



May 7, 2020

Chancellor Gary S. May
Offices of the Chancellor and Provost
Fifth Floor, Mrak Hall
University of California, Davis
One Shields Avenue
Davis, California 95616

Sent via Electronic Mail (chancellor@ucdavis.edu)

Dear Chancellor May:

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.

Founded in 1974, the Student Press Law Center (SPLC) is the nation's only legal assistance agency devoted exclusively to supporting, defending, and educating high school and college journalists about the rights and responsibilities embodied in the First Amendment and supporting the student news media in covering important issues free from censorship. The SPLC is a nonpartisan, nonprofit organization.

FIRE and the SPLC are concerned about the state of freedom of expression, including freedom of the press, at the University of California, Davis in light of its policy and practice of granting the Media Board—an administrative advisory committee that reports to the Chancellor's Office—broad oversight of independent student media, including the ability to select student media editors and leadership. The unfettered discretion extended to the Board is inconsistent with the values of a free press: It takes editorial independence away from student media leadership and places it in the hands of non-journalists who report directly to university administrators—the very individuals about whom student journalists are supposed to report. This process naturally invites conflicts of interest that will, and do, have a chilling effect on the reporting and opinions of the student press, undermining UC Davis's commitment to free expression and its obligations under the First Amendment and California law.

Our understanding of the pertinent facts follows. We appreciate that you may have additional information to offer and invite you to share it with us. If our understanding is substantially accurate, the time has come for UC Davis to abandon its current model of oversight of the student press, a relic expressly founded to chill student journalists' voices. In its place, UC Davis must adopt policies and procedures that restore student journalists' rights to freedom of expression, including editorial independence over their publications and the right to select their own leadership.

I. UC Davis Policies and Practices Inappropriately Give the Subjects of the News—Administrators—Authority Over the Student Media that Publish the News

Established in the 1970s as a result of a resolution by the UC Regents,¹ the Media Board (the “Board”) “develops policies for and oversees the administration of the California Aggie, and FM Radio Station KDVS.”² The board’s responsibilities include selecting the editor-in-chief of *The Aggie* and the manager of KDVS.³

At its inception, the Board was created as an instrumentality of the university’s administration to curb the editorial independence and press freedom of student media. Specifically, the board was established because the UC Regents “deplore[d] the frequent use of campus student newspapers as instruments of socio-political advocacy and for the dissemination of lewd and obscene articles and photographys [sic]” and were “apprehensive regarding the apparent lack of supervisions to assure editorial integrity and conformity with generally accepted standards of decency and editorial excellence.”⁴ With these concerns in mind, the Regents required each UC chancellor to create policies for the oversight of student media.⁵ One such policy at UC Davis was the implementation of the Media Board.⁶

The Board is comprised of three paid student members, two student alternates, two faculty or staff members, and several ex-officio members, including the Media Board chair, student government officials, and student media leaders.⁷ In addition to selecting editorial leaders, the

¹ *Resolution Approved on Student Newspapers*, UNIV. BULLETIN, Jul. 13, 1970 at 11, available at <https://bit.ly/3fr3NSY>; Paul Goodman, *Does Chancellor Meyer Believe in a Free Student*, CAL. AGGIE, Feb. 10, 1971 at 5, available at <https://bit.ly/2SFq2Lh>.

² *Media Board*, Univ. of Cal. Davis, <https://aac.ucdavis.edu/committees/committee-detail?id=18> (last visited May 4, 2020).

³ *Id.*

⁴ *Resolution Approved on Student Newspapers*, *supra* note 1.

⁵ *Id.*

⁶ Goodman, *supra* note 1.

⁷ *Media Board*, *supra* note 2; *2019-2020 Membership Roster*, UC Davis Campus Media Board, <https://bit.ly/3baiEhp>. (last visited May 4, 2020).

Board “has the authority to discipline or dismiss them.”⁸ The Board also has the power to review and reverse the adverse personnel decisions made by student publication leaders.⁹

The Board Guidelines charge the Board with “maintain[ing] editorial freedom and editorial responsibility” of student media, while also requiring the Board to ensure the publications “serve the general campus community,” “serve the interests of the students,” and “use propriety and good taste in expression,” among other responsibilities.¹⁰

II. Granting Administrators Authority Over Editorial Leadership Is Inconsistent with a Free Press and the First Amendment

The First Amendment is binding on public universities like UC Davis. *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); *see also 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”).

Despite the Media Board’s characterization of itself as serving to protect First Amendment freedoms, the core values of the First Amendment and the freedom of the press it embraces are *diminished*—not served—by a system that allows the foxes to choose the henhouse’s leadership. The First Amendment “does not leave us at the mercy of the *noblesse oblige*,” and an unconstitutional grant of authority cannot be left in place merely because its holders “promised to use it responsibly.” *United States v. Stevens*, 559 U.S. 460, 480 (2010).

A. *UC Davis’s Media Board policies and practices disregard the First Amendment rights of student journalists and state law protections.*

It is well-established that public institutions of higher education “may not constitutionally take adverse action against a student newspaper, such as withdrawing or reducing the paper’s funding, because it disapproves of the content of the paper.” *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *see also Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995). As the United States Court of Appeals for the Second Circuit helpfully explained:

[A]t a minimum, when a public university establishes a student media outlet and requires no initial restrictions on content, it may

⁸ Susanne Rockwell, *Campus Mediates Between Aggie, Hurt Readers*, UC DAVIS, May 7, 1999, <https://www.ucdavis.edu/news/campus-mediates-between-aggie-hurt-readers-dialogue-focuses-campus-climate-well-student-press>; *see also Campus Media Board Guidelines*, Univ. of Cal., Davis (on file with author).

⁹ *Campus Media Board Guidelines*, *supra* note 8.

¹⁰ *Id.*

not censor, retaliate, or otherwise chill that outlet’s speech, or the speech of the student journalists who produce it, on the basis of content or viewpoints expressed through that outlet.

Husain v. Springer, 494 F.3d 108, 124 (2d Cir. 2007).

The United States Court of Appeals for the Ninth Circuit, the decisions of which are binding on UC Davis, put it simply by explaining that “no . . . content control is justified for communication among students which is not part of the educational program” because “[i]nterstudent communication does not interfere with what the school teaches; it enriches the school environment for the students.” *Burch v. Barker*, 861 F.2d 1149, 1157, 1159 (9th Cir. 1988). Further, California law prohibits university administrators from censoring—that is, exerting content control over—student media. Cal. Educ. Code § 66301.

i. The Media Board’s role invites unconstitutional content discrimination.

The Media Board’s primary purpose of overseeing *The Aggie* and KDVS directly invites this kind of unconstitutional content control. Both *The Aggie* and KDVS are student-run, independent media outlets that are not part of a curriculum, and thus UC Davis is not permitted to make content-based decisions about the publications. Yet, such decisions are exactly what the Board is charged to carry out.

First, the Board retains the power to hire and discipline the editor of *The Aggie* and the general manager of KDVS.¹¹ These individuals are the leaders of their publications, tasked with determining the content of the newspaper and radio station.¹² By harboring the power to determine *who* will make such content decisions, the Board ultimately holds captive the power to determine *what* kinds of content decisions will be made, if through no other means than considering what content goals an editorial candidate may have at the time of hiring and choosing individuals whose goals mirror those of the Board. This risk is clearly shown in the Board Guidelines, which specify that interviews are held in part to determine if candidates “understand[] . . . the purposes and goals of the medium.”¹³

Second, the clear risk of content control created by the role of the Board is only exacerbated by the fact that the Board may “discipline and/or dismiss” *The Aggie*’s editor or the KDVS general manager.¹⁴ While discipline and dismissal are allowed only “for cause,”¹⁵ the Guidelines make no effort to define or cabin “cause.” To the contrary, the Board’s mandate to ensure the content of student media “serve the general campus community,” “serve the

¹¹ *Campus Media Board Guidelines*, *supra* note 8.

¹² *See id.* (Each of these media executives is the chief administrative officer of his/her respective medium and is responsible for the medium on a day-to-day basis.)

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

interests of the students,” and “use propriety and good taste in expression” renders it readily apparent that “cause” includes content-based justifications. For example, the Board might dismiss an *Aggie* editor because it disagrees with the content of an editorial or the tone of a news article, or because it believes the content of the publication is not in “good taste.” Such actions, of course, would be impermissible under California law and the First Amendment, which protects the “dissemination of ideas—no matter how offensive to good taste—on a state university campus.” *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973).

Third, beyond the Board’s power to hire and fire, its broad authority to “develop[] policy and establish[] standards” for student media, given the content-related duties of the Board, clearly demonstrates a risk of content discrimination. In fact, the Guidelines recognize that since-eliminated Regental policy requiring a representative of the Chancellor’s office review each medium soon after publication to determine if “in his [/her] judgment, the publication has complied with campus publication guidelines” is now “suspect” under “[c]ase law.” At the same time, however, the Guidelines state that “the responsibility of review by the Media Board has not been eroded or vitiated.”¹⁶ But, as a body whose authority is delegated from your office and overseen by your subordinate, the Board is a representative of your office and may no more legally determine the fitness of student media content than you could.

By determining who will lead student media and therefore the content goals that will guide student media each year, the Board engages in unconstitutional content control of student publications each time it makes hiring decisions.

ii. Even if the Media Board never exercises its authority, its role and guidelines create an impermissible chilling effect.

Even if the Board delegated its role in hiring student publication leaders to the publications themselves and existed as a mere formality, its governing Guidelines create a chilling effect on the content of student media that cannot be tolerated at a public institution of higher education. When “an official’s act would chill or silence a person of ordinary firmness from future First Amendment activities,” that act violates the First Amendment. *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999). Here, UC Davis has acted impermissibly by establishing the Media Board and its operating Guidelines.

Chilling effects are also impermissible under California Education Code section 66301. For example, in *Smith v. Novato Unified School System*, the First District Court of Appeal held that a school district violated Education Code section 48907—which is substantially similar to section 66301 but applies to primary and secondary schools—by simply apologizing for allowing a controversial editorial to be published in the student newspaper and indicating that the piece “was outside the scope of [the student’s] ‘rights of expression.’” 150 Cal. App. 4th 1439, 1462 (1st Dist. 2007). Although the school had not taken disciplinary action against the student, the *Smith* court concluded that the school’s statement created an impermissible

¹⁶ *Id.*

chilling effect by indicating that administrators would keep future controversial pieces from publication. *Id.* at 1461, 1463. This chilling effect was, it explained, impermissible under California law.

UC Davis’s Media Board policies and practices, including its procedures for hiring student publication leaders, threaten to introduce the opportunity for retaliation and inherently introduces an apparent, if not actual, conflict of interest. Putting administrators—who are commonly the subjects of coverage by *The Aggie* and KDVS—in charge of determining who will next lead these publications puts those administrators in a position to retaliate, consciously or subconsciously, against student journalists who may have covered their official actions with a critical eye.

Not only would this retaliation be impermissible under the First Amendment, fear of such retaliation also creates a chilling effect that itself undermines the Board’s and the university’s embrace of a free press. The mere fact that the Board *could* move to dismiss student media leaders, for example—even if it never opted to do so—certainly chills the content of student publications. As a recent example, *Aggie* Editor-in-Chief Kaelyn Tuermer-Lee shared that when concerns were raised about the Board moving forward with the editor selection process without reaching quorum, she was initially hesitant to push back out of fear that the Board might retaliate by disciplining her. Even once she decided to move forward with publishing an editorial about the issues,¹⁷ she said she felt the publication had to be cautious about how it worded its complaints in order to avoid retaliation. This is a classic example of the chilling effect at work, and the policies and practices that produce it cannot be justified in the face of constitutional and state law.

B. UC Davis’s Media Board policies cannot be squared with its own policies, including the Board’s responsibility to “[m]aintain editorial freedom.”

In addition to UC Davis’s constitutional obligations, UC Davis has chosen to promise its students broad freedom of expression:

Independent thought and diversity of opinions are the essence of the University, and freedom of expression is necessary for the University to fulfill its mission of producing and disseminating knowledge. Without the ability of its members to freely hear, express, and debate different ideas and points of view, the University would lack the culture of free inquiry that lies at the foundation of the academic enterprise.¹⁸

¹⁷ See Editorial Board, *The Aggie demands selection of its new editor-in-chief be halted until adjustments are made*, CAL. AGGIE, Apr. 14, 2020, <https://theaggie.org/2020/04/14/the-aggie-demands-selection-of-its-new-editor-in-chief-be-halted-until-adjustments-are-made>.

¹⁸ *Policy and Procedure Manual*, § 400-01: *Freedom of Expression*, UNIV. OF CAL. DAVIS, <https://ucdavispolicy.ellucid.com/documents/view/37/active> (last visited May 5, 2020).

Further, according to the Media Board Guidelines, UC promises its student publications “editorial freedom.”¹⁹ This promise simply cannot be squared with the unfettered discretion UC Davis has extended to the non-journalists who comprise the Media Board to exert power over student media.

III. Conclusion

It is the responsibility of journalists, including student journalists, to serve as “surrogates for the public,” keeping a watchful eye on the operations of government. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980). The current model undermines these ideals of free expression by empowering an instrumentality of the UC Davis administration to police the content of the student media, leaving the watched to determine their watchdog.

The Media Board was created with a purpose and effect that are both now recognized as unconstitutional. UC Davis must rectify this situation by abolishing the current Media Board, or—at the very least—amending its present policy to eliminate any authority the board has over content. Student journalists—best equipped to know what they need in a leader and least likely to introduce bias—must be at the center of determining their own leadership.

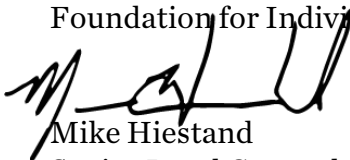
We request receipt of a response to this letter no later than the close of business on May 19, 2020. While this situation requires immediate attention, as editorial candidates have already been identified and hiring must commence as soon as possible, please apprise us if you anticipate needing additional time to respond in light of the COVID-19 pandemic. If so, we ask that you put interim measures in place and let us know when you expect to be able to respond more substantively.

Sincerely,



Lindsay Rank

Program Officer, Individual Rights Defense Program
Foundation for Individual Rights in Education



Mike Hiestand

Senior Legal Counsel
Student Press Law Center

Cc: Mayra Llamas, Chair, UC Davis Media Board
Emily Galindo, Interim Vice Chancellor for Student Affairs

¹⁹ *Campus Media Board Guidelines*, *supra* note 8.