



Foundation for Individual Rights in Education

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March 9, 2011

President James Jacobs
Macomb Community College
South Campus D-300
14500 East 12 Mile Road
Warren, Michigan 48088

Sent via U.S. Mail and Facsimile (586-445-7886)

Dear President Jacobs:

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

I write you today because FIRE is concerned about a memorandum sent by Geary M. Maiuri, Associate Vice President for Student and Community Services, to all students at Macomb Community College (MCC) on January 8, 2011. The memorandum, titled "Student Civility at Macomb Community College," threatens MCC students' freedom of speech under the First Amendment—by which MCC is both legally and morally bound as a public institution of higher education. However, it is unclear from the language of the memorandum whether it constitutes official policy at MCC, or whether it instead represents an aspirational statement on the part of the school. Therefore, I write you today to seek clarification regarding the status of the memorandum at MCC.

MCC's memorandum on "Student Civility at Macomb Community College" states, in relevant part:

It is critical for you to know and understand some of the things we at Macomb Community College feel are important and what we expect of you as a Macomb College student.

It is important that you have a serious attitude toward learning and a respectful approach to dealing with situations. Appropriate behavior is

required, and Macomb students should exhibit respect toward fellow students and staff. We ask you to follow faculty and staff directives, refrain from the use of foul language, and not to create disturbances or threats that would otherwise disrupt the learning or office environment. It is important for you when on campus, to exhibit professionalism and collegiate behavior. We appreciate diversity, and expect our students to show respect toward diversity. All of us want to attend school at a safe campus, so we encourage you to report any dangerous or suspicious behavior.

As a college student, we expect that you will understand and adhere to college policies and laws. The College's Handbook on Rights and Responsibilities outlines the actions that will be taken if students do not adhere to college rules and regulations.

Taken as a whole, the proscriptions contained in MCC's memorandum on Student Civility at Macomb Community College, if they are intended to be enforceable rules, encompass a wide swath of constitutionally protected expression and therefore violate the free speech rights of MCC students.

First, the memorandum "ask[s]" that students "refrain from the use of foul language" and not create "disturbances." Yet, it has long been held that "foul language" such as the use of profanity and vulgarity is protected by the First Amendment. In the well-known case of *Cohen v. California*, 403 U.S. 15, 25 (1971), for example, the Supreme Court of the United States overturned the conviction of a man who wore a jacket bearing the words "Fuck the Draft" into a county courthouse. The Court, in holding that this expression was entitled to constitutional protection, famously declared that "one man's vulgarity is another's lyric," and proceeded to note that "it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."

In a case even more closely related to MCC's memorandum, the Court held that a student newspaper's use of the headline "Motherfucker Acquitted" at a public university was protected by the First Amendment, declaring 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.'" *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973). Under these and other precedents, it is clear that MCC's memorandum encompasses protected expression by asking students to "refrain from the use of foul language." As a result, this provision, to the extent it constitutes official school policy at MCC, is unconstitutionally overbroad, as 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). MCC would be well advised to make clear that engaging in protected speech at the school, including "foul language," is not restricted and will not be subject to punishment.

The provision asking students not to create "disturbances" fares no better from a free speech perspective, as it is susceptible to a First Amendment challenge on grounds of vagueness. 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). Here, MCC students are given no notice as to what constitutes a “disturbance[]” in the eyes of the administration, and are left instead with an amorphous term regulating their behavior. This lack of specificity and concrete guidance is likely only to confuse MCC students, who will be forced to guess at what the administration considers to be a “disturbance[.]” As a result, students will likely self-censor to such a degree that expression on campus will be chilled. Such a result is untenable at any institution that holds itself out as a true marketplace of ideas.

Additionally, much speech that may “disturb[]” others or that may be subjectively labeled as causing a “disturbance[]” is protected under the First Amendment. Indeed, as the Supreme Court declared over fifty years ago, “[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.” *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). The Court even held in a famous case that the First Amendment protected *Hustler* magazine’s publication of an outlandish cartoon suggesting that the Reverend Jerry Falwell lost his virginity in a drunken encounter with his mother in an outhouse. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). The publication of that cartoon no doubt “disturb[ed]” Reverend Falwell and many others; yet if such blatantly ridiculing speech is protected under the First Amendment, it is obvious that much expression that falls under MCC’s regulation of “disturbances” is likewise entitled to constitutional protection.

Next, MCC’s memorandum states that students “should exhibit respect toward fellow students and staff,” and additionally states that the school “expect[s] our students to show respect toward diversity.” Once again, it is unclear from the language of the memorandum whether these are aspirational statements or whether MCC instead is requiring these values of its students under pain of punishment. To the extent that these statements represent official policy at MCC, they infringe upon the free speech rights of MCC students. First, much speech that fails to demonstrate “respect” toward others, or toward diversity, is nevertheless protected under the First Amendment. Indeed, the *Hustler* and *Terminiello* precedents demonstrate this principle amply. There is good reason for this protection; for instance, should MCC students be required to exhibit “respect” toward students who might be neo-Nazis? It is easy to see in such a case why a requirement that students unconditionally “respect” all fellow students and staff is not within the power of any government agency such as MCC.

Second, the term “respect” is far too amorphous, standing alone, to properly regulate student speech and conduct; what may be “respect[ful]” to one person can easily be found lacking in “respect” to another. This provision, like the other unconstitutionally vague language in the MCC memorandum, is susceptible to selective enforcement and fails to adequately apprise MCC students of their expressive rights. The same is true of the statement that the school “expect[s] our students to show respect toward diversity.” It is unclear what this provision

ultimately requires of students, and students may reasonably be confused upon encountering it in the memorandum.

In sum, the various statements contained in MCC's memorandum, well-intentioned though they may be, jeopardize the free speech rights of MCC students. As such, the memorandum goes against MCC's legal and moral obligations as a public institution of higher education, and contradicts the Supreme Court's longstanding declaration that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy v. James*, 408 U.S. 169, 180 (1972).

In an instructive recent case which is squarely on point for analyzing MCC's memorandum, a federal district court struck down a policy at San Francisco State University that required 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). The court recognized that there is "an emotional dimension to the effectiveness of communication," and that for many speakers, "having their audience perceive and understand their passion, their intensity of feeling, can be the single most important aspect of an expressive act." *Reed*, 523 F. Supp. 2d 1005, 1018–19. MCC would be wise to recognize the lesson of *Reed*. While MCC may desire that its students behave with civility and respect in all interactions on campus, it cannot *require* that students do so under pain of punishment. If it wishes to instill and encourage these values in its student body, MCC should make clear that the provisions stated in its memorandum to the student body are purely *aspirational*, and that no student will face unconstitutional investigation or sanction for failing to follow these provisions. As currently formulated, however, MCC's memorandum is not sufficiently clear on this point, and a reasonable student reading the memorandum could well conclude that he or she is subject to punishment under its terms.

Lastly, I note that MCC's memorandum states that the school "expect[s]" students to "understand and adhere to college policies and laws," and that "[t]he College's Handbook on Rights and Responsibilities outlines the actions that will be taken if students do not adhere to college rules and regulations." That the memorandum explicitly refers to possible punishment for violation of official policy is significant from a free speech perspective because MCC currently maintains at least one policy on student expression that restricts constitutionally protected speech. Specifically, MCC's policy on "Acceptable Use of Information Technology Resources" states, in relevant part:

The following behaviors are prohibited while using College information technology resources, including computers and networks owned or operated by Macomb Community College, or to which Macomb Community College is connected.

...

Sending chain letters, junk mail, "spam," "flaming," "mailbombs," or other similar types of broadcast messages;

Sending a message to more than ten (10) internal or external email addresses except as required to conduct College business;

...

Sending messages that are malicious or that a reasonable person would find to be harassing or threatening;

This policy fails to uphold students' First Amendment rights in a number of respects. First, by prohibiting users of MCC's information technology resources from sending "chain letters" or from sending a message to more than ten internal or external e-mail addresses unless they are "conduct[ing] College business," the policy deprives students of the right to engage in a considerable amount of protected expressive activity. The First Amendment protects the right of students at a public university to send "chain letters" as well as electronic messages to more than ten e-mail addresses, as it is difficult to imagine that doing so has such a significant impact that it amounts to a disruption of the educational process or the proper functioning of the university. Indeed, this policy applies to solicited e-mails and replies as much as it does to unsolicited messages. As such, it is far too broad a regulation to pass constitutional muster.

The exception made for messages that are "required to conduct College business" is not sufficient for upholding MCC students' expressive rights. Students have the right to e-mail ten or more individuals about non-official business, as such expression potentially includes discussion of social, political, and cultural matters which carry public significance. For instance, MCC's policy would make it a punishable offense for a student to e-mail ten friends in order to spread the news of a hypothetical 9/11-style terrorist attack on the United States. Surely this cannot be the intent of MCC's e-mail policy.

The Supreme Court has held that "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). MCC's policy currently fails to recognize this, and should be revised to reflect the fact that students have the right to use all available campus mediums, including e-mail, to discuss and banter about a wide range of topics as they advance in their education and practice their communication skills.

Additionally, MCC's policy prohibits "[s]ending messages that are malicious." This ban, like several of the provisions discussed with respect to the memorandum on Student Civility at Macomb Community College, is likely void for both vagueness and overbreadth. Speech that is merely "malicious" is entitled to constitutional protection and must be permitted on a public university campus, unless it rises to the level of actionable harassment or otherwise falls outside the bounds of the First Amendment. Moreover, using a standard of "malicious[ness]" creates an impermissibly vague regulation. Consequently, the ban on "malicious" expression untenably restricts MCC students' free speech rights.

FIRE asks that Macomb Community College revise its policies to make them consistent with the requirements of the First Amendment and, to prevent speech at MCC from being impermissibly chilled, that MCC clarify to students and administrators that protected expression may never and will never be investigated or punished at MCC. FIRE also stands ready to help with the necessary revisions to these policies, and we would be happy to work with you to bring these policies in line with the First Amendment.

Thank you for your attention and sensitivity to these important concerns. I look forward to hearing from you.

Sincerely,



Azhar Majeed

Associate Director of Legal and Public Advocacy

cc:

Gearry M. Maiuri, Associate Vice President for Student and Community Services, Macomb Community College

Susan R. Boyd, Dean of Student Success, Macomb Community College

Hunter Wendt, General Counsel, Macomb Community College