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November 9, 2009

Dr. Raj K. Chopra
President
Southwestern College
900 Otay Lakes Road
Chula Vista, CA 91910

Re: Southwestern College Actions and Policies Infringing Free Speech

Dear President Chopra:

I am writing to express serious concerns that Southwestern College is violating the free speech rights of faculty, staff, and students. I share concerns expressed in the November 3, 2009 letter from FIRE, which I will not repeat. Instead, I offer several additional comments, including the college's obligations under California law.

It should go without saying that a public college must uphold the highest possible commitment to freedom of speech and exchange of ideas. Unfortunately, the college's actions and policies, as described in the FIRE letter, fall far short of that standard. It appears that the college twice unlawfully ordered students to disperse a peaceful assembly and illegally retaliated against faculty who participated in the first assembly. Such actions violate the fundamental right to freedom of speech and must not be repeated. The ACLU is fully prepared to take whatever actions are necessary and appropriate to enforce the paramount right to freedom of speech in a public college.

1. California law does not allow the college to declare most of the campus off-limits to free speech.

As a community college, Southwestern is subject to Education Code section 76120, which provides:

> The governing board of a community college district shall adopt rules and regulations relating to the exercise of free expression by students upon the premises of each community college maintained by the district, which shall

> include reasonable provisions for the time, place, and manner of conducting such activities.
>
> Such rules and regulations shall not prohibit the right of students to exercise free expression including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, and the wearing of buttons, badges, or other insignia, except that expression which is obscene, libelous or slanderous according to current legal standards, or which so incites students as to create a clear and present danger of the commission of unlawful acts on community college premises, or the violation of lawful community college regulations, or the substantial disruption of the orderly operation of the community college, shall be prohibited.

Of course, section 76120 cannot be construed to prohibit speech protected by the First Amendment. *See Khademi v. South Orange County Community College Dist.*, 194 F. Supp. 2d 1011, 1021 (C.D. Cal. 2002).

Moreover, section 76120 must also be construed consistently with Article I, section 2 of the California Constitution, which provides even greater protections for speech than the First Amendment. *San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist.*, 46 Cal.4th 822, 842 (2009).

Under Article I, section 2, the college may restrict speech or assembly only if "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory*, 154 Cal.App.3d 1157, 1168 (1984). This standard is objective and does not allow the college to prohibit speech by the simple fiat of declaring the campus a "non-public forum."

Policy No. 5550 is therefore unlawful to the extent it designates virtually the entire campus as a non-public forum. A peaceful assembly is not basically incompatible with the normal activities of the campus. While the college might properly prohibit actual interference with classroom instruction, obstruction of free passage, or seriously disruptive behavior, it cannot categorically prohibit peaceful speech and assembly on virtually all of the campus.[1]

As noted, section 76120 permits only "reasonable" time, place, and manner regulations. In light of the state and federal constitutions, a court would not find it "reasonable" to declare that the entirety of a 156-acre campus, except for one "free

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[1] Policy No. 5550 is particularly egregious to the extent it apparently prohibits "wearing buttons, badges, or other insignia" except "in those parts of the District designated as Free Speech areas." Students must be allowed to wear buttons, badges, or insignia in any place on campus, including classrooms. *Cf. Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 531 (9th Cir. 1992) ("The passive expression of a viewpoint" by wearing a button "'is certainly not in the class of those activities which inherently distract students and break down the regimentation of the classroom.'").

speech area" limited to a single patio, is a "non-public forum," especially for faculty, students, and staff.

Moreover, Education Code § 82537 declares, "There is a civic center at each and every community college within the state where the citizens … may meet and discuss, from time to time, as they may desire, any subjects and questions …." This section declares the public policy that community colleges shall be open to public debate and further undermines the categorical designation of the campus as a "non-public forum."[2] *Cf. Burbridge v. Sampson*, 74 F. Supp. 2d 940, 948 (C.D. Cal. 1999) (citing section 82537 and finding much of community college campus to be public forum).

Above all else, a college campus is a place "where open exchanges of ideas occur." *San Leandro Teachers Ass'n*, 46 Cal.4th at 844. The college therefore has no legitimate interest in restricting speech or assembly to a single patio. As the California Supreme Court has long made clear, "The government has no valid interest in restricting or prohibiting speech or speech-related activity simply in order to avert the sort of disturbance, argument or unrest which is inevitably generated by the expression of ideas which are controversial and invite dispute." *Los Angeles Teachers Union, Local 1021 v. Los Angeles City Bd. of Ed.*, 71 Cal.2d 551, 558 (1969).

The college must therefore revise its policies to allow free speech and assembly throughout the campus, subject only to limited restrictions on matters such as actual interference with classroom instruction, obstruction of free passage, or seriously disruptive behavior. Moreover, the college should immediately repudiate and apologize for issuing unlawful orders to disperse and engaging in unlawful retaliation against faculty. Any reprimands or discipline issued against students for engaging in speech should be rescinded and expunged.

2. California law does not authorize a prior restraint on college student speech.

Apart from the concerns expressed above, it appears that the college's speech policies and procedures may be invalid on their face.

Policy No. 5550 provides, "The Superintendent/President shall enact such administrative procedures as are necessary to reasonably regulate the time, place, and manner of the exercise of free expression in the limited public forums." I am not aware of the specific procedures, if any, that have been adopted. However, to the extent they require students to obtain a permit before engaging in speech, they are invalid.

Education Code section 66301(a) prohibits the college from making or enforcing any "rule subjecting a student to disciplinary sanction solely on the basis of conduct that

[2] To the extent the student handbook allows only students to engage in demonstrations on campus, it may also violate section 82537.

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." In particular, "This section does not authorize a prior restraint of student speech …." Educ. Code § 66301(c).

"A prior restraint exists when the enjoyment of protected expression is contingent upon the approval of government officials." *Baby Tam & Co., Inc. v. City of Las Vegas,* 154 F.3d 1097, 1100 (9th Cir.1998). A requirement to obtain a permit before engaging in speech is a prior restraint. *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 130 (1992). Because prior restraints on college students' speech are not authorized, the college may not require a permit before a demonstration may occur.

3. The First Amendment narrowly circumscribes the college's right to require an advance permit for speech or assembly.

Even if the statute did authorize a permit requirement, the First Amendment disfavors prior restraints, and the government bears a heavy burden to justify them. *NAACP Western Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984); *Rosen v. Port of Portland*, 641 F.2d 1243, 1247, 1249 (9th Cir. 1981).

A permit requirement for speech in a public forum "(1) must not delegate overly broad discretion to a government official; (2) must not be based on the content of the message; (3) must be narrowly tailored to serve a significant governmental interest; and (4) must leave open ample alternatives for communication." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1037 (9th Cir. 2006).

The First Amendment thus strictly limits the circumstances and procedures under which a permit may be required.

a. The policy may not delegate excessive discretion and must contain a mandatory deadline for issuing a permit.

To survive First Amendment scrutiny, a permit requirement may not place "unbridled discretion in the hands of a government official or agency." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990). A permit policy must contain "narrowly drawn, reasonable and definite standards," so that the decision to grant or deny a permit is not left "to the whim of the administrator." *Forsyth County*, 505 U.S. at 133; *cf. Khademi*, 194 F. Supp. 2d at 1023 (striking down requirement that "interior amplification must be authorized by the President" without specific standards, because it provides campus "presidents with absolutely no standards to guide their decisions").

A valid permit requirement must also place prompt "limits on the time within which the decision-maker must issue the license." *FW/PBS*, 493 U.S. at 225-26.

b. A permit requirement for small groups is an invalid prior restraint.

A permit requirement for small groups is not narrowly tailored to serve any significant interests in ensuring access to public areas, assuring reasonable safety, and preventing unreasonable interference with university activities. A "narrowly tailored permit requirement must maintain a close relationship between the size of the event and its likelihood of implicating government interests," and in "most circumstances, the activity of a few people peaceably using a public right of way for a common purpose or goal does not trigger the ... interest in safety and traffic control." *Santa Monica*, 450 F.3d at 1040.

In "public open spaces, unlike on streets and sidewalks, permit requirements serve not to promote traffic flow but only to regulate competing uses and provide notice ... of the need for additional public safety and other services. Only for quite large groups are these interests implicated, so imposing permitting requirements is permissible only as to those groups." *Id.* at 1042; *see also Grossman v. City of Portland*, 33 F.3d 1200 (9th Cir. 1994) (permit requirement for small group not narrowly tailored).

c. Any permit requirement must contain an exception for spontaneous expression.

The right to freedom of speech demands the ability to speak out or demonstrate spontaneously in response to events. "Spontaneous expression ... is often the most effective kind of expression." *Grossman*, 33 F.3d at 1206. To "comport with the First Amendment, a permitting ordinance must provide some alternative for expression concerning fast-breaking events." *Santa Monica Food Not Bombs*, 450 F.3d at 1047. A blanket requirement to obtain a permit in advance violates that right. *See Rosen*, 641 F.2d at 1247-50.

4. The college unconstitutionally restricts protected speech.

Finally, Policy No. 5550 should also be revised to make clear that the mere expression of "hate," unaccompanied by any violence or true threat of violence, is protected by the First Amendment and Article I, section 2. Also, the reference to "harassment, threats, or intimidation" in section 66301(d) must be read consistently with the state and federal constitutions and cannot authorize discipline without at least a "threshold showing of severity or pervasiveness" targeted at specific individuals. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001).

I look forward to your response as soon as possible. This letter may not address every free speech issue presented by the college's actions or policies. If there are additional facts or circumstances I should know, or if you have any questions, please feel free to contact me.

Sincerely,

David Blair-Loy
Legal Director

cc:
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