
Equal Educational Opportunity and Free Speech on Public College and University Campuses in California

**A Report of the California Advisory Committee to the
United States Commission on Civil Rights**

October 2012

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Letter of Transmittal

California Advisory Committee to the U.S. Commission on Civil Rights

Kimberly A. Tolhurst, *Delegated the Authority of the Staff Director*

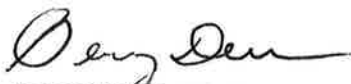
The California Advisory Committee (Committee) to the U.S. Commission on Civil Rights submits this report, *Free Speech on Public College and University Campuses in California*, as part of its responsibility to examine and report on civil rights issues in California under the jurisdiction of the Commission. This report was approved by a vote of 10 yes, 2 no, and 3 abstentions. The report follows a public hearing on the issue on April 18, 2010. A conditionally approved report was prepared by the Committee during its last charter under the chairmanship of Velma K. Montoya, but was not publicly released.

Campus speech policies generally are enacted in order to comply with Title IX of the Educational Amendments of 1972, prohibiting sexual harassment, and Title VI of the Civil Rights Act of 1964, which prohibits harassment on the basis of race, color or national origin by entities receiving Federal financial assistance. There is concern that there may be a problem with the formulation and implementation of speech policies on college campuses and federal enforcement of such policies as they affect the Constitutional rights of free speech.

In 2003, Gerald A. Reynolds, then Assistant Secretary, Office for Civil Rights (OCR), U.S. Department of Education weighed in on the alleged conflict between free speech on college campuses and federal anti-discrimination law. In issuing guidance regarding speech policies on college campuses, Mr. Reynolds wrote: "OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U. S. Constitution." OCR in its comment on this report, noted: "OCR's 1994 Investigative Guidance on Racial Incidents and Harassment Against Students states: 'In addition, the existence of a racially hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient also constitutes different treatment on the basis of race in violation of title VI.'"

In order to effectuate governing federal policies yet also comply with controlling United States Supreme Court precedent, ensure the First Amendment rights of students, and also facilitate an atmosphere of collegiality and inclusiveness vital to the institutions of higher learning in California; the Committee recommends that the Department of Education reaffirm the Department of Education's 2003 guidance letter.

Respectfully,



Percy Dufan, *Chair*
California State Advisory Committee

Background

Public colleges and universities are subject to federal antidiscrimination laws, including Title IX of the Education Act Amendments of 1972, and Titles VI and VII of the Civil Rights Act of 1964. These federal laws impose a duty on public colleges and universities to respond to discriminatory harassment committed by students against other students. Campus speech policies generally are enacted in order to comply with Title IX of the Educational Amendments of 1972, prohibiting sexual harassment,¹ and Title VI of the Civil Rights Act of 1964, which prohibits harassment on the basis of race, color or national origin by entities receiving Federal financial assistance.²

There is concern that there may be a problem with the formulation and implementation of speech policies on college campuses and federal enforcement of such policies as they affect the Constitutional rights of free speech. There is also a concern of a risk that harassment and conduct policies may be promulgated or enforced more on ideological grounds, rather than because of a concern for liability. Freedom of expression extends beyond scholarship to the campus community. Similar to the allowance of free speech to professors in their classrooms and writings, colleges and universities allow students to engage in peaceful and lawful protest and debate. However, colleges and universities may take appropriate action to protect property, ensure safety, maintain order and prevent disruption of university operations.

In principle, freedom of expression and diversity of opinion and equality of opportunity are not competing goals. Unfortunately, however, there are occasions when there is tension among them. There have been instances – including well-publicized incidents on California public college and university campuses – in which some have used their right of free speech to degrade, marginalize, threaten, and harass individuals or

communities on the basis of race, ethnicity, gender or religion. Though these actions may be very few, such actions may have a far-reaching negative impact as such speech sends a false message that members of certain communities that traditionally may have been excluded from higher education, are unwelcome. It also undermines the public university's efforts to be inclusive.

Public colleges and universities also have competing obligations because they are government entities, subject to the requirements of the First Amendment³ that limits the degree to which they can discipline persons for speech.⁴ Moreover, disciplining persons for speech can cause a chilling effect on the core university value of freedom of expression. Additionally, some groups or individuals may employ anti-harassment policies and/or the mechanisms implementing those policies to suppress legitimate speech or ideas with which they disagree.

Public colleges and universities may face challenges in their efforts to comply simultaneously with the sometimes competing legal obligations. In 1999 the Supreme Court in *Davis v. Monroe County Board of Education*, held a parent could bring a private action against a school board because of “student-on-student harassment,” but only when the school “acts with deliberate indifference to known acts of harassment in its programs or activities,” and only “for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.”⁵ In its decision the Supreme Court ruled, essentially, that a school could be liable

¹ 20 U.S.C. 1681(a)(1),

² 42 U.S.C. 2000(d).

³The First Amendment to the United States Constitution provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

⁴ California's Leonard Law, passed in 1992, grants First Amendment protection to students at secular private colleges and universities in California, and prohibits such institutions from restricting speech that otherwise would be protected under the First Amendment to the Constitution.

⁵ *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). at p. 633.

for student-to-student sexual harassment if it knew about the harassment but failed to stop it.

Davis involved LaShonda Davis, a fifth grade student in Macon, Georgia, who was molested by a male classmate. She told several teachers and asked that her seat be moved. The teachers, however, did nothing to stop the harassment. Her grades fell, and she became suicidal. The boy eventually pled guilty to sexual battery and ultimately moved away from the school district. LaShonda's family then brought a lawsuit against the school district. The *Davis* decision has become the operating standard for anti-harassment policies enacted by schools.

Davis specifically does not, however, require the school "ensure that . . . students conform their conduct to" certain rules, but instead only requires schools to "respond to known peer harassment in a manner that is not clearly unreasonable."⁶ The Court also noted the *Davis* case pertained to an elementary school, and a university need not exert the same control over its students as it "would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims."⁷

There is a concern that an over-emphasis by public colleges and universities on preventing illegal harassment may be undermining the free speech rights of students guaranteed by the First Amendment. Diversity of opinion and equality of opportunity also are essential to productive and enriching higher education. Previously, equal access to higher education in this country was denied to many persons on the basis of economic condition, race, color, religion, or gender. In recent decades, it has become a generally-accepted tenet that society benefits from having a publicly-funded system of higher education that is accessible and open to persons from all backgrounds. Diversity of opinion and equality of opportunity now are viewed as essential conditions for the university to

successfully pursue its mission of scholarship and education. The inclusion of a broad range of social, racial, ideological and economic backgrounds contributes to a multiplicity of experiences, outlooks and ideas, promoting a richer, more scholarly environment.

College and university administrators and advocates of speech restrictions assert it is unclear how colleges and universities reconcile the mandates of ensuring a safe and secure learning environment yet also observe the First Amendment. The United States Supreme Court has yet to deal with a single case encompassing both issues. As a result, many advocates of these policies contend there is not clear and explicit guidance on how public colleges and universities must comply with potentially dual mandates. However, courts repeatedly have struck down public university anti-harassment policies, finding they violate students' free-speech rights, indicating the permissible scope of these policies is more clear than the advocates recognize.

DeJohn v. Temple University, reinforced the *Davis* principles, explaining students' First Amendment rights were more preeminent in the university context "where free speech is of critical importance because it is the lifeblood of academic freedom."⁸ The Court specifically noted: "Because overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination, the overbreadth doctrine may be invoked in student free speech cases." It declared portions of the University's harassment policy facially unconstitutional because speech could not be prohibited merely because it may be seen as "hostile" or "offensive" without the requirements of a showing of "any requirement akin to a showing of severity or pervasiveness."

Under Title VI of the Civil Rights Act of 1964, the U. S. Department of Education's Office for Civil Rights (OCR) has the responsibility to enforce federal laws that prohibit discrimination

⁶ *Id.*, at pp. 648-649.

⁷ *Id.*

⁸ *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008).

on the basis of sex, race or other prohibited classifications in federally funded educational programs and activities.⁹ OCR regulations read: “In addition, the existence of a racially hostile environment that is created, encouraged, accepted, tolerated, or left uncorrected (by a college or university receiving federal funds) also constitutes different treatment on the basis of race in violation of title 6.”¹⁰

In 2003, Gerald A. Reynolds, then Assistant Secretary, Office for Civil Rights (OCR), U.S. Department of Education, weighed in on the alleged conflict between free speech on college campuses and federal anti-discrimination law.¹¹ In issuing guidance regarding speech policies on college campuses, Mr. Reynolds wrote:

“OCR’s regulations are not intended to restrict the exercise of any expressive activities protected under the U. S. Constitution. OCR has consistently maintained that the statutes that it enforces are intended to protect students from invidious discrimination, not to regulate the content of speech. Harassment of students, which can include verbal or physical conduct, can be a form of discrimination prohibited by the (federal) statutes enforced by OCR. In order to establish a hostile environment, harassment must be sufficiently serious (i.e., severe, persistent or pervasive) as to limit or deny a student’s ability to participate in or benefit from an educational program.

“OCR has consistently maintained that schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech. OCR’s regulations and policies do not require or

prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment.

“Harassment, however, to be prohibited by the statutes within OCR’s jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR’s standard, the conduct must also be considered sufficiently serious to deny or limit a student’s ability to participate in or benefit from the educational program. Thus, OCR’s standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim’s position, considering all the circumstances, including the alleged victim’s age.

“In summary, OCR interprets its regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles. No OCR regulation should be interpreted to impinge upon rights protected under the First Amendment to the U. S. Constitution or to require recipients to enact or enforce codes that punish the exercise of such rights. There is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment. With these principles in mind, we can, consistent with the requirements of the First Amendment, ensure a safe and nondiscriminatory environment for students that is conducive to learning and protects both the constitutional and civil rights of all students. The U.S. Department of Education thus follows the harassment standard enunciated by the U.S. Supreme Court in *Davis* in analyzing speech policies set by institutions of higher education.”¹²

On April 18, 2010, the California Advisory Committee held a public hearing on speech policies on public college and university campuses in California. This report is the statement of the Committee on the issue.

⁹ Pub. L. 88-352, 78 Stat. 241.

¹⁰ 59 Fed. Reg. 11,448 (Mar. 10, 1994) at <http://www2.ed.gov/about/offices/list/ocr/docs/race394.html> (last accessed May 20, 2011).

¹¹ Gerald A. Reynolds was the Chairman of the U.S. Commission on Civil Rights at the time this project was conducted by the California Advisory Committee.

¹² Gerald A. Reynolds, then assistant secretary, Office of Civil Rights, U. S. Department of Education, letter issuing guidelines regarding speech policies on college campuses, Apr. 23, 2003.

Perspectives from California's Public Universities and Colleges

The University of California

The University of California (UC) is comprised of ten separate campuses. The president of the university and the office of the president is responsible for administration and oversight of the entire system, although ultimate authority over policy rests with the Board of Regents. Policies may be adopted at any of the various university levels; that is by the Regents, the President, the campus, or units within campuses. Regents and Office of the President policies take precedence over local campus or unit policies.

According to Christopher Patti, General Counsel, UC policy contains strong affirmations of protections for the free-speech rights of students, faculty, and visitors to the university. The university's policy on speech and advocacy states that: "The university is committed to assuring that all persons may exercise the constitutionally protected rights of free expression, speech, assembly, and worship." The university's policy on academic freedom states that: "The university is committed to upholding and preserving principles of academic freedom, which include freedom of inquiry and research, freedom of teaching, and freedom of expression and publication." Finally, the university's regulations governing the conduct of persons on campus not affiliated with the university, state that: "Regulations may not be utilized to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly."¹³

UC policies also support student speech activity by making financial support from student-fee revenues available to student organizations. According to university policy, the procedure

and criteria for distribution of those funds "must be viewpoint neutral in their nature. That is they must be based on considerations, which would not include approval or disapproval of the viewpoint of the student organizations."¹⁴

In 2009, the Office of the General Counsel of UC conducted a review of the university's student conduct harassment policies in the wake of recent court decisions. Previous definitions of university harassment policies were similar to ones struck down in a number of recent court cases, and it was recommended that the policies be modified. As a result, the revised definition of harassment for UC is modeled on the definition of unlawful student-on-student harassment set forth by the US Supreme Court in its *Davis* decision.¹⁵

Specifically, the UC policy currently defines prohibited harassment as conduct that is so severe and/or pervasive and objectively offensive and that so substantially impairs a person's access to university programs or activities, that the person could effectively deny equal access to the university's resources and opportunities on the basis of his or her race, color, national origin, or ethnic origin, alienage, sex, religion, age, sexual orientation, gender identity, marital status, veteran's status, physical or mental disability or perceived membership in any of these classifications. In this way, the university hopes to retain the tools necessary to respond to acts of discriminatory harassment while minimizing the vulnerability of this harassment policy under the 1st Amendment.

Patti told the California Advisory Committee that the courts have yet to reconcile the conflict between anti-harassment obligations and free speech protections on college campuses. In the meantime, UC is developing policy that hews as closely as the institution can to what the court said is the standard.

¹³ Christopher Patti, General Counsel, University of California, testimony before the California Advisory Committee to the U.S. Commission on Civil Rights, Apr. 18, 2010, Briefing Transcript, p. 134 (hereafter Campus Speech Transcript).

¹⁴ *Ibid.*, p. 135.

¹⁵ *Ibid.*, p. 138. In *Davis v. Monroe County Board of Education* (526 U.S. 629), the U.S. Supreme Court ruled that schools are indeed liable for student-to-student sexual harassment, if they knew about the harassment and had failed to stop it.

California State University

The California State University (CSU) has 23 campuses statewide, with an enrollment of over 430,000 students. The 23 university campuses operate autonomously. The CSU Board of Trustees is charged in the California Education Code with the responsibility to adopt broad policy regulations in Title 5 that govern the institution overall, but the campuses are given wide berth in adopting more specific rules that are appropriate to their distinct locales.

Pertinent to the issues of equal educational opportunity and free speech, regulations have been issued by the board of trustees and involve the general use of campus grounds and buildings such as the distribution of handbills and leafleting at rallies and events. However, it is left to the purview of each of the individual 23 CSU campuses to issue their own time, place, and manner regulations, regarding freedom of speech. As a result, each of the 23 CSU campuses has their own “free-speech policies” that apply only at that particular campus. However, according to Gail Baker, an attorney with the General Counsel Office of CSU, “the student conduct code also makes clear that no student may be disciplined by any behavior protected by the 1st Amendment.”¹⁶

A system as large as CSU has incidents related to free speech. Some of the grounds upon which a CSU student could be disciplined that are speech related include willfully, materially, and substantially disrupting or obstructing campus activity or the free flow of pedestrian or other traffic; substantially and materially disrupting normal campus operations; substantially and materially infringing upon the rights of members of the campus community; disorderly, lewd, or indecent behavior; or student behavior and conduct that threatens or endangers the health or safety of the members of the campus community.¹⁷

In 2008 at the Crops House on CSUs Polytechnic (Cal Poly) San Luis Obispo campus, a university-owned house where agriculture students are given subsidized lodging in exchange for work on the school’s farms, some students placed a noose near a confederate flag along with a racist sign. School officials also confirmed that a racist sign was posted at the house during a recent party.¹⁸

At a university-owned house on a CSU campus, some students placed a noose along with a racist sign next to a Confederate flag.

According to Baker, “There was a lot of outrage over the incident that was expressed not only by the campus administration but by the general campus community as well. A lot of people were pushing for student discipline against the students, and CSU had a legitimate concern to think that to impose discipline it may have implicated their free-speech rights under the 1st Amendment rights. Ultimately the students were not formally disciplined, however the campus did successfully persuade them to vacate student housing—a form of discipline.”¹⁹

According to Baker, the Cal Poly incident reflects the complexity of free speech issues on campus. It is very difficult to draft a student conduct code or free speech policy that covers every possible contingency. Such policies are, to some degree, likely to be necessarily broad and there will always be matters of interpretation trying to fit general prohibitions to a particular set of facts. Nevertheless, CSU acknowledges that it has a legal obligation to make its policies specific enough to give advance notice to students and other members of the campus community about what will and will not be tolerated.

¹⁶ Gail Baker, Campus Speech Transcript, p. 126.

¹⁷ Ibid., p. 127.

¹⁸ “Sowing Hate, Racist sign and symbols found at Cal Poly agriculture house no punishment expected,” New Times, Oct. 30, 2008, vol. 23, issue 13. In the aftermath of the Cal Poly incident, it became illegal in the state of California to place a noose on a college campus, and that joined previous prohibitions on swastikas and burning crosses. So

¹⁹ Gail Baker, Campus Speech Transcript, p. 128.

California Community Colleges

The California community college system differs greatly from California State University and the University of California. California community colleges are the largest higher education system in the nation with over 72 districts and 112 colleges. More than 2.9 million students attend California community colleges. Purposes of the community college system include basic skills training, work force training, transfer to other four-year universities, and in some cases personal enrichment.

Central to the governance of the 112 campuses are locally elected governing boards at each college. Each community college district is thus a local government entity; not a state entity. California Education Code 70902 states, among other things, that these local governing boards shall: manage and control district property; establish procedures to ensure faculty, staff, and students the opportunity to express their opinions on the campus level; as well as establish roles and regulations governing student conduct. As a result, specific compliance with equal educational opportunity laws and free speech policies are done at the local level—not at the state level.²⁰

The community colleges, however, must follow California Education Code 66301 in their policies regarding freedom of speech on college campuses. That law states that neither the regents of the University of California, the trustees of the State of California, the governing board of the community college district, nor any mention of any campus of those institutions shall make or enforce a rule subjecting a student to disciplinary action solely on the basis of conduct that is speech.²¹

Jonathan Lee, staff attorney in the Chancellor's Office of California community colleges noted the lack of a role for the Chancellor's office in balancing equal opportunity and free speech

concerns. “Curiously omitted from the state statute is [the Chancellor’s office]. Education Code 76120 specifically points out that the governing board of a community college district shall adopt rules and regulations relating to the exercise of free expression by students upon the premises of each community college maintained by the district, which shall include reasonable provisions for the time, place, and manner of conducting such activities.”²²

As a result of this decentralization, there are essentially 72 community college policies in California regarding the issue of freedom of speech on campus. As Lee told the California Advisory Committee, “It is a confusion that exists throughout the state regarding the level of direction that the Chancellor’s Office can do. Essentially, at the Chancellor level, the office administers the funding and some different conditioning throughout the state. But in regards to free speech and those in particular important issues, the office does not weigh in nor does it have jurisdiction.”²³

California community colleges comprise the largest higher education system in the nation with over 112 colleges and 2.9 million students.

There have been recently publicized incidents regarding speech issues on several college campuses. Lee told the Committee, that all college district do not necessarily have their own general counsel, but all districts retain their own counsel and could have their own variation of policies.

So an examination of student conduct, equal opportunity compliance, and free speech policies on California community college campuses, would entail an independent analysis of each campus. Considering that college campuses in the state range from Los Angeles to Los Rios, different campuses have different affairs and different student conduct issues.²⁴

²⁰ CAL. EDC. CODE § 76120.

²¹ CAL. EDC. CODE § 66301.

²² Jonathan Lee, Campus Speech Transcript, p. 118.

²³ Ibid., p. 122.

²⁴ Ibid. p. 123.

Legal Perspectives about Speech Policies on California's Public Colleges and Universities

Foundation for Individual Rights in Education (FIRE)

According to the Foundation for Individual Rights in Education (FIRE), speech policies that restrict protected free speech are prevalent on college and university campuses. FIRE has conducted its analysis of speech policies of some 400 colleges and universities nationwide and found nearly 70 percent have speech policies that the organization believes violate the First Amendment.²⁵

In testimony before the California Advisory Committee, FIRE president Greg Lukianoff did not dismiss concerns of harassment on campus. However, he asserted that it is the position of the organization that the Supreme Court has established the basis of what constitutes harassment in a school setting, and that standard should be followed.

“(FIRE) believes that actual harassment should be pursued. But there is a standard set by the Supreme Court on what peer-on-peer harassment means. True harassment means much more than merely offensive or rude speech. And contrary to prior belief, there is no First Amendment exception for harassment, for harassment is considered not to be speech but a pattern of behavior that is so severe, pervasive, and objectively offensive that it undermines and detracts from the victim’s educational experience such that victimized students are effectively denied equal access to instructions -- institutions of resources and opportunities.”²⁶

According to FIRE, the implementation of that standard on college and university campuses

balances perfectly well the dual interest to prevent racial and sexual harassment with the interest in free speech. According to Lukianoff, not following the standard for harassment as set out by the Supreme Court trivializes real harassment. “If colleges and universities would follow the actual law, they would have a policy that actually does prevent racial and sexual harassment.”²⁷

FIRE estimates that 70 percent of colleges and universities nationwide have speech policies that violate First Amendment rights.

Lukianoff noted for the California Advisory Committee what he considered examples of bad speech policies on public colleges and universities in California.

“The CSU Monterey Bay catalogue has a policy on sexual harassment, sexual assault, and non-tolerance that examples of harassment include sending inappropriate jokes or comments in print or by e-mail; derogatory cartoons, drawings, and posters; as well as inappropriate gestures.

“San Francisco State University Sexual Harassment Policy and Procedure provides that sexual harassment is one person's distortion of a university relationship by unwelcome conduct which emphasizes another person's sexuality. “UC Santa Cruz policy states that examples of sexual harassment and discrimination include sexual jokes, comments or innuendos and sex-based cartoons or visuals that ridicule or denigrate a person.”²⁸

According to Lukianoff and FIRE, the long-term effect of overbroad speech restrictions on campus is a chilling effect. People will be reluctant to speak openly if they have reason to believe that they will be punished for it. This in turn, breaks down the essential function of higher education—the free exchange of ideas. Moreover, it teaches students bad lessons about how to live in a free society.

²⁵ Foundation for Individual Rights in Education at <http://thefire.org/public/pdfs/9aed4643c993299724a29d6.pdf?direct> (last accessed May 20, 2011.)

²⁶ Greg Lukianoff, president, FIRE, Campus Speech Transcript, p. 15.

²⁷ Ibid., p. 15.

²⁸ Ibid., p. 12.

***American Civil Liberties Union
(ACLU)***

Representatives from the American Civil Liberties Union (ACLU) expressed support for the position of FIRE regarding speech policies on public college and university campuses. David Blair-Loy, legal director for the ACLU in California, told the California Advisory Committee: "I very much concur with FIRE's analysis of the applicable law. I think FIRE is absolutely right as a matter of First Amendment law and also as a matter of California State law (and) problems with overbroad speech codes."²⁹

The representative from the ACLU also agreed with the stated position of FIRE that narrowly tailored prohibitions on harassment are not only valid but necessary to protect equal educational opportunity. However, Blair-Loy cautioned that harassment policies must be carefully drafted to comply with the appropriate legal standards set out in the Supreme Court's *Davis* decision.

The California Advisory Committee heard from the ACLU that the California Education Code, section 66301, guarantees college and university students the same rights to freedom of speech on campus that they would have off campus. California law, therefore, essentially incorporates First Amendment law into the state's education statutes. So public colleges and universities in the state should not in theory have different free speech policies.

Blair-Loy further explained to the California Advisory Committee that in his opinion the protection of free speech on college and university campuses is an essential component of equal education opportunity. "Free speech is an essential part of academic inquiry. Without freedom of speech a college or university cannot function properly and cannot serve its highest mission to teach and explore all ideas and all points of view."³⁰

²⁹ David Blair-Loy, legal director of ACLU of San Diego & Imperial Counties, Campus Speech Transcript, p. 28.

³⁰ Ibid., p. 32.

Of specific interest to the California Advisory Committee is civil rights. The ACLU made it clear to the Committee that it holds that protecting free speech on public college and university campuses advances civil rights.

As Blair-Loy told the Committee: "Historically, the civil rights movement and the movement for equal opportunity could not have existed without the guarantee of freedom of speech against government censorship and against university censorship. During the civil rights movement, governments at the state and local level did their utmost to stop the civil rights movement through censorship. It was not just police dogs and fire houses that were used to quell the movement. Administrations on college campuses in the South and all over the country did everything within their power to stifle and censor the speech of civil rights activists.

***Freedom of speech has been essential
and continues to be essential to the
struggle for civil rights.***

--David Blair-Loy, ACLU

"It was because of the First Amendment and the efforts of civil rights lawyers defending the free speech rights of civil rights activists that the movement was able to continue and prevail. One of the problems with speech codes is that they inevitably backfire on the very minorities that they purport to protect."³¹

Blair-Loy concluded: "The way to change culture is to teach, to advocate, to persuade, to cultivate a new culture. There is nothing to say that a university or a college or a school cannot engage in its own advocacy through its own power of government speech. It can teach respect for diversity, it can cultivate tolerance and respect and foster these principles by persuasion and example rather than dictate."³²

³¹ Ibid., p. 34.

³² Ibid., p. 42.

Invited perspectives about speech policies on California's public colleges and universities

Council of University of California Faculty

Robert Meister, Chair, Council of UC Faculty Associations, expressed his concern to the California Advisory Committee regarding vicarious liability and the suppression of free speech on college campuses. Vicarious liability is liability that a supervisory party bears for the actions or conduct of a subordinate.³³

Meister told the California Advisory Committee that the University of California (UC) is applying the principle of vicarious liability to insulate itself from student protests against university policies. According to Meister, the University of California treats political protests and demonstrations using the same legal and disciplinary techniques it applies to fraternity parties. "When you have a fraternity party at a university, it is at least arguably the case that you want to develop disciplinary rules that encourage students to chill or perhaps to avoid going to a party that might turn wild or rowdy. The problem is that the central meaning of the First Amendment is that you cannot apply tort doctrines such as vicarious liability to protected speech and to the rules establishing public order, time, place, or manner of activities, some elements of which involve protected speech."³⁴

"The First Amendment, if it means anything at all, certainly blocks vicarious liability....It is not the case that the free-speech movement of the 1960s brought us free speech in the same degree that the civil rights movement brought us civil rights. The result of the free-speech movement was that faculty and students were fired and dismissed for activities that were political and faculty tenure was subject to good cause."³⁵

³³ Black's Law Dictionary, Seventh Edition.

³⁴ Robert Meister, Chairman, Council of UC Faculty Associations, Campus Speech Transcript, p. 46.

³⁵ Ibid., p. 53.

Los Angeles County Human Relations Commission

Colleges and universities are critical to educating individuals in the nonviolent resolution of differences. For many students, college is the last formal educational experience before they launch their full-time work careers. As such, they are in place to help students learn to exercise a balance between decency in debate and a respect for fundamental rights.

Although some speech can lead to harmful consequences, Robin Toma from the Los Angeles County Commission on Human rights told the California Advisory Committee that First Amendment right to free speech is critically important. With respect to education, "Free speech protected by the First Amendment must be balanced with the right to equal protection in pursuing (an) education...Research supports that where students experience biased related harassment incidents, they report depression in higher numbers, are absent from school more often, and have lower grades."³⁶

***"Speech that has controversial ideas—even those that are seen as racist or bigoted—should be challenged with more speech, not suppression."
--Robin Toma***

According to Toma it is critical that colleges and universities promote ways of engaging different points of views in respectful ways that do not demean others. He suggested that there are many resources available to college administrators that would allow for free-academic debate while ensuring a non-hostile environment protected by our civil rights laws on campus. Speech that is simply expressing controversial ideas—even those that are seen as racist or bigoted, is best challenged with more speech, not suppression.³⁷

³⁶ Robin Toma, executive director, Los Angeles County Human Relations Commission, Campus Speech Transcript, p. 94.

³⁷ Ibid., p. 96.

American Council of Trustees and Alumni (ACTA)

Anne Neal, president of the American Council of Trustees and Alumni (ACTA) told the California Advisory Committee that values such as civility and mutual respect are important, but not at the cost of chilling free speech. Citing an academic committee report on free speech developed in the 1970s at Yale University, “The university cannot make its primary and dominant value the fostering of friendship, solidarity, harmony, civility, or mutual respect without sacrificing its central purpose. Though the good university will seek and may in some significant measure attain these ends, (it) should never let these values—as important as they are—override the university’s central purpose to value the freedom of expression because it provides a forum for the new, the provocative, the disturbing, and the unorthodox.”³⁸

Neal told the California Advisory Committee that ACTA believes that a critical part of a quality education is a campus atmosphere that fosters open debate, vibrant dialogue, multiple viewpoints, and the free exchange of ideas. “Sadly, the free exchange of ideas is in many ways an endangered species on our college campuses. Many institutions around the country, including some in California, have put in place policies called speech codes, harassment codes, student-conduct codes, and free-speech zones that are really nothing more than wrongful restrictions of free speech protected by the First Amendment. “Far from encouraging the free exchange of ideas, these kinds of codes do just the opposite in putting certain areas of discussion off limits. Faced with speech codes or harassment policies, students and faculty will hold back from expressing controversial opinions and making forceful arguments when they are worried they might face disciplinary repercussions to constitutionally protected speech.”³⁹

³⁸ Anne Neal, president, American Council of Trustees and Alumni, Campus Speech Transcript, p. 61.

³⁹ Ibid., pp. 62, 64.

American Council on Education (ACE)

According to Ada Meloy, General Counsel, American Council on Education (ACE), “Institutions of higher education in California and elsewhere are struggling to walk the line between protection of free speech and maintenance of a vibrant and welcoming learning environment, and they are getting it right most of the time. Despite the complexities in 1st Amendment jurisprudence, colleges and universities are generally very successful in their implementation of speech policies.”⁴⁰

Meloy went on to tell the California Advisory Committee that ACE was aware of only three cases reported in the last three years concerning California public college and university speech policies. In two of those instances, the speech was accompanied by inappropriate conduct and lawsuits ensued.

“The essence of the university experience should be based on the un-limitable freedom of the human mind to follow truth and to tolerate any error so long as reason is left free to combat it.”
— Thomas Jefferson

The American Council on Education has issued a position statement on academic rights and responsibilities, which has been endorsed by 26 additional educational organizations including all of the major representatives of higher education. The statement asserts that intellectual pluralism and academic freedom are fundamental tenants of American higher education. Meloy cautioned, however, that “freedom of speech is not absolute under all circumstances and in all forums. Types of unprotected speech include the advocacy of illegal action, true threats, and defamation. Time, place, and manner restrictions can be permissible as long as done in a content natural way and providing other avenues for communication.”⁴¹

⁴⁰ Ada Meloy, General Counsel, American Council on Education, Campus Speech Transcript, p. 84.

⁴¹ Ibid., p. 88.

Conclusions

Although the Supreme Court issued its *Davis* ruling over 10 years ago explaining offensive speech or conduct only constitutes “harassment” which can be prohibited if it is “so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit;” and that ruling has been applied to institutions of higher learning in *DeJohn* and other court rulings; California public colleges and universities continue either to enact speech restrictions contrary to *Davis* or enforce student codes of conduct in a manner inconsistent with *Davis*.

Committee members subsequently learned that University of California’s president, Mark Yudof – a recognized expert in the fields of constitutional law, freedom of expression, and education law – had become aware of such problems with the University’s speech-restrictive policies. In an October 15, 2009, letter to the UC Chancellors, Yudof announced a new harassment policy “effective immediately,” noting that then-current harassment policies “create certain legal vulnerabilities” and “do not track current case law regarding the standards of discriminatory harassment.” The new UC harassment policy closely mirrors the 1999 *Davis* standard.⁴²

Recommendations

In order to effectuate governing federal policies, comply with controlling United States Supreme Court precedent, ensure the First Amendment rights of students, and ensure an atmosphere of collegiality and inclusiveness vital to institutions of higher learning in California; the California Advisory Committee recommends:

1. All public colleges and university campuses should immediately undertake a comprehensive review of the language of student codes of conduct to insure those codes are consistent with *Davis*, are not over-inclusive, and do not infringe on students' First Amendment rights.
2. The standard employed by the OCR should be used, i.e., in order to form the basis for any type of student disciplinary action, speech must “be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program.”
3. Colleges and universities should effectively communicate the proper standard to all constituencies, including, but not limited to, administrators, faculty, and students, through websites, faculty manuals, administrative policies, and informational materials provided to incoming students. The policy should be readily available to the general public, with access not restricted only to those with “passwords” for website access. Such materials should also be provided in alternative formats to accommodate persons with disabilities.
4. Student group leaders and their faculty advisors should be educated concerning these matters at the beginning of each academic year, and possibly required to execute a document attesting to the fact they have been so informed. This could be in conjunction with the educational program on the United States Constitution on September 17, Constitution Day, required of educational institutions that receive Federal funds under Public Law 108-447.

⁴² Leonard Mitchell and Matthew Rosenthal dissented from the report. Three other members, Kathay Feng, Robin Toma, and Betty Wilson, abstained from approving the report.

5. Students should be informed concerning the recourse available to them if they perceive their First Amendment rights have been violated, with those procedures clearly and readily available on official campus websites.
6. The processes by which a perceived violation of a student code of conduct is investigated, charged, and adjudicated must be transparent, with particular attention to notice and providing the charged party a meaningful opportunity to be heard and present evidence.
7. Colleges and universities should facilitate mediation sessions, with participation in such sessions a prerequisite to pursuing a claim for a violation of the student code of conduct based on speech activity.
8. The Committee also notes California's community college system faces its own unique circumstances, given the relative autonomy of various community college districts. The community college districts should enact a uniform system of conduct in this regard, which actually will ease the burden on each of the districts because they will not have to independently formulate their own policies.⁴³

⁴³ Mark G. Yudof, President, University of California, Charles B. Reed, Chancellor, California State University, and Jack Scott, Chancellor, California Community College were provided an opportunity to review and comment on the Committee's findings and recommendations. The response of the U.S. Department of Education, Office for Civil Rights is included in this report.

Dissenting Member Comment⁴⁴

Matthew Rosenthal dissented, writing:

I do not approve the final report of the free speech briefing. I believe public educational institutions must ensure an inclusive, non-discriminatory atmosphere for all students independent of their race, color, religion, sex, age, disability, or national origin. The right to equal access to education is a civil right. I feel confident that this is the purpose of anti-harassment policies on campuses that limit speech. Moreover, the report as issued does not fall within our mandate.

The guidelines of the state advisory committees are very clear. We are allowed to conduct only the following activities: (1) evaluate discrimination or denial of equal protection under the law due to race, color, religion, sex, age, disability, or national origin; (2) appraise federal laws or policies with respect to discrimination or denial to equal protection of the laws due to race, color, religion, sex, age, disability, or national origin; (3) examine voting rights violations.

The attached report does none of these things. It does not examine discrimination or denial of equal treatment in terms of how anti-harassment policies on campuses are perpetuated. It merely compares state policies to federal policies but does not mention discrimination at all. It does not evaluate federal policies in terms of discrimination. In fact, to the contrary, this report actually praises federal policies, and suggests they be upheld, while stating that California institutions are in violation of them.

We are only allowed to examine federal laws and policies, or Californian policies that include discrimination. The report fails on this point. It does not evaluate voting violations. The fact is that we have no authorization to determine whether California state university and college policies are in violation of the Constitutional right to free speech if there is no substantial discussion of discrimination, however meaningful a topic it may be.

⁴⁴ Leonard Mitchell, the other dissenting member, did not provide a written dissent.

Response from the U.S. Department of Education Office for Civil Rights

United States Department of Education
Office for Civil Rights
400 Maryland Ave., S.W.
Washington D.C. 20202-1100

May 20, 2011

Peter Minarik, Regional Director
U.S. Commission on Civil Rights, Western Region
300 N. Los Angeles Street, Suite 2010
Los Angeles, CA 90012

Dear Dr. Minarik:

Thank you for the opportunity to comment on the references to the U.S. Department of Education's Office for Civil Rights ("OCR") in the Commission's draft report, *Equal Educational Opportunity and Free Speech on Public College and University Campuses in California*

We call your attention to the quotation in the first full paragraph on page 3. ("Under Title VI of the Civil Rights Act of 1964, 'The existence of a racially hostile environment that I created, encouraged, accepted, tolerated, or left uncorrected on campus can constitute a violation of Title 6 by the institution.'") Although we are unaware of that specific language in Public Law 88-352, OCR's 1994 Investigative Guidance on Racial Incidents and Harassment Against Students contains an almost identical statement. See Fed. Reg. 11,848 (Mar. 10, 1994) ("In addition, the existence of a racially hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient also constitutes different treatment on the basis of race in violation of title VI."), available at <http://www2.ed.gov/about/offices/list/ocr/docs/race394.html>. The Commission may wish to change the citation in footnote 5 to the 1994 guidance if it retains the quoted passage.

Again, thank you for affording us the opportunity to comment on references to OCR in the draft report.¹

Sincerely,

< signed >

Ricardo Soto
Deputy Assistant Secretary for Civil Rights

¹. Aside from the corrections listed above, the Commission may want to consider a slight revision to the first sentence of the third full paragraph on page 2. A more precise statement of *Davis* would be: "In 1999 the Supreme Court in *Davis v. Monroe County Board of Education* ... held a parent could bring a private action for monetary damages against a school board"

Response from California State University⁴⁵

California State University
Office of the Chancellor
401 Golden Shore
Long Beach, CA 90802

February 1, 2012

Dr. Peter Minarik, Regional Director
U.S. Commission on Civil Rights
Western Regional Office
300 North Los Angeles Street, Suite 2010
Los Angeles, CA 90012

Dear Dr. Minarik:

This report announces the Commission's conclusion that:

"Although the Supreme Court issued its *Davis* ruling over 10 years ago explaining offensive speech or conduct only constitutes "harassment" which can be prohibited if it is "so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit," and that ruling has been applied to institutions of higher learning in *DeJohn* and other court rulings, California public colleges and universities continue either to enact speech restrictions contrary to *Davis* or enforce students codes of conduct in a manner inconsistent with *Davis*." (Emphasis added.)

No example, however, is cited -- from the California State University, the University of California or the California Community Colleges -- to support the conclusion that any of these institutions has "enforce[d] students codes of conduct in a manner inconsistent with *Davis*" or that student speech has been impermissibly curtailed at any of these institutions.

The public hearing the Commission held to receive testimony on these issues took place almost two years ago on April 18, 2010. On October 26, 2010, the U.S. Department of Education Office of Civil Rights (OCR) issued a "Dear Colleague" letter to institutions of higher education across the country addressing their legal obligations to address bullying and harassment, which often takes the form of speech. On April 4, 2011, OCR issued a second "Dear Colleague" letter addressing in some detail the responsibilities of institutions of higher education under Title IX of the Education Amendments of 1972 when dealing with complaints of sexual harassment, which again can involve speech, and sexual violence. Despite the relevance of these issues to those under consideration by the Commission, no reference to or mention is made of a sister federal agency's important guidance in the report. As just one example of the ramifications of the Commission's failure to consider the inter-relationship between the guidance being given to the higher education community by two different agencies of the federal government, one of the

⁴⁵ The Committee did not receive a reply from Mark G. Yudof, President, University of California, or Jack Scott, Chancellor, California Community College.

Commission's recommendations is that "[c]olleges and universities should facilitate mediation sessions, with participation in such sessions a prerequisite to pursuing a claim for a violation of the student code of conduct based on speech activity." The OCR's April 4, 2011 "Dear Colleague" letter gives the exact opposite direction, that mediation is not appropriate even on a voluntary basis when a sexual harassment claim (which can involve speech) includes any kind of sexual assault.

The CSU has a strong commitment to upholding the free speech rights of all members of the university community, as well as protecting all members of the university community from impermissible discrimination and harassment. In the wake of the OCR's October 2010 and April 2011 guidance, the CSU has for the last 6-8 months been working closely with OCR to update its student harassment policies and expects that process will be completed in the very near future. We expect those updated policies will for the most part address concerns that the Commission may have as a result of this report.

With kind regards,

Sincerely,

< signed >

Charles B. Reed
Chancellor

**California Advisory Committee
to the
United States Commission on Civil Rights**



U.S. Commission Contact

| | |
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This report is the work of the California State Advisory Committee to the United States Commission on Civil Rights. The report, which may rely on studies and data generated by third parties, is not subject to an independent review by the Commission staff. The views expressed in this report and the findings and recommendations contained herein are those of a majority of the State Advisory Committee members and do not necessarily represent the views of the Commission or its individual members, nor do they represent the policies of the U. S. Government. This report can be obtained in print form or on disk in Word format from the U.S. Commission on Civil Rights by contacting the named Commission contact person. It is also posted on the web-site of the Commission at www.usccr.gov.