noting that the Court regularly condemns broadly worded ordinances that "grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences").

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[14] Standards of Student Conduct, Art. I, §§ R–S.
[15] *Id.* §§ R–S.
[16] *Id.* § S.
[17] *Id.* §§ M–N.

1. There is no exception to the First Amendment for "hate speech" or racist speech.

The District and Santa Ana may not punish students for engaging in racist speech or "hate speech." Decades of precedent make clear that the First Amendment protects speech that some or even most Americans consider hateful. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992) (striking down an ordinance that prohibited placing on any property symbols that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender").

The First Amendment does not exist to protect only uncontroversial expression; it exists precisely to protect speech that we may find challenging, repugnant, or offensive. In rulings spanning decades, the Supreme Court of the United States has explicitly held that speech cannot be restricted because it offends others. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If 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."). This is no less true on public college campuses. *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("[T]he 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.'").

The Court reiterated this fundamental principle in *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), proclaiming:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. . . . [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

The Court once again reaffirmed this principle in *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017), holding unanimously that the perception that expression is "hateful" or that it "demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground" is not a sufficient basis on which to remove speech from the protection of the First Amendment.

In the public college context, federal courts nationwide have consistently struck down policies that—like the Conduct Code sections here at issue—use content-based, overbroad, and vague language in an attempt to prohibit offensive or racist speech, and in doing so sweep within their ambit a great amount of protected speech.[18] This is because "[c]ontent-based regulations

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[18] *See, e.g.*, *McCauley v. Univ. of V.I.*, 618 F.3d 232, 247–51 (3d Cir. 2010) (invalidating campus policies prohibiting "any act" that "frightens, demeans, degrades or disgraces any person" including any violations involving "sexual harassment" and "unauthorized or offensive signs"); *DeJohn*, 537 F.3d at 317–18 (invalidating sexual harassment policy that prohibited all "expressive, visual, or physical conduct of a sexual or gender-motivated nature" when "such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment"); *Dambrot*

are presumptively invalid." *R.A.V.*, 505 U.S. at 382. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

As these cases and many others demonstrate, the District may not punish students for engaging in speech on the basis that it is viewed as racist or hateful.

2. Profanity and vulgar language is protected by the First Amendment.

The District may not punish students for using profanity or vulgar language. Profanity is protected expression under long-settled and well-established First Amendment law. *See Cohen v. California*, 403 U.S. 15 (1971) (reversing conviction of man wearing a jacket bearing the slogan "Fuck the Draft" into a courthouse because message was protected under First Amendment); *Swartz v. Insogna*, 704 F.3d 105, 111 (2d Cir. 2013) (giving "the finger" is pure speech that cannot be penalized as disorderly conduct). While some may find the use of profanity juvenile or distasteful, decades of case law hold that government actors may not censor speech simply because it is offensive or vulgar. "[B]ecause governmental officials cannot make principled decisions" concerning distasteful or impolite speech, "the Constitution leaves matters of taste and style . . . largely to the individual." *Cohen*, 403 U.S. at 25. "[O]ne man's vulgarity is another's lyric." *Id.*

3. The District must apply its ban on obscenity constitutionally.

The Conduct Code also purports to allow the District and Santa Ana to punish obscene speech. However, as the November 2018 charges against Rivas, Bolles, and Torres demonstrate, Santa Ana administrators have used the Conduct Code to punish speech that does not meet the exacting legal definition of obscenity.

While the Supreme Court has held that obscenity is among the narrow categories of speech that do not enjoy First Amendment protection, it has also made clear that obscenity has a specific, narrowly-tailored definition. *See Miller v. California*, 413 U.S. 15, 28 (1973) ("[N]o one

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v. Central Mich. Univ., 55 F.3d 1177, 1182–85 (6th Cir. 1995) (invalidating anti-discrimination and harassment policy prohibiting "demeaning or slurring individuals . . . because of their racial or ethnic affiliation" or "using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation"); *College Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1016–18 (N.D. Cal. 2007) (enjoining provision of Code of Student Conduct requiring students to be "civil to one another and to others in the campus community"); *Roberts*, 346 F. Supp. 2d 853 (striking down campus speech code prohibiting "insults, epithets, ridicule, or personal attacks" as unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 373–74 (M.D. Pa. 2003) (enjoining provisions of speech code that prohibited "acts of intolerance," and prohibited the communication of beliefs that "provoke, harass, intimidate, or harm another," or participating in "acts of intolerance that demonstrate malicious intentions toward others"); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1165, 1168–80 (E.D. Wisc. 1991) (striking down speech code provisions prohibiting "racist or discriminatory comments, epithets, or other expressive behavior directed at an individual" that demean racial, religious, or ethnic groups and create a hostile environment); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 868 (E.D. Mich. 1989) (striking down as overly broad and vague Policy on Discrimination and Discriminatory Harassment prohibiting students from "stigmatizing or victimizing" individuals or enumerated groups).

will be subject to prosecution for . . . obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct . . . ."); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 235 (2002) (under *Miller*, to meet obscenity test, the government must prove that expression taken as a whole: "[1] appeals to the prurient interest [in sex], [2] is patently offensive in light of community standards, and [3] lacks serious literary, artistic, political, or scientific value") (internal quotation marks omitted). The profanity and drawings of penises that prompted the disciplinary proceeding against the students here do not begin to approach the "hard core" pornography that may be constitutionally banned as obscenity.

Santa Ana administrators cannot simply label speech as "obscene" and thereby divorce it from the protection of the First Amendment. Yet that is precisely what occurred when Rivas, Bolles, and Torres were charged with using obscene speech on the basis of words and images, like cartoon penises, that clearly came nowhere near meeting the exacting *Miller* test. If the District and Santa Ana are to constitutionally enforce a ban on obscene expression, they must ensure that administrators understand that obscenity has a precise legal definition. Otherwise, students risk being charged with violating the prohibition of obscenity for engaging in clearly protected expression that is merely offensive or refers to something sexual.

4. Most instances of "teasing" and "name-calling" are protected by the First Amendment.

The District cannot require that its students be civil to one another. While the District has a moral and statutory obligation to address conduct that constitutes discriminatory harassment, as defined by federal law and enacting regulations, it cannot turn isolated incidents of "name-calling" or "teasing" into proscribable harassment by recasting them as "bullying" or "verbal assault[s]."

In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Supreme Court set forth a strict definition of student-on-student (or peer) harassment. In order for student conduct (including expression) to constitute actionable harassment, it must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, and (3) "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school." *Id.* at 650. By definition, this includes only extreme and typically repetitive behavior—conduct so serious that it would prevent a reasonable person from receiving his or her education.

Although the *Davis* formulation was crafted in the context of sexual harassment, its requirement that harassment be so severe, pervasive, and objectively offensive that it substantially interferes with the victim's ability to receive his or her education is instructive in the broader discriminatory harassment context. Indeed, the Department of Education's Office for Civil Rights (OCR), the federal agency responsible for implementing and enforcing federal anti-discrimination laws on our nation's campuses, made clear in its 2001 *Revised Sexual Harassment Guidance* that its definition of harassment is "consistent" with and "intended to capture the same concept" as the Court's definition in *Davis*. As OCR Assistant Secretary Gerald A. Reynolds made clear in a July 28, 2003, "Dear Colleague" letter sent to all

college and university presidents, harassment "must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive."[19]

While colleges may wish to encourage civility between their students, they cannot require it by threat of discipline. *See Reed,* 523 F. Supp. 2d at 1013. As the *Reed* court explained:

> The First Amendment difficulty with this kind of mandate should be obvious: the requirement "to be civil to one another" and the directive to eschew behaviors that are not consistent with "good citizenship" reasonably can be understood as prohibiting the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause. Similarly, mandating civility could deprive speakers of the tools they most need to connect emotionally with their audience, to move their audience to share their passion.

While the District may ask that its students not call each other names or tease each other, it cannot constitutionally punish students for engaging in sporadic name-calling or teasing that does not rise to the level of harassment, as defined by law.

5. The Conduct Code impermissibly allows administrators to punish students for "disruptive written or verbal communication."

Section S of the Conduct Code purports to prohibit "disruptive written or verbal communication." However, the Supreme Court has long made clear that a public school at any educational level—even in the elementary or high school setting—may not restrict student speech without showing that it will or has caused an actual material and substantial disruption. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) ("Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."). "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* Moreover, courts have made clear that a public college cannot restrict the speech of college students in the same way that a public elementary or high school may. *See, e.g.*, *DeJohn,* 537 F.3d at 315–16 (holding that public college administrators "are granted *less leeway* in regulating student speech than are public elementary or high school administrators") (emphasis in original).

Just two months ago, Rivas, Bolles, and Torres were charged with engaging in disruptive speech because of words and symbols written on a large beach ball without evidence that they caused anything more than "discomfort and unpleasantness." *Tinker,* 393 U.S. at 509. As with

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[19] U.S. DEP'T OF EDUC., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec'y for Civil Rights (July 28, 2003), *available at,* https://www2.ed.gov/about/offices/list/ocr/firstamend.html.

the Code provision banning obscenity, an administrator cannot simply remove First Amendment protections by labeling disfavored speech "disruptive."

We note that the Conduct Code by its terms purports to regulate pure speech, namely "written or verbal communications," rather than conduct. The District must revise the Code to focus on genuinely disruptive conduct, discriminatory harassment, or other properly defined categories of unprotected speech such as true threats.

C. Santa Ana Has Enacted an Unconstitutional Prior Restraint on Student Speech.

Santa Ana has imposed a prior restraint on its students' exercise of their First Amendment rights by requiring that they complete a form at least three weeks prior to engaging in any "club related activities" on campus and by requiring that they have club advisors present with them at all events and meetings. Students must be allowed to engage in non-disruptive expressive activity in the open, outdoor areas of Santa Ana's campus without prior permission and without fear that they will be stopped by an administrator or subject to unconstitutional permitting requirements.

Administrative procedures requiring a speaker to obtain a license or permit, or to register with the government before speaking, are highly disfavored under long-established law. *See N.Y. Times v. United States*, 403 U.S. 713, 714 (1971) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.") (internal quotation marks omitted). The First Amendment does not allow—and courts will not uphold—broad permitting schemes that place a significant burden on speech and are not sufficiently tailored to serve an important government interest.

In *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), the Supreme Court struck down a village ordinance prohibiting all door-to-door canvassing without a permit, reasoning that the ordinance was not sufficiently tailored to meet the government's interests in preventing fraud and crime and protecting privacy. *Id.* at 168–69. As the Court reasoned, the village's broad permitting scheme placed a substantial burden on citizens' First Amendment rights by entirely preventing anonymous and spontaneous speech, and by deterring speakers who do not wish to seek a license. *Id.* at 166–68. The Court observed:

> It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.

Id. at 165–66.

Moreover, courts will strike down permitting systems "without narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151

(1969); *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988) (holding that permit requirements must have clearly delineated standards). The *Shuttlesworth* Court struck down an ordinance requiring a permit for parades and demonstrations where it vested "virtually unbridled" authority in government actors to decide what permits to grant or deny. 394 U.S. at 150.

Policies that require individuals or small groups to obtain a permit or license in order to engage in any expressive activity are not narrowly tailored and generally fail constitutional scrutiny in a public forum. *See Boardley v. Dep't of Interior*, 615 F.3d 508, 520–23 (D.D.C. 2010) (permit requirement for individuals or small groups held unconstitutional); *Cox v. City of Charleston*, 416 F.3d 281, 285–87 (4th Cir. 2005) (same); *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1255 n.13 (11th Cir. 2004) (same); *Douglass v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996) (same); *Grossman v. City of Portland*, 33 F.3d 1200, 1205–08 (9th Cir. 1994) (same); *Shaw*, 2018 U.S. Dist. LEXIS 7584, at *29 ("The permitting requirement also impermissibly restricts speech because it applies to all speakers regardless of whether applicants intend to speak alone or as part of a group.").

Santa Ana's requirement that ratified clubs complete an "Activity Approval/Permit For Use of Facilities By Student Groups" at least three weeks before engaging in any expressive activity on campus is an unlawful prior restraint. The requirement places a significant burden on speech and is not narrowly tailored to any government interest, let alone a significant one, *see Watchtower*, 536 U.S. at 165–66, and it applies even to the non-disruptive expressive activities of small groups of students, s*ee Grossman*, 33 F.3d at 1205–08.

Moreover, the Club Council Constitution requires advisors to be present at all meetings and events, which imposes an additional unconstitutional burden by limiting expressive activity to those times an advisor is able and willing to be present. College students are adults and the requirement that they be chaperoned when engaging in protected expressive activity violates the First Amendment.

IV. Conclusion

The District and Santa Ana must cease enforcement of the unconstitutional aspects of their policies, immediately undertake their revision, and train administrators tasked with enforcing speech-related policies in order to ensure compliance with the First Amendment. Failure to do so betrays the District's and Santa Ana's missions as public institutions of higher learning and violates the rights of all District students.

Be advised that a public college administrator who violates clearly established law will not retain qualified immunity and can be held personally responsible for monetary damages for violating First Amendment rights under 42 U.S.C. § 1983. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). There is no doubt that numerous District and Santa Ana policies violate well-established First Amendment rights of District students.

FIRE is committed to using all of the resources at its disposal to see this matter through to a just conclusion. To this end, we request receipt of a response to this letter no later than the close of business on January 30, 2019.

Sincerely,

Marieke Tuthill Beck-Coon
Director of Litigation
Foundation for Individual Rights in Education

Encl.

cc:
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