



February 23, 2010

Chancellor Marye Anne Fox  
University of California, San Diego  
9500 Gilman Drive # 0005  
La Jolla, CA 92093-0005

Dear Chancellor Fox:

I am writing to follow up on my letter of yesterday. I have now reviewed materials posted at [www.battlehate.ucsd.edu](http://www.battlehate.ucsd.edu), which address many important issues but also raise serious concerns that UCSD is violating the First Amendment by chilling protected speech.

It is appropriate for UCSD to proclaim its “message against racism and hate” and take concrete steps to provide “support for individual students ... ensure students’ safety ... continu[e] discussions with students ... identify best practices to address campus climate” and promote diversity on campus. We appreciate the statement that “among the highest of academic values is our right to free expression.”

However, we are deeply concerned that UCSD has “launched aggressive investigations ... for violations of the Student Code of Conduct,” both of “the off campus party” and “the racist message found on campus,” that apparently implicate protected speech. It is troubling that the administration has raised the prospect of a letter of censure or expulsion, noting that sanctions “may be more severe if the violations are connected with, arise from, or are motivated by bias or hate,” and even referring to possible criminal prosecution.

Without a clear statement that UCSD will not investigate or impose sanctions for protected speech, these veiled threats exert a clear chilling effect on First Amendment rights. Intentionally or not, the university is sending a message to students to think twice before speaking out on any controversial issue, for fear that giving offense to any group will lead to investigation and possible discipline. That chilling effect will inevitably lead to self-censorship, which is precisely what the First Amendment exists to prevent.

As the university has said, the proper response to offensive speech is more speech, not less. We encourage you to uphold that principle by making absolutely clear that UCSD will immediately cease any investigation of protected speech. The university should make clear that any investigation is targeted only at conduct unprotected by the First Amendment.

To continue the investigations without such assurances would violate the First Amendment, regardless of the result of the investigations. We concur with the exhaustive First Amendment analysis set forth in FIRE’s letter to you of today and add only the following.

First, it is not clear that any provision of the Student Code of Conduct has been violated. In my review of the code, I am unable to locate any provision clearly implicated by the recent events. It does not appear that any of the speech at issue, though unquestionably offensive, rose to the level of harassment prohibited by section 22.16.10.24.

Second, under Education Code section 66301(a), the university shall not “make or enforce a rule subjecting a student to disciplinary sanction solely on the basis of conduct that 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.” This statute guarantees, at a minimum, that “students have the same free speech rights on campus that they have off-campus.” *Crosby v. South Orange County Community College Dist.*, 172 Cal.App.4th 433, 441 (2009). Therefore, even if some portion of the conduct code might apply, it cannot be enforced against speech that would be constitutionally protected outside of campus or campus sponsorship.

Third, even if the code of conduct could be construed to cover off-campus speech not sponsored by the university or a registered student organization, the university may not constitutionally regulate the speech at issue. *See, e.g., Layshock ex rel. Layshock v. Hermitage School Dist.*, \_\_\_ F.3d \_\_\_, Nos. 07-4465, 07-4555, 2010 WL 376184 (3d Cir. Feb. 4, 2010); *Thomas v. Board of Education*, 607 F.2d 1043 (2d Cir. 1979).

In its initial reactions to the recent events, UCSD defended First Amendment rights while simultaneously condemning racist speech. Unfortunately, it appears that in response to political pressure, the university is backing off its defense of freedom of speech. The First Amendment exists precisely because freedom of speech would otherwise always be at the mercy of political pressure. If students can be investigated for engaging in the speech at issue here, then, for example, student activists could be investigated for allegedly offending white students with language considered inflammatory against whites. Times of controversy, more than any other, require faithful adherence to the Constitution to protect freedom of speech for all.

I look forward to your response to this letter as soon as possible. Please let me know if you have any questions or concerns.

Sincerely,

David Blair-Loy  
Legal Director

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