



Foundation for Individual Rights in Education

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November 3, 2009

Dr. Raj K. Chopra, Superintendent/President
Southwestern College
Office of the Superintendent/President
900 Otay Lakes Road
Chula Vista, California 91910

Sent via U.S. Mail and Facsimile (619-421-0346)

Dear Superintendent/President Chopra:

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

FIRE is deeply concerned about Southwestern College's (SWC's) violations of the First Amendment rights of freedom of speech and freedom of assembly of its faculty and students. SWC has unconstitutionally suspended three professors who did nothing more than join a group of students who peacefully protested SWC decisions and requested an audience with you. FIRE is also concerned about reports that the campus police have been used to intimidate faculty members and students and that students are being declared guilty of offenses for exercising their constitutional rights at SWC. Finally, FIRE has determined that SWC maintains and enforces an unconstitutional "free speech zone" policy restricting freedom of expression. SWC's policies and actions have chilled and restricted freedom of expression, making a mockery of students' and faculty members' constitutional guarantees of free speech and free association—rights that SWC, as a public institution, is bound by the First Amendment to protect.

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

According to eyewitnesses who have described these events both to FIRE and to the press, on October 22, 2009, a group of students and faculty members assembled in the "free speech area" to protest various actions of SWC. The protesters understood that they had been permitted to protest from 11:00 a.m. to

12:00 p.m. using amplified sound. According to a professor who was in attendance, at noon one of the students said, "Let's go where they can hear us." Some of the students then decided to go to your office to speak with you. When they reached the courtyard where your office is located, they were met by police officers who would not let them pass. The students asked several times for admission to the courtyard and to your office, but the police prevented them from entering.¹ Three faculty members were with the group of students for different amounts of time during the conversation and left separately at around 12:30 p.m.

On the evening of October 22, the three faculty members who had been present with the students in front of the courtyard were hand-delivered letters signed by you at their off-campus homes. One of the faculty members reported to FIRE that the faculty member was phoned by Director of Human Resources Jackie Osborne. Osborne stated that she was ordered to give the professor a letter from you immediately. The professor arrived at the front entrance of the professor's apartment building to find Osborne and a campus police officer. Osborne then stated that the professor must sign to acknowledge receipt of the letter. When the professor refused, Osborne stated that the professor would be banned from campus for refusing to sign. The professor then signed and opened the letter.

The letter, which was in all relevant respects identical for each of the three faculty members, stated that those faculty members had been summarily banned from SWC's campus because of an unspecified "matter" and that they were prohibited even from using their SWC e-mail:

Pursuant to Penal Code 626.4(a), this letter serves as notification that effective at close of business today, October 22, 2009, the consent to remain on the campus under the control of the Superintendent/President has been withdrawn.

[...] You will continue on paid administrative leave pending an investigation and resolution of the matter.

You are advised not to enter any District premises without prior permission from the Superintendent/President. You are also directed to refrain from using any District facilities, phone or email.

On October 23, when students from the banned professors' classes found that their professors were missing, some of them chose to go to your office to register their concerns. They too were met by police and told that their presence was unlawful.

¹ Another professor who was in attendance tells a similar story in an October 30 e-mail posted at <http://saveourswc.blogspot.com/2009/10/swc-faculty-and-staff-respond-to.html>:

There were a couple of students who urged the group to "take it to the streets." I followed the procession down to the 100 area where they were redirected around the 100 building where the procession stopped at the breezeway between 102 and 100 building. The police blocked all breezeways. At the 102 breezeway I watched the group question the police as to why they could not enter area. The Sergeant and 1 other cop explained they could not allow disruption of campus business. I saw absolutely no angry confrontation in any shape or form. A couple of male students were a bit loud but the crowd quickly lost interest and dispersed. A petition was passed around for a minute or two. I went back to work. I was within 10 feet of the whole thing.

On October 29, Acting Superintendent/President Nicholas C. A. Alioto sent a memorandum to the “College Community” denying that SWC’s actions, including having placed the professors on “administrative leave,” amounted to a suspension or any disciplinary action at all. Alioto added in his memo that the professors are under investigation for

- a) Incitement of students to move outside the free speech area and to violate College policies
- b) Disregard for warnings and directives of police officers
- c) Physical confrontation with police officers[.]

California Penal Code Section 626.4 permits a college’s chief administrative officer to ban someone from campus “whenever there is reasonable cause to believe that such person has willfully disrupted the orderly operation of such campus or facility.” FIRE has seen no evidence whatsoever that the peaceful assembly of the students and faculty members, both in the free speech area and near your office, was anything close to “a substantial and material threat” or disruption to the campus. Nor can the repeated requests to meet with you on October 22 and 23 legitimately be called disruption or a threat of disruption. Moreover, Section 626.4 demands that “[c]onsent **shall be** reinstated by the chief administrative officer whenever he or she has reason to believe that the presence of the person from whom consent was withdrawn will not constitute a substantial and material threat to the orderly operation of the campus or facility.” (Emphasis added.) This has not occurred.

A public liberal arts college such as SWC should be seeking at all times to expand open discourse, to develop intellectual inquiry, and to engage and challenge the way people think. Contrastingly, a college that is intolerant of the often messy reality of a free society—for example, the need to make painful funding decisions that will affect college students and faculty members—is incapable of teaching students to live in freedom. SWC’s actions send the message that speech that is unpopular with the authorities is to be feared, restrained, and monitored. This message is completely incompatible with a free society and stands in stark opposition to the ideals of higher education. SWC would be wise to remember the Supreme Court’s definitive expression of the important role of our universities in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957):

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. **To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.** ... Scholarship cannot flourish in an atmosphere of suspicion and distrust. 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. [Emphasis added.]

SWC’s actions create the very “atmosphere of suspicion and distrust” against which the justices warned. Likewise, in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), the Supreme Court held that “a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with

conditions as they are, or even stirs people to anger.” Peaceful protest simply does not amount to disruptive activity absent an actual disruption.

Moreover, it is settled law that the First Amendment’s protections fully extend to public colleges like SWC. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967) (“[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment”); *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); *Widmar v. Vincent*, 454 U.S. 263, 268-69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities”).

Second, according to other reports, police officers recently have been attending peaceful meetings of students and faculty members, students who were involved in peaceful meetings and protests have been summoned to the president’s office, and at least one student has been reprimanded for exercising his rights during the peaceful protests on campus. FIRE is concerned that you appear to be using the campus police to intimidate professors and students who are exercising their constitutional rights to freedom of speech, freedom of assembly, and petition for redress of grievances. Needless to say, this is a shocking violation of your legal and moral obligation to uphold the First Amendment at SWC.

Finally, FIRE is deeply concerned about SWC’s constitutionally infirm “Freedom of Expression” policy (Southwestern Community College District Policy No. 5550). Not only are the problems in this policy numerous, but SWC also has removed this policy from the 2009–2010 *Student Policy Manual* while leaving a page reference to the absent policy in the manual’s Table of Contents.

The first serious problem in this policy is the college’s contention that SWC “is a non-public forum institution, except for those areas designated as Free Speech areas.” This characterization is patently untenable, as it runs counter to the Supreme Court’s declaration that “the campus of a public university, at least for its students, possesses many of the characteristics of a public forum.” *Widmar v. Vincent*, 454 U.S. 263, 267 n. 5 (1981). SWC may not, consistent with its obligations as a public institution, simply assert that the vast majority of its campus is a non-public forum when longstanding precedent from our nation’s highest court dictates otherwise.

Adding insult to injury, the policy fails to inform students and faculty which areas of campus are open to free speech. The “Free Speech areas” are not named in either the policy itself or the remainder of the Student Policy Manual. Unacceptably, students and faculty wishing to engage in expressive activity on campus must stumble upon SWC’s “Vendor Solicitation” policy in order to learn that the one so-called free speech area is the Student Union Patio. Thus, members of the SWC community are effectively provided no official notice regarding the parts of campus

that are potentially available for free speech activities. Without question, this omission impermissibly restrains students and faculty members who wish to exercise their First Amendment rights on campus.

Furthermore, even those students and faculty who discover the location of SWC's "free speech patio" in the Vendor Solicitation policy will be further disappointed to learn that the "free speech patio" comprises only the small area between the college bookstore and the outdoor seating area of the Student Union cafeteria. At most, this represents five percent of SWC's campus. Limiting free speech to such a small segment of the campus significantly and unacceptably restricts the exercise of students' and faculty members' First Amendment rights at a large institution such as SWC, which has an annual enrollment of approximately 18,000 students and a 156-acre campus.

Again, as a public institution, SWC is legally obligated to uphold the First Amendment rights of its students and faculty members. The only possible defense of SWC's policy is that it is a reasonable time, place, and manner restriction as allowed by cases like *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). There is nothing reasonable, however, about transforming the vast majority of the university's property—indeed, *public* property—into a censorship area. Federal case law regarding freedom of expression simply does not support the transformation of public institutions of higher education into places where constitutional protections are the exception rather than the rule. Time and again, courts have determined that to be considered legal, all time, place, and manner restrictions must be narrowly tailored to serve substantial governmental interests. The generalized concern for order that underlies the establishment of "free speech zone" policies is neither specific nor substantial enough to justify such restrictions.

Similarly, the policy states that "[t]he Superintendent/President shall enact such administrative procedures as are necessary to reasonably regulate the time, place, and manner of the exercise of free expression ..." This provision fails to pass constitutional muster because it seems to reserve almost complete discretion to the Superintendent/President to determine the circumstances under which free speech activities may take place and neglects to list the criteria to be used when making those determinations, depriving students and faculty members of sufficient notice regarding their First Amendment rights on campus. There is nothing reasonable about reserving almost complete discretion to determine the conditions, both in time and place, under which approved speech activities may take place. Such an open-ended and vaguely worded policy invites selective application and administrative abuse, creating the possibility that speakers espousing disfavored viewpoints will be unfairly burdened in their efforts. SWC's actions in relation to the October protests demonstrate this administrative abuse.

Finally, the Freedom of Expression policy states that "[s]tudents may be disciplined for any speech containing harassment, threats, intimidation, or hate unless such speech is constitutionally protected." This vague, self-contradicting provision ignores the reality that much speech containing or characterized by "hate" is nevertheless entitled to constitutional protection. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *Terminiello v. Chicago*, 337 U.S. 1 (1949). There simply is no First Amendment exception for "hate" speech. By suggesting that students may be subject to discipline for speech "containing ... hate," SWC misinforms its students of their expressive rights under First Amendment jurisprudence. In addition, the attempt to save the policy by adding the words "unless such speech is constitutionally protected" will likely serve

only to confuse students attempting to ascertain their speech rights at SWC. How is a student to determine, under this provision, what types of hate speech are protected at SWC and what types are punishable? College students are not constitutional scholars and cannot reasonably be expected to find the language in this provision to be anything other than contradictory and vague, thus adding to the litany of problems presented by the Freedom of Expression policy.

Be advised that FIRE has challenged the establishment of free speech zones at universities across the nation, including at West Virginia University, Seminole Community College in Florida, Citrus College in California, the University of North Carolina–Greensboro, Texas Tech University, the University of North Texas, and the University of Nevada–Reno. In all of these cases, the institutions challenged have either decided to open their campuses to expressive activities or have been forced by a court to do so. For instance, in FIRE’s case at Texas Tech, a federal court determined that Texas Tech’s policy must be interpreted to allow free speech for students on “park areas, sidewalks, streets, or other similar common areas ... irrespective of whether the University has so designated them or not.” See *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004). SWC would be well advised to take this decision into account in considering its own policies.

SWC must revise its Freedom of Expression policy, stop declaring that lawful assembly is unlawful, stop interfering with the First Amendment rights of students and faculty, refrain from intimidating students and faculty members through use of the police, and immediately reverse the suspensions of the three faculty members. We urge SWC to undo its unjust policy and actions and thus affirm that free speech at SWC is to be celebrated, honored, and broadened—not feared, restrained, and hidden. Let your students and faculty members exercise their basic legal, moral, and human rights; let them speak, assemble, and protest as their consciences dictate.

Please spare SWC the embarrassment of fighting against the Bill of Rights—a statement of both law and principle by which the university is legally and morally bound. FIRE hopes to resolve this matter amicably and swiftly, but we are committed to using all of our resources to restoring justice at SWC.

We request a response on this matter by November 17, 2009.

Sincerely,



Adam Kissel
Director, Individual Rights Defense Program

cc:

Nicholas C.A. Alioto, Acting Superintendent/President, Southwestern College
Jack Scott, Chancellor, California Community Colleges
Kay L. Albiani, President, Board of Governors, California Community Colleges
Nick Aguilar, Southwestern Community College District Governing Board
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