June 22, 2007

Chancellor Marye A. Fox
University of California, San Diego
9500 Gilman Drive, MC 0005
La Jolla, CA 92093-0005

Sent via U.S. Mail and Facsimile (858-534-6523)

Dear Chancellor Fox:

The Foundation for Individual Rights in Education (FIRE) is disappointed to write to you about the second serious threat to liberty on your campus within one month. We write today to express our grave concern over the threat to UCSD students' rights to free expression and free assembly presented by UCSD's proposed "Policy on Speech, Advocacy and Distribution of Literature on University Property" (attached).

This is our understanding of the facts; please inform us if you believe we are in error. On the afternoon of Friday, June 8, 2007, Vice Chancellor of Business Affairs Steven Relyea and Vice Chancellor of Student Affairs Joseph Watson sent an e-mail to all faculty, staff and students at UCSD announcing an official review of UCSD Policy & Procedure Manual (PPM) 510-1, Section IX, "Speech, Advocacy and Distribution of Literature." The e-mail included a link to the policy online and asked recipients to comment on the revisions presented therein by June 25, 2007, promising that "[a]ll comments received will be evaluated and, as appropriate, incorporated in to the policy." The e-mail informed recipients that the revised policy "will be implemented in August or September 2007."

It is impossible to view the timing of the announcement as anything other than a deliberate response to recent events on UCSD's campus. The announcement came just over a week after the May 30 staged walk-out by students at UCSD's Thurgood Marshall College in protest of UCSD's recent decision not to rehire teaching assistants Scott Boehm and Benjamin Balthaser because of their public criticism of the university. Under the proposed changes, similar demonstrations would be considered violations of university policy, subjecting students to disciplinary action, including "any and all remedies" UCSD deems fit, simply for exercising their constitutional right to peaceful assembly.

The proposed changes include several objectionable and very likely unconstitutional provisions.

First, and most troublesome, is UCSD's proposal to require advanced reservations for any expressive activity expected to draw more than 10 people. Specifically, the proposed new policy states that:

> Reservations for activities within the Designated Public Forums are recommended but not required unless (i) the activity can reasonably be expected to attract a crowd of 10 or more people or (ii) free-standing equipment will be used. Reservations must be made at least one business day in advance of the planned activity. Reserved activities shall have priority over non-reserved activities.

As discussed below, "Designated Public Forums" is defined broadly, effectively covering much of the UCSD campus. The operation of such a reservation system is patently incompatible with the First Amendment rights of UCSD students and faculty. Rallies and demonstrations are often spontaneous responses to unfolding events; to require prior reservations for virtually all campus demonstrations is to suppress free and open discourse on campus. Moreover, requiring prior reservations for events attracting more than 10 people on a campus of more than 20,000 undergraduates is not the type of narrowly tailored "reasonable time, place and manner" restriction that alone can pass constitutional muster, as established by the Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). There is nothing "reasonable" about transforming the vast majority of the university's property—indeed, *public* property—into a "censorship area."

A school as large as UCSD cannot credibly argue that any gathering of over 10 students—less than 0.05 percent of the student body—on the vast majority of campus requires a reservation, lest campus order be somehow threatened. Because of the size of UCSD's student population, one could reasonably conclude that *any* event on campus could possibly draw more than 10 attendees. UCSD proposes to effectively require, then, that all "exercise[s] of free speech" occurring on campus be explicitly reserved at least one business day prior. Such a requirement is untenable in light of UCSD's legal and moral duty to guarantee the constitutional rights of its students and faculty.

Two additional sections of the proposed policy revision present immediate constitutional concerns. First, Section 6(a)(5) ("Activities Constituting Violations of Campus Policy"), which prohibits "mak[ing] any person an involuntary audience or an involuntary participant of any event or activity," is unacceptably vague and overbroad. Under this proposed policy, any member of the UCSD community passing by an otherwise legitimate and acceptable act of free expression on campus would be empowered to complain of being made "an involuntary audience." In effect, then, UCSD community members disagreeing with particular instances of public free expression would be granted the ultimate "heckler's veto" by means of this provision. Such a result is unacceptable at a public university that claims to be "committed to ensuring that the exercise of constitutional rights of free and open discussion, expression, and advocacy are not only protected but encouraged as a vital aspect of the spirit of free inquiry appropriate to a university setting."

Similarly, Section 4(a) ("Political Activity"), which mandates that "members of the University staff and faculty must keep their personal Political Activity separate from their institutional role and from University activities," is unconstitutionally vague. Because "Political Activity" is never defined within the policy, UCSD staff and faculty would be left to guess as to what kind of speech constitutes punishable "Political Activity"—resulting inevitably in the chilling of protected speech. Further, in addition to concerns about vagueness, Section 4(a)'s restriction on "Political Activity" impinges on the constitutional right of public employees to comment on "matters of public concern," discussed at length in our May 16 letter.

Our final concern is that PPM 510-1, Section IX, C.1. would establish "Designated Public Forums" around the UCSD campus "for the exercise of legally protected rights of free expression." Specifically, the policy identifies eleven discrete areas around campus as designated public forums, and further designates any areas that are "(i) not otherwise regulated, (ii) at least 25 feet from the entrances or exits of University buildings and parking lots, and (iii) a safe distance from the curbing of campus roads" as additional public forums.

While it appears that this provision does not unduly quarantine free expression to a mere fraction of the available campus, FIRE must stress that establishing "free speech zones," as UCSD seeks to do here, undermines the fundamental conception of the American public university as a true "marketplace of ideas." *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967). We must also note that 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, 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.

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, 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). UCSD would be well advised to take this decision into account in considering the deficiencies in its own policies, as it directly conflicts with UCSD's proposal to require that a space of "at least 25 feet from the entrances or exits of University buildings" be kept clear of "the exercise of legally protected rights of free expression." Such a large "buffer" zone cannot be reconciled with UCSD's legal obligation to uphold the First Amendment rights of its students.

We offer the following guidelines to help institutions rewrite policies in keeping with the First Amendment and any reasonable principle of free expression:

1. The default position of any policy should be that free speech is the norm all over the campus. In general, policies should say what a university *cannot* do in specific language, and, to a lesser extent, what restrictions are permissible and when. A truly progressive policy would mirror the Bill of Rights.

2. Schools cannot restrict speech to a small portion of campus, nor to inaccessible or sparsely used/populated areas of the campus only. The speech must be generally accessible to the population at large—and especially to the target audience.

3. Speech may not be unduly restricted by pre-registration regulations, onerous monetary deposit requirements, or expensive insurance requirements. No rule that allows the school substantial discretion to impose conditions on speech for groups or individuals is allowable. Discretionary decisions need to be "content and viewpoint neutral," meaning they implicate factors like noise or interference with traffic flow, and nothing relating to the substance of the speech.

4. Speech activities should not be unduly restricted by "neatness" and "cleanliness" considerations. A school may require that students clean up after a rally or a leafleting. A school may not stop leafleting because of a general fear that students might not clean up afterwards. Of course, if a particular group has a demonstrated history of not cleaning up after its own mess, then modest restrictions might be in order—such as a monetary bond to cover the cost of a clean-up service. Only in light of past failures should a group be saddled with such pre-conditions.

5. Demonstrative activities should not be restricted in the name of aesthetics. It is reasonable to ask students to restore the campus area to its original condition after a large demonstration or leafleting (beyond normal wear and tear, which is a normal cost of operation for a university), but it is unreasonable to prohibit an expressive activity in advance for fear that it will make a mess or be unaesthetic. (This is related to No. 4, above.)

6. Virtually all universities already have the power, through existing rules, to prevent the type of disruptive conduct they might fear would take place. They can stop demonstrations that substantially impede the function of the university, block traffic flow, or prevent students from sleeping or studying. They can punish students who engage in vandalism or violence. The university also has increased power to regulate the presence of those speakers who have not been invited to campus and who are otherwise unaffiliated with the university. The university should not simply assume before the fact that student or faculty expression will be impermissibly disruptive. Rather, the university should accept its role as the ultimate free speech zone.

In addition to their facial deficiencies, these proposed new regulations come at a time when academic freedom and freedom of expression are already in question at UCSD. As we discussed in our May 16 letter, FIRE is deeply concerned that UCSD's decision not to rehire Dimensions of Culture (DOC) Program teaching assistants Scott Boehm and Benjamin Balthaser was due to their public criticism of the DOC's core curriculum. By both the public and private admission of Dr. Abraham Shragge, the current Director of the DOC, the decision not to renew Balthaser and Boehm's contracts was not based on their teaching performance, but rather was due to their public and private criticism of the DOC's management and direction.

At this juncture, not only has UCSD not taken action to restore Boehm and Balthaser to their positions, but it has in fact moved to silence student protests of this perceived denial of academic freedom by passing policies designed to prevent precisely the type of protest that took place on UCSD's campus on May 30. These developments are disturbing indeed.

In light of the constitutional concerns thus presented, UCSD should immediately reconsider its proposed changes to its "Speech, Advocacy & Distribution of Literature" policy, as well as its decision not to rehire Boehm and Balthaser. Please spare UCSD 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. We urge UCSD to reconsider these unjust policies and practices and to affirm that free speech at UCSD is to be celebrated, honored, and broadened—not feared, restrained, and hidden. Let your students exercise their basic legal, moral, and human rights; let them speak, assemble, and protest as their consciences dictate.

We look forward to hearing from you. We request a response on this matter by July 9, 2007.

Sincerely,

Samantha Harris
Director of Legal and Public Advocacy

Encl.

cc:
Steven Relyea, Vice Chancellor of Business Affairs, UCSD
Joseph Watson, Vice Chancellor of Student Affairs, UCSD
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