



## Foundation for Individual Rights in Education

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May 18, 2011

Dianne Boardley Suber, President  
Saint Augustine's College  
Office of the President  
1315 Oakwood Avenue  
Raleigh, North Carolina 27610

Sent via U.S. Mail and Facsimile (919-828-0817)

Dear President Suber:

As you can see from the list of our Directors and Board of Advisors, FIRE unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals from across the political and ideological spectrum on behalf of liberty, free speech, legal equality, due process, the right of conscience, and academic freedom on America's college campuses. Our website, [thefire.org](http://thefire.org), will give you a greater sense of our identity and activities.

FIRE is gravely concerned about the threats to freedom of expression and due process presented by the disciplinary action of St. Augustine's College (SAC) against a student who exercised the right to free expression granted him by the college. It is inconsistent with both SAC's mission and its explicit guarantees to students to punish a student for expressing his views. This inconsistency is exacerbated by the fact that SAC has punished the student for encouraging his peers to exercise the very rights that SAC has promised.

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

On April 16, 2011, a tornado cut off electrical power to many SAC students. On April 18 on SAC's Facebook page, SAC announced that the college would reopen on April 19. In response, some students complained about this decision because segments of the student body were still without residential electrical power. SAC scheduled a meeting with Progress Energy and concerned students and announced on SAC's Facebook page that the meeting would occur on April 19 at 11:15 a.m. In response on that page, student Roman Caple reportedly wrote:

Here it go!!!! Students come correct, be prepared, and have supporting documents to back up your arguments bcuz SAC will come hard!!!! That is all

According to SAC's Facebook page, power was restored to the entire campus by 2:00 p.m. on April 19.

On April 27, Caple met with SAC Vice President for Student Development and Services Eric W. Jackson. Later that day, Jackson wrote Caple a letter informing him that he was being punished by not being allowed to participate in SAC's 2011 commencement activities. Jackson's letter stated that the cause of the punishment was "your negative social media exchange during the institution's recovery from the tornado," without mentioning any other prior or additional offenses of any kind. Jackson added that "[a]ll students enrolled at Saint Augustine's College are responsible for **protecting the reputation of the college** and supporting its mission." (Emphasis added.)

According to SAC's public statement on April 29 about Caple's case, Caple's comment and other unspecified comments by him directed "to select individuals" were unacceptable because they "were designed for the sole purpose of inciting students to react to the College's continued efforts to manage a difficult situation," were an "attempt to create chaos," "were designed to disrupt" the meeting with Progress Energy, and were designed solely "to fuel an already tense situation."

Due to his punishment, Caple did not participate in SAC's commencement activities on May 1.

While SAC is not a public institution and thus not bound by the First Amendment, it is nevertheless both morally and contractually bound to honor the explicit and repeated promises of freedom of expression it makes to its students in its materials. SAC's *Student Code of Conduct and Student Judicial Manual* promises that "[s]tudents enjoy the same basic rights and are bound by the same responsibilities to respect the rights of others, as are all citizens." SAC identifies these rights as including "freedom of speech." SAC adds that the college is *not* "a setting described in the concept of *in loco parentis*" (emphasis in original)—that is, SAC instead treats its students as the adult citizens they are. Additionally, in SAC's *Student Handbook and Academic Calendar*, SAC states as a matter of "College Policy" that SAC has an "obligation to provide an open forum to present and debate public issues." Given these statements, students who choose to matriculate at SAC do so having relied upon SAC's clear promises of free expression and thus may reasonably expect to utilize this right while enrolled at SAC without fear of official repercussion or punitive discipline of any kind.

Yet, SAC's punishment of Caple violated SAC's binding guarantee of free expression to its students. Far from violating SAC policy, Caple encouraged his fellow students to actively and peacefully participate in a forum provided by SAC, advising them to "come correct, be prepared, and have supporting documents to back up your arguments"—precisely the kind of critical thinking and engaged civic-mindedness that any college ought to be encouraging among its students.

Furthermore, SAC's arguments that Caple violated SAC's *Code of Conduct* are without merit.

First, Caple's speech was not punishable either as incitement or as disruption. The precise legal standard for incitement is found in the Supreme Court's decision in *Brandenburg v. Ohio*, 395

U.S. 444, 447 (1969). There, the Court held that the state may not “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” This is an exacting standard, as evidenced by its application in subsequent cases. For instance, the Supreme Court held in *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973), that a man who had loudly stated, “We’ll take the fucking street later” during an anti-war demonstration did not intend to incite or produce immediate lawless action (the Court found that “at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time”), and was therefore not guilty under a state disorderly conduct statute. The fact that the Court ruled in favor of the speaker despite the use of such strong and unequivocal language underscores the narrow construction that has traditionally been given to the doctrine and its requirements of likelihood and immediacy.

Moreover, merely “inciting students to react,” as stated by SAC, does not amount to an “attempt to create chaos” or to “disrupt” the meeting with Progress Energy. Even if many students had arrived at the meeting with the “fuel” of “supporting documents to back up [their] arguments,” they too would merely be exercising their rights as promised to them by SAC. There appears to be no evidence whatsoever that either Caple or any student disrupted or intended to disrupt the meeting.

Additionally, SAC may not punish protected speech merely by citing the rationale of “disruption” of a university function. Rather, actionable disruption related to speech must be both material and substantial. This constitutional principle holds even at the grade school level, an *in loco parentis* educational context in which students enjoy more limited speech rights—precisely the kind of educational setting SAC promises its students that it does not replicate. In the seminal case of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969), the Supreme Court declared that “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.”

Second, students have no obligation to “protect[] the reputation of the college” when they express their views about the college. A guarantee of freedom of expression does not exist to protect only non-controversial speech; indeed, it exists precisely to protect speech that some members of a community may find controversial or offensive. The right to free speech includes the right to say things that are deeply offensive to many people, and the Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends people. In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973), the Court held that “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.’” First Amendment protection extends even to those statements that anger others. In *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), the 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.” In *Texas v. Johnson*, 491 U.S. 397, 414 (1989), the Court eloquently explained the rationale behind these decisions, stating that “[i]f 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.”

Under these and other binding legal precedents, there is little question that Caple’s speech is fully protected. Indeed, the citizen’s right to petition officials for a redress of grievances is a longstanding principle at the heart of the relationship between citizens and the authorities who wield power over them. As a private college, SAC is of course free to change its policies to state that SAC students no longer enjoy the free speech of citizens. SAC also is free to censor its own Facebook page by removing unwanted posts and comments. SAC is not free, however, to promise fundamental rights to students, induce students to believe they have those rights, and then punish students for exercising them.

SAC’s treatment of Caple also raises due process concerns.

First, Jackson’s disciplinary letter identified no particular infraction in the *Code of Conduct* or any finding of “Responsible” under the *Code*. Rather, Jackson referred erroneously to an alleged responsibility to “protect[] the reputation of the college and support[] its mission.” No such responsibility is stated anywhere within the *Code*. Again, calling on fellow students to exercise their rights and to “come correct, be prepared, and have supporting documents to back up your arguments” in no way inhibits SAC’s mission, but in fact seems to *support* SAC’s mission and “obligation to provide an open forum to present and debate public issues.”

Second, Jackson’s meeting with Caple appears to have followed none of the procedures for hearings established in the *Code of Conduct*. The *Code* provides that “[a]ll charged students have a right to a judicial hearing, before the Judicial Board[,] to determine whether they are responsible or not responsible for the charge(s) filed.” There appears to be no evidence that Caple waived this right, for which a “Waiver of the Right to a Campus Hearing” form is required. It appears that no written complaint was filed against Caple and that no hearing or proceedings whatsoever were held before the Judicial Board. Even if Jackson were to be considered the Judicial Administrator in the process, the *Code of Conduct* clearly states that “the Judicial Administrator does not vote.” Also, it does not appear, as the *Code of Conduct* provides, that the “hearing” with Jackson was recorded, that Caple was offered to have an “advocate” or “counsel of choice” present with him during this “hearing,” or that Caple was offered a right to appeal. In sum, it appears that Jackson acted completely outside of the *Code of Conduct*’s stated processes in deciding to punish Caple for his protected speech.

Finally, lest SAC wish to argue that its action against Caple is not a punishment subject to the requirements of the *Code of Conduct*, FIRE notes that one of the punishments available under the Code is that “participation in extra-curricular or athletic activities may be limited.” Commencement activities surely count as extra-curricular activities under the *Code*.

FIRE requests that SAC immediately acknowledge its error and announce to the SAC community that it honors its promises, namely, that protected expression will never again be punished by SAC and that SAC administrators will no longer act outside of the *Code of Conduct* to punish a student. In addition, FIRE expects SAC to work productively with Caple’s attorney, Brandon S. Atwater, to make Caple whole.

FIRE hopes this situation can be resolved amicably and swiftly. We are, however, committed to using all of our resources to see this situation through to a just and moral conclusion. We request a response to this letter by June 3, 2011.

Sincerely,

A handwritten signature in dark ink, appearing to read "Adam Kissel". The signature is fluid and cursive, with the first name "Adam" written in a larger, more prominent script than the last name "Kissel".

Adam Kissel

Vice President of Programs

cc:

B. Connie Allen, Provost, Saint Augustine's College

Leon Scott, Executive Vice President, Saint Augustine's College

Eric W. Jackson, Vice President for Student Development and Services, Saint Augustine's College

Marc Newman, Vice President for Institutional Development, Saint Augustine's College

Crystal Williams, Registrar, Saint Augustine's College

Doris Bullock, Dean of Students and Residential Life, Saint Augustine's College

George Boykin III, Chief of Police, Saint Augustine's College