



Foundation for Individual Rights in Education

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January 23, 2007

President Robert A. Corrigan
President's Office, ADM 562
1600 Holloway Avenue
San Francisco, California 94132

Sent via U.S. Mail and Facsimile (415-338-6210)

Dear President Corrigan:

As you can see from our directors and board of advisors, FIRE unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, due process, legal equality, voluntary association, freedom of speech, and academic freedom on our nation's college campuses. Our website, www.thefire.org, will give you a greater sense of our identity and activities.

FIRE is deeply concerned about the threat to free expression posed by San Francisco State University's (SFSU's) investigation of the SFSU College Republicans for holding a controversial yet constitutionally protected anti-terrorism rally on October 17, 2006.

This is our understanding of the facts; please inform us if you believe we are in error. On October 17, the College Republicans held an anti-terrorism rally in Malcolm X Plaza on the SFSU campus. In the context of protesting terrorist organizations, several College Republicans stepped on butcher paper that they had painted to resemble the flags of Hamas and Hezbollah. Unbeknownst to the protestors, the Arabic script they had painted on the flags represented the word "Allah."

On October 26, the Muslim Student Association (MSA) submitted a formal complaint to the Office of Student Programs and Leadership Development (OSPLD). According to OSPLD Director Joey Greenwell, the complaint accused the College Republicans of "walking on a banner with the word 'Allah' written in Arabic script." By early December, Greenwell sent an e-mail to the College Republicans saying that the OSPLD had concluded its investigation into "allegations of attempts to incite violence and create a hostile environment" and "allegations of actions of incivility." Pursuant to Student Group Misconduct procedures, the OSPLD has passed its

investigation along to the Student Organization Hearing Panel, which will schedule a hearing and rule on the allegations.

A public university such as SFSU should not investigate—and *cannot* lawfully punish—students for engaging in expression that is unquestionably protected by the First Amendment. (See *Texas v. Johnson*, 491 U.S. 397 (1989), holding that burning an American flag as part of a political protest is expression protected by the First Amendment). SFSU has a duty to uphold the First Amendment rights of all of its students, even if their expressive activity offends the religious sensibilities of some. The First Amendment not only protects students' right to free expression, but prevents SFSU from forcing its students to abide by the decrees of any faith. Just as SFSU could not punish students for taking Jesus' name in vain or for driving a car on the Jewish sabbath, it cannot punish students for stepping on a makeshift flag bearing the word "Allah."

Moreover, SFSU's own policies protect students' right to engage in expressive activity. The Guidelines for Academic Freedom and Responsibility protect the right of students and faculty "to meet and share their views on a wide spectrum of intellectual and social issues." Students' expression cannot cease to garner protection under SFSU's policies merely because that expression is disagreeable to some members of the community.

The accusation that the College Republicans' conduct amounted to "incitement" and "hostile environment" harassment is wholly without merit. "Incitement" is a clearly defined legal term applying not simply to offensive or unpopular speech, but to speech that encourages "imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). For example, a speaker exhorting an angry, violent crowd to attack a government office could be found guilty of incitement. However, speech does not constitute incitement if a speaker's words result in violence because people despise what that speaker said and wish to silence him or her. In fact, the Court has specifically addressed speech that arouses anger by stating unequivocally that a principal "function of free speech under our system of government is to invite dispute," and, further, that free speech "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." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). By punishing students on the basis of how harshly, violently, or unreasonably others might react to their words, SFSU would create an incentive for those who disagree to react violently, conferring a "heckler's veto" on speech to the least tolerant members of the community.

Further, the College Republicans' expression does not constitute hostile environment harassment. The Supreme Court has held that for student conduct to constitute constitutionally unprotected hostile environment harassment, it must be "so severe, persistent, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999). Clearly, the speech in question here—an isolated expressive act, made in the context of a political demonstration—fails to meet the exacting demands of this precise and well-established legal standard. Moreover, in 2003, the Department of Education's Office of Civil Rights (OCR) issued a letter to college presidents specifically to clarify that "the offensiveness of a particular expression, standing alone, is not a legally sufficient basis

to establish a hostile environment under the [harassment] statutes enforced by OCR.” It is thus wholly unreasonable and legally untenable to assert that the College Republicans’ one-time demonstration was severe, persistent, and pervasive harassment that denied any onlookers the opportunity to benefit from their educational experiences.

Finally, SFSU’s prohibition on “actions of incivility” unquestionably violates the First Amendment. Indeed, most speech and expression that is “uncivil” is nonetheless entirely constitutionally protected. As the U.S. Supreme Court has stated, “the 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.’” *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973). If any action that some students find offensive may be punished as “uncivil,” then students’ right to protest—surely a cherished and oft-exercised right at SFSU—would be completely undermined, for the very nature of a protest entails expressing a sentiment with which some in the community will disagree. Even when protestors’ expression is coarse or vitriolic, SFSU is constitutionally and morally bound to protect it.

The resolution passed by the Associated Students, Inc. denouncing the College Republicans’ actions may indicate that the greater campus community finds the College Republicans’ protest methods reprehensible. Nonetheless, SFSU has a duty to ensure that the outrage of the majority does not silence the voice of the minority. At an institution as diverse as SFSU, it is to be expected that disagreements between students will occur and tensions among the student body will occasionally run high. SFSU must teach its students that the way to deal with disagreeable speech is to counter it with more speech, not to silence it with sanctions and punishment.

Please spare SFSU the embarrassment of fighting against the Bill of Rights, by which it is legally and morally bound. SFSU must immediately cease its investigation of the College Republicans for engaging in constitutionally protected expression. FIRE hopes to resolve this situation amicably and swiftly; we are, however, prepared to use all of our resources to see this situation through to a just and moral conclusion.

We request a response on this matter by Tuesday, February 6, 2007.

Sincerely,

Tara E. Sweeney
Senior Program Officer

cc:

John M. Gemello, Provost and Vice President for Academic Affairs, SFSU
J. E. Saffold, Dean of Students and Vice President for Student Affairs, SFSU
Kevin Bowman, Associate Vice President for Student Affairs, SFSU
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