



September 26, 2014

Chancellor Nicholas B. Dirks
University of California, Berkeley
Office of the Chancellor
200 California Hall #1500
Berkeley, California 94720

Sent via U.S. Mail and Facsimile (510-643-5499)

Dear Chancellor Dirks:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

I write to you today to urge the University of California, Berkeley (UC Berkeley) to revise several policies on campus expression that violate the First Amendment rights of UC Berkeley students. The present moment offers a great opportunity for UC Berkeley to improve its policies, given that the university is celebrating the 50th anniversary of the Free Speech Movement this year.

UC Berkeley currently maintains six policies that restrict and chill campus discourse. Each of these six speech codes earns a "yellow light" rating from FIRE, denoting university policies that ambiguously regulate expression and encourage administrative abuse. (A full explanation of FIRE's rating system can be viewed at <http://www.thefire.org/spotlight/using-the-spotlight-database>.) In light of these policies, I urge your institution to live up to UC Berkeley's proud free speech traditions and its legal and moral obligations, as a public university, under the First Amendment. On the 50th anniversary of the Free Speech Movement, there is no better time for the university to re-examine its speech policies and make the necessary revisions. As you have stated, in recognition of the importance of this anniversary:

For speech to have power to change our society, it must be based not just on ideals, it must be rooted in knowledge, morality, and understanding. True free speech rejects homogeneity and uniformity, and embraces engagement across differences of background and perspective

FIRE would be happy to work with your administration in order to truly restore free speech to UC Berkeley's campus and honor the legacy of the Free Speech Movement. Let us begin by taking a look at each of UC Berkeley's speech codes, one by one.

First, UC Berkeley's "Residential Conduct Code," found in the *Bear Necessities Guide*, prohibits, in relevant part:

Verbal abuse, threats, intimidation, harassment and/or coercion.

This policy impermissibly bans any and all "[v]erbal abuse." While some expression may be displeasing to some or even many individuals, it does not lose First Amendment protection on that basis alone. In a decision relevant to an analysis of this policy, the Supreme Court of the United States struck down a state law ban on "opprobrious words or abusive language" because those terms, as commonly understood, encompassed speech protected by the First Amendment. *Gooding v. Wilson*, 405 U.S. 518 (1972). Based on this and related precedents, UC Berkeley must remove its ban on "verbal abuse."

Second, UC Berkeley's policy on "Respect and Civility," also located in the *Bear Necessities Guide*, states, in pertinent part:

[T]he administration of this University publicly declares its expectation that all members of the campus community will work to develop and maintain a high degree of respect and civility for the wealth of diversity in which we are all fortunate to live and work together.

This policy restricts student speech by imposing a requirement of "respect and civility," despite the fact that a great deal of expression lacking in those values is constitutionally protected. Consider that just a few years ago, a federal judge invalidated, on First Amendment grounds, a policy at San Francisco State University requiring students "to be civil to one another." *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007). This precedent—which arose in the same federal circuit in which UC Berkeley sits—is certainly instructive with respect to UC Berkeley's own policy.

If UC Berkeley wishes to share values such as "civility" and "respect" with its students and *encourage* (but not *require*) them to adopt those values themselves, it may do so without violating the First Amendment. The university would simply need to make clear that this policy is purely aspirational and that students will not face investigation or disciplinary action for not abiding by its terms. A good example of such aspirational language can be found in Pennsylvania State University's "Penn State Principles." The preamble to the Penn State Principles states:

The Penn State Principles were developed to embody the values that we hope our students, faculty, staff, administration, and alumni possess. **At the same time, the University is strongly committed to freedom of expression. Consequently, these Principles do not constitute University policy and are not intended to interfere in any way with an individual’s academic or personal freedoms.** We hope, however, that individuals will voluntarily endorse these common principles, thereby contributing to the traditions and scholarly heritage left by those who preceded them, and will thus leave Penn State a better place for those who follow.

[Emphasis added.]

By adding similar language to its policy on Respect and Civility, UC Berkeley can encourage students to share its institutional values and at the same time respect freedom of speech.

Third, UC Berkeley’s policy on “Posting in University Housing,” found in the *Bear Necessities Guide*, provides, in relevant part:

Flyers must be submitted to Residential Living for approval at least five working days prior to requested posting date.

[...]

Flyers should not include or allude to alcohol or drugs, be obscene or libelous, or have commercial content.

This policy imposes an untenable system of prior review and authorization for student postings in the residence halls. The Supreme Court and lower courts have made clear in one ruling after another that such prior restraints are heavily disfavored under the First Amendment. *See, e.g., Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (“Any prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity.”); *Kunz v. New York*, 340 U.S. 290, 293 (1951) (holding that “an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak” is “clearly invalid as a prior restraint on the exercise of First Amendment rights”).

UC Berkeley’s policy also fails to provide content- and viewpoint-neutral criteria by which student postings will be reviewed and approved. The policy’s lack of notice and specificity means that the Residential Living staff has complete discretion to approve or deny student postings on any basis, including viewpoint. This flatly ignores the Supreme Court’s declaration that “subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the

licensing authority, is unconstitutional.” *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150–51 (1969).

The policy’s lack of content- and viewpoint-neutral criteria is additionally highlighted by its directive that “[f]lyers should not include or allude to alcohol or drugs.” This provision would prevent a student group from promoting, for instance, an upcoming campus event or debate about marijuana legalization, drug sentencing guidelines, alcohol abuse, or other important topics. As such, the policy may be susceptible to an overbreadth challenge. A statute or law regulating speech is unconstitutionally overbroad “if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate.” *Doe v. University of Michigan*, 721 F. Supp. 852, 864 (E.D. Mich. 1989), citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Accordingly, UC Berkeley would be well advised to remove its ban on postings that “include or allude to alcohol or drugs.”

Fourth, UC Berkeley’s “Sexual Harassment Info Sheet,” maintained by the Gender Equity Resource Center, states, in pertinent part:

Some examples of potential sexual harassment:

[...]

- Sexual innuendoes and comments about your clothing, body or sexual activities ...
- Suggestive or insulting sounds (ie: cat calls, whistles, etc.: hostile environment)
- Humor and jokes about sex in general that make someone feel uncomfortable or that they did not consent to (hostile environment)
- Sexually harassing a person or group based on perceived or actual gender, sexuality, age, disability, race, etc. (ie: a teacher telling a class that “pretty girls aren’t good at science”; calling someone a lesbian because they want to play sports; a group of peers at school saying loudly how “Latin women are always wildcats in bed”, calling a man “fag” because he doesn’t play football, etc: hostile environment)

This policy lists as purported illustrations of sexual harassment a number of examples that constitute protected speech. Consider, for instance, that in *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988), the Supreme Court upheld constitutional protection for a satirical advertisement suggesting that Reverend Jerry Falwell lost his virginity to his own mother in a drunken outhouse tryst. This type of expression would, no doubt, qualify as both “[s]exual innuendo[]” and “[h]umor ... about sex in general that make[s] someone feel uncomfortable.” Yet under the First Amendment, a public institution such as UC Berkeley must allow a wide range of discussion and dialogue to take place. *See Boos v. Barry*, 485 U.S. 312, 322 (1988) (“[I]n public debate our own citizens must tolerate insulting, and even

outrageous, speech in order to provide ‘adequate “breathing space” to the freedoms protected by the First Amendment.’”).

Fortunately, the Supreme Court has provided a simple solution for universities that wish to prevent student-on-student (or peer) harassment while upholding free speech rights on campus. In *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999), the Court defined peer harassment as targeted, discriminatory conduct that is “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.” As the Court’s only decision to date regarding the substantive standard for peer harassment, *Davis* is controlling on this issue. UC Berkeley should incorporate the *Davis* standard into this and any other policy addressing peer harassment and make clear in the policy that any stated examples will constitute actionable harassment only when they rise to the level of the *Davis* standard.

Fifth, UC Berkeley’s policy on “Areas for Public Expression,” located in the *Berkeley Campus Regulations Implementing University Policies*, provides, in relevant part:

The Sproul Plaza and Lower Sproul Plaza have traditionally been designated as areas for public expression. ... During open hours Sproul Plaza and Lower Sproul Plaza may be used without reservation for discussion or public expression which does not require or involve sound amplification equipment. Space in both areas may be reserved through the Office of Student Life for use by recognized campus organizations or non-University groups in accordance with facility use regulations and established office procedures.

This policy limits students’ ability to engage in expressive activity on campus by providing only two designated areas that may be used “without reservation for discussion or public expression.” While it is a useful start to identify these two locations for unregistered, spontaneous student expression, UC Berkeley must open up more space on its campus for free speech activities. This is made clear by the Supreme Court’s numerous rulings about the importance of open discourse in higher education. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”).

While public universities such as UC Berkeley may establish reasonable “time, place and manner” restrictions on expression, these restrictions must be “narrowly tailored” to “serve a significant governmental interest” and must “leave open ample alternative channels for communication.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). As a large public institution with a sizeable student body, UC Berkeley falls short of these stringent standards by limiting peaceful, spontaneous student expression—including silent distribution of literature, symbolic protest, and the like—to two areas of campus. This policy cuts off much discussion and debate from taking place, an unfortunate result given

that spontaneous speech is often necessary to respond in a timely and effective manner to immediate or still-unfolding events. Therefore, UC Berkeley should open up many more of the large, open spaces on campus to spontaneous student speech.

Sixth, the University of California System’s “Campus Climate” policy urges students to report speech that is “inconsistent with our Principles of Community,” such as “expressions of bias” and “hate speech.” UC defines those terms as follows:

Expressions of Bias: A general communication not directed toward a particular individual, which disparages a group of people on the basis of some characteristic

Hate Speech: Hate speech is any speech, gesture or conduct, writing, or display that may incite violence or prejudicial action against someone based on actual or perceived race, color, ancestry, gender, gender identity, ethnicity[.]

Unfortunately, these definitions encompass much speech protected by the First Amendment. To begin with, the policy’s ban on any “general communication not directed toward a particular individual, which disparages a group of people on the basis of some characteristic” is extremely overbroad. This definition encompasses the discussion of many viewpoints relating to race, national origin, sexual orientation, and other characteristics—including on such issues as affirmative action, immigration reform, and gay marriage—that a student or administrator may subjectively find disparaging with regard to a protected group. Yet such social and political commentary is at the core of the First Amendment’s protections and may not be restricted at a public university simply because it offends or is critical of another person or group. As the Supreme Court has recognized, “speech concerning public affairs is more than self-expression; it is the essence of self-government,” reflecting “our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (internal quotations omitted).

Additionally, the policy’s ban on “any speech, gesture or conduct, writing, or display that may incite violence or prejudicial action against someone based on actual or perceived race, color, ancestry, gender, gender identity, ethnicity” is amorphous and likely to chill campus debate and discussion. It is unclear how students are expected to know whether particular speech may “incite” such action, since it does not require that the speech actually *urge* such a result. Moreover, it is unclear what would constitute “prejudicial action” against another person. These defects render the policy unconstitutionally vague. A policy or regulation is said to be unconstitutionally vague when it does not “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Here, students are given no indication of what type of expression is reasonably likely to incite “violence or prejudicial action” on the part of another person. As a result, many students will understandably self-censor rather than risk investigation and punishment under this policy’s uncertain terms.

While we understand that the Campus Climate policy is a system-wide policy within the University of California system, UC Berkeley can certainly take steps to ameliorate the policy's infringements on free speech. As discussed with respect to its policy on Respect and Civility, which can be improved with aspirational language, the university could revise this policy to indicate that it does not carry the weight of disciplinary action and will be used solely for reporting and statistical purposes. A good example of how this can be done comes from the University of Virginia's "Bias Reporting Web Site." That policy provides a definition of a "bias complaint" and then states, in relevant part:

This definition is used for reporting and statistical purposes only. It carries no independent sanctioning weight or authority.

[...]

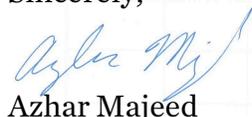
Although the expression of an idea or point of view may be offensive or inflammatory to some, it is not necessarily a violation of law or University policy. The University values and embraces the ideals of freedom of inquiry, freedom of thought, and freedom of expression, all of which must be vitally sustained in a community of scholars. While these freedoms protect controversial ideas and differing views, and sometimes even offensive and hurtful words, they do not protect personal threats or acts of misconduct which violate criminal law or University policy.

By adding these provisions to its definition of a "bias complaint," the University of Virginia makes clear to students that its policy will not be used to censor or punish protected speech. UC Berkeley would be well advised to do the same with its policy.

Thank you for your attention and sensitivity to these important concerns. Once again, FIRE hopes to work with the University of California, Berkeley to improve its policies on student expression and restore free speech to its campus in honor of the legacy of the Free Speech Movement.

We ask for a response by October 17, 2014. I look forward to hearing from you.

Sincerely,



Azhar Majeed

Director, Individual Rights Education Program

cc:

Harry Le Grande, Vice Chancellor, Student Affairs

Gibor Basri, Vice Chancellor, Equity & Inclusion

Billy Curtis, Director, Gender Equity Resource Center