



Foundation for Individual Rights in Education

601 Walnut Street, Suite 510 • Philadelphia, Pennsylvania 19106
T 215-717-3473 • F 215-717-3440 • fire@thefire.org • www.thefire.org

Greg Lukianoff
PRESIDENT

Robert L. Shibley
SENIOR VICE PRESIDENT

William Creeley
DIRECTOR OF LEGAL AND
PUBLIC ADVOCACY

Adam Kissel
VICE PRESIDENT OF
PROGRAMS

Alan Charles Kors
CO-FOUNDER AND
CHAIRMAN EMERITUS

BOARD OF DIRECTORS

Harvey A. Silverglate
CO-FOUNDER AND
CHAIRMAN

Barbara Bishop
William J. Hume
Richard Losick
Joseph M. Maline
Marlene Mieske
Daphne Patai
Virginia Postrel
Daniel Shuchman

BOARD OF ADVISORS

Lloyd Buchanan
T. Kenneth Cribb, Jr.
Candace de Russy
William A. Dunn
Benjamin F. Hammond
Nat Hentoff
Roy Innis
Wendy Kaminer
Woody Kaplan
Leonard Liggio
Herbert London
Peter L. Malkin
Muriel Morisey
Steven Pinker
Milton Rosenberg
John R. Searle
Christina Hoff Sommers

August 3, 2011

Linda P.B. Katehi, Chancellor
University of California, Davis
Office of the Chancellor
Fifth Floor, Mrak Hall
Davis, California 95616

Sent via U.S. Mail and Facsimile (530-752-2400)

Dear Chancellor Katehi:

As you can see from the list of our Directors and Board of Advisors, the Foundation for Individual Rights in Education (FIRE; thefire.org) 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, due process, academic freedom and, in this case, freedom of speech on America's college campuses.

FIRE is deeply concerned about the threat to freedom of expression posed by the UC Davis School of Medicine's decision to put a student on academic probation and demand he undergo a psychological assessment because of three emails he sent in 2010. FIRE also is deeply concerned by the unconstitutional decision of the UC Davis School of Medicine to give the UC Davis Principles of Community disciplinary force, which violates the speech rights of all students at UC Davis.

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

The listserv for the School of Medicine Class of 2014, med2014@ucdavis.edu, is not limited to professional events and topics; it was designed and has been used as a forum for class members to discuss anything potentially of common interest. On September 13, 2010, for example, ██████████ emailed the listserv about a "kegger" party he called "CAMP MED" that would include "tents so most people could just party and crash." ██████████ email stated that "we can get a few kegs ..., set up two or three Beirut/flipcup [drinking game] tables in the garage," and that the party would have music, dancing, and a "makeshift firepit." He also was going to "leave some cards out if people want to play [the drinking game] kings." On the similar list medall@ucdavis.edu on August 8, 2010, ██████████ advertised "MS1's successful completion of our first quiz" with a party scheduled for August 13, 2010, which would include "a keg of something tasty" as well as "plenty of beer," and ██████████ invited others to "bring any of your favorite liquors, mixers, and/or snacks."

Similarly, on July 19, 2010, matriculating medical student Curtis Allumbaugh emailed the med2014 listserv regarding a party he was organizing. Allumbaugh's email provided the address of the party, detailed the available space, and listed a variety of alcohol that would be available at the party. The email noted that others had signed up to bring snacks and mentioned that some things were still lacking for the party, such as music, fruit juice, and beer.

On July 20, 2010, then-second-year student [REDACTED] emailed Allumbaugh, notifying him that she had "been placed on the class of 2014's listserv" to communicate with the class. She argued that emails that "place a heavy emphasis on alcohol" could "alienat[e] your classmates who may not drink" and "portray [Allumbaugh] in a negative light." In response, Allumbaugh emailed her directly on July 21, stating,

[H]onestly, I am completely offended and pissed off by your email. I think you're acting like a busy body with no place in this matter. ... Obviously there is a mention of alcohol because over 60 people have responded requesting it It has nothing to do with official school activities, drinking is left as a personal (and obviously popular) decision, there are plenty of other official activities, and you really have no place in this. You should really just mind your own business and let our class be.¹

Separately, on July 23, 2010, Allumbaugh emailed Professor Donald M. Hilty with reservations about having been placed in the School of Medicine's Rural-PRIME program, which trains students to become physicians in rural communities in California. Allumbaugh wrote that "I have finally accepted the reality that I hate rural areas, no longer care about unde[r]served populations, and my misery would detract from my performance I'm hoping next week will somehow change my mind" Hilty responded on July 25, 2010, stating that he appreciated Allumbaugh's honesty. Hilty's response did not raise any disciplinary issue whatsoever regarding Allumbaugh's email.

The School of Medicine nevertheless disciplined Allumbaugh for his expression. On August 3, 2010, Allumbaugh met with Jim Nuovo, Associate Dean of Student Affairs and Graduate Medical Education. Nuovo sent him a letter on September 14 about their meeting. Nuovo cited the emails to the listserv, [REDACTED], and Hilty as violations of School of Medicine Bylaws 80(B) for demonstrating a "lack of professional competence," and the UC Davis Principles of Community in "failing to demonstrate the highest standards of civility and decency to all and in failing to demonstrate courtesy, sensitivity and respect." In particular, Nuovo wrote that Allumbaugh's email about the party was "concerning for its overemphasis on drinking," that his email to [REDACTED] was "inappropriate and unprofessional," and that his email to Hilty was "not consistent with the ideals of our profession."

As a result, Nuovo ordered Allumbaugh to review the policies he had allegedly violated, and to discuss them with his Academic Advisor, Catherine VandeVoort, to demonstrate that he had read and understood them. More importantly, Nuovo forwarded Allumbaugh's case to the School of Medicine's Committee on Student Progress (CSP) for possible further disciplinary action.

¹ In reply, [REDACTED] merely wrote on June 23, "I didn't mean for my message to offend you; we just like to look out for each other here at UCDSOM."

Allumbaugh met with the CSP on October 20, 2010. On November 3, he received a letter from CSP Chair Hanne Jensen. The letter did not repeat the expression at issue in the case, but it did inform Allumbaugh that he had not met the School of Medicine's *academic* requirement of acting "in a manner consistent with professional standards," which includes "interpersonal and communication skills." The letter also informed him that he had been punished with academic probation for the rest of his time in medical school and that he was required to undergo a psychological assessment to determine whether he was "fit" to continue in medical school. (Allumbaugh has reported to FIRE that he was assessed and found fit to continue.)

The letter also cited several provisions of School of Medicine Bylaws 80(B) without specifying which of the "performance deficiencies" described in the Bylaws Allumbaugh had demonstrated.² (This appears to violate Bylaws rule 80(B)(3), which provides that "Students placed on academic probation will be informed in writing of the specific deficiency(ies) for which probation is being imposed.") Furthermore, being on academic probation, Allumbaugh has been prohibited from participating in "rotations outside the course catalog" without CSP permission.³

Finally, in a move that unconstitutionally violates the rights of all students in the School of Medicine, on November 19, 2010, the school added "failure to abide by the Principles of Community" to the list of "performance deficiencies indicating lack of professional competence" that can cause a student to be put on academic probation.

That the First Amendment's protections fully extend to public universities such as UC Davis has long been settled law. See, e.g., *Healy v. James*, 408 U.S. 169, 180 (1972) (citation omitted) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'"); *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").

Moreover, the principle of freedom of speech 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 others. 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

² "i. professional dishonesty; ii. failure to take adequate responsibility for patient care; iii. inability to work effectively with patients; iv. inability to work effectively with classmates or other health professionals; v. exceeding the authority of a student in matters of patient care; vi. behavior that is disruptive to class or to clinical team performance; or vii. other behavior of equal gravity sufficient to compromise his/her professional competence."

³ In addition, according to a general letter to students from Nuovo on January 5, 2011, students on academic probation also were henceforth to be prohibited from participating in all "medical and/or professional extracurricular activities." Allumbaugh has stated to FIRE that this prohibition has been applied to him.

may not be shut off in the name alone of ‘conventions of decency.’” 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 again emphasized the inadequacy of mere offense as a justification for punishing protected speech, noting 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 standards, there can be no question that Allumbaugh’s emails are protected. Acting professionally in truly professional settings is one thing; requiring that medical students meet workplace speech and conduct standards on an email listserve dedicated to discussing a wide range of activities and topics, however, is impermissible. The class listserve is not a professional environment where academic standards apply; emails about social events that mention alcohol and parties are far within the bounds of free expression and are certainly outside of the locus of professional life. Even more outside the bounds of professional life are private emails between individuals about a party, such as Allumbaugh’s email to Villanueva. Further, it would be quite surprising—and disappointing—to learn that the School of Medicine punishes speech on the order of “You should really just mind your own business and let our class be,” even in professional settings.

In addition, Allumbaugh’s sincere expression regarding his fit with Rural-PRIME appears to be a matter of discipline only because he stated his actual feeling at the time. Whether or not Allumbaugh likes rural areas and underserved populations is a matter of personal conscience outside the bounds of professional competence. As illiberal as it is to punish protected expression, it is still worse to demand internal conformity to moral standards. As the Supreme Court wrote in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641–42 (1943), “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” By punishing Allumbaugh for acting in a manner “not consistent with the ideals of our profession” on the basis of his email to Hilty, UC Davis apparently seeks to require its medical students to profess personal allegiance to a particular understanding of the role of doctors in our society. While UC Davis may encourage such a viewpoint amongst its students, it cannot violate its students’ freedom of conscience by requiring that students adopt this moral understanding under pain of punishment.

Finally, it is blatantly unconstitutional to police student speech under the UC Davis Principles of Community. The Principles explicitly state that “[t]he Principles of Community are not official University of California, Davis policy” and that “[w]e affirm the right of freedom of expression within our community.” The UC Davis School of Medicine has decided to punish speech by enforcing moral principles that UC Davis has explicitly declined to enforce with discipline; UC Davis has not even given the Principles of Community the status of official policy. Furthermore, the Principles of Community, when given disciplinary rather than hortatory force, violate the First Amendment on their face. The First Amendment principles cited above leave no room for the view that a public university may punish failures of “courtesy, sensitivity and respect” or

“civility”—among other unconstitutionally vague statements of morality in the Principles of Community.

Such impermissibly vague terms could, in application, mean virtually anything. A 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). Students in the School of Medicine are now forced to guess what their peers and/or the administration might deem lacking in “courtesy, sensitivity and respect” or “civility” and as a result will likely self-censor to such a degree that expression on campus will be deeply chilled.

The effect is likely profound—particularly so, given UC Davis’ demonstrated willingness to punish students who fail to abide by the school’s interpretation of the Principles of Community. Even assuming that a student was able to figure out which speech is and is not lacking in these officially mandated UC Davis virtues, the fact that a student may be punished for seeming to lack “respect” or “civility” means that engaging in wide swaths of constitutionally protected expression may serve as grounds for punishment. Such a result is simply untenable at a public university. For example, the policy arguably bars, among other forms of protected speech, any kind of sharp-edged humor. It also arguably bars heartfelt statements about, for example, the roles of physicians and women in abortion.

It is instructive to consider a recent federal court ruling from the Northern District of California. United States Magistrate Judge Wayne Brazil’s order, on First Amendment grounds, prevented administrators in the entire California State University System from enforcing a “civility” policy against student speech:

There also is an emotional dimension to the effectiveness of communication. Speakers, especially speakers on significant or controversial issues, often want their audience to understand how passionately they feel about their subject or message. [...] Civility connotes calmness, control, and deference or responsiveness to the circumstances, ideas, and feelings of others. [...] Given these common understandings, a regulation that mandates civility easily could be understood as permitting only those forms of interaction that produce as little friction as possible, forms that are thoroughly lubricated by restraint, moderation, respect, social convention, and reason. The First Amendment difficulty with this kind of mandate should be obvious: the requirement “to be civil to one another” and the directive to eschew behaviors that are not consistent with “good citizenship” reasonably can be understood as prohibiting the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause. [...] In sum, there is a substantial risk that the civility requirement will inhibit or deter use of the forms and means of communication that, to many speakers in circumstances of the greatest First Amendment sensitivity, will be the most valued and the most effective.

College Republicans at San Francisco State University v. Reed, 523 F. Supp. 2d 1005, 1018–20 (N.D. Cal. 2007).

As should be readily apparent, Judge Brazil's holding is entirely on point here. UC Davis' application of its Principles of Community as a mandatory civility requirement, enforceable by official discipline, is in violation of the First Amendment.

FIRE notes that according to School of Medicine policy, the CSP may amend its punishment of Allumbaugh after a request is made in writing. FIRE requests that UC Davis recognize and reverse its error in punishing Curtis Allumbaugh's protected speech. Accordingly, FIRE requests that you immediately rescind the discipline against him, removing him from probation. In addition, FIRE is concerned that the School of Medicine may be using the probation in order to build a case to eventually remove Allumbaugh from the program entirely. We advise you that the School of Medicine may use no policy or contrivance to punish Allumbaugh for his protected expression by other means. Finally, FIRE requests that the School of Medicine rescind its new requirement that all School of Medicine students adhere to the unconstitutionally vague principles of the Principles of Community.

With this letter we enclose a signed FERPA waiver from Curtis Allumbaugh, permitting you to fully discuss his case with FIRE.

FIRE is committed to using all of our resources in support of students' expressive rights and toward seeing this matter through to a just and moral conclusion. We request a response by August 17, 2011.

Sincerely,



Adam Kissel

Vice President of Programs

Encl.

cc:

Claire Pomeroy, Dean, UC Davis School of Medicine

Jim Nuovo, Associate Dean of Student Affairs and Graduate Medical Education, UC Davis
School of Medicine

Hanne Jensen, Chair, Committee on Student Progress, UC Davis School of Medicine

Donald M. Hilty, Director, Rural-PRIME Program, UC Davis School of Medicine

Mark Servis, Associate Dean of Curriculum and Competency Development, UC Davis School of
Medicine

Kathryn Sutter, Career Advisor, UC Davis School of Medicine

Catherine VandeVoort, Academic Advisor, UC Davis School of Medicine

Susan Gardinor, Year 1 Curriculum Manager, UC Davis School of Medicine

Susan K. Hefner, Registrar, UC Davis School of Medicine

Gail Peoples, Academic Advising Coordinator, UC Davis School of Medicine

Terje Robertson, Registrar Administrator, UC Davis School of Medicine

Lauren Snow, Financial Aid Director, UC Davis School of Medicine