



A D A M S
D A Y
H I L L
ATTORNEYS AT LAW

March 9, 2011

COPY

President Cheryl Roberts
Chemeketa Community College
4000 Lancaster Drive NE
P.O. Box 14007
Salem, Oregon 97309

Re: *Violation of Students' First Amendment Rights*
Aggrieved Persons: Frederick "Caleb" Pearson and Devaun Ramsey

Dear President Roberts:

I have been retained as local counsel by the Alliance Defense Fund on behalf of Caleb Pearson and Devaun Ramsey. The Alliance Defense Fund is a public interest legal organization dedicated to defending the First Amendment rights of students and faculty on university campuses. The purpose of this letter concerns Chemeketa Community College's "Free Speech Zone" and harassment policies on Mr. Pearson's and Mr. Ramsey's constitutional rights. To assist you in understanding how the College's policies infringe upon these individual's constitutional rights, I am summarizing the current relevant law on the subject matter.

FACTUAL BACKGROUND

A. Suppression of the Students' Speech Activity.

On Monday, October 25, 2010, Mr. Pearson arrived at the College to express his religious and moral beliefs about abortion. Mr. Pearson brought with him two 4 x 8 foot signs discussing the sanctity of human life. Mr. Pearson also brought with him pamphlets to distribute to willing recipients. Mr. Pearson began displaying his signs in the central area of the campus between Building 1 (the bookstore) and Building 9 (the library). Approximately 20 minutes after arriving in the quad, Officer Bryan K. Bagwell and Officer, Robert LaFollette, approached Mr. Pearson and informed him that free speech is allowed only at the "free speech table" located inside Building 2. They informed Mr. Pearson that he needed to go through the proper channels of the Office of Student Retention and College Life to request approval to express his views at the free speech table. They told him to pick up his signs and leave. After some further conversation, Mr. Pearson stopped displaying his signs.

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On Thursday, December, 16, 2010, Mr. Pearson met with Peter Starr, Civic Engagement, Community Service, and Service Learning Coordinator for the Office of Student Retention and College Life, to obtain a copy of the Free Speech Agreement Guidelines and the Free Speech Zone Application. Mr. Starr informed Mr. Pearson that he heard that a trespassing order was issued against him and that if he was seen again on the College campus he would be trespassing. Mr. Starr also informed Mr. Pearson that the trespassing order would prevent Mr. Pearson from reserving the free speech zone. Mr. Pearson asked Mr. Starr if he could stand in the central area of campus holding signs depicting the Rwandan genocide and the United Nations' failure to remedy the problem. Mr. Starr told him that it would depend on the content of the signs.

After meeting with Mr. Starr, Mr. Pearson inquired about the trespassing order by contacting the Public Safety Office. Sergeant Dennis Kirk provided Mr. Pearson with a memorandum that states there is no trespassing order against Mr. Pearson. Mr. Pearson has not held his signs on campus since being told to remove them by Officers Bagwell and LaFollette.

Mr. Ramsey also desires to hold pro-life signs and distribute literature about the sanctity of life on campus like Mr. Pearson. After hearing about Mr. Pearson's attempt to display signs and distribute literature on campus in October 2010, and the attendant threats of punishment by College officials, Mr. Ramsey has withheld his pro-life speech on campus.

B. The College's "Free Speech Zone" Policy.

The College restricts student speech to one table on the Salem campus, which students must reserve in advance. According to the College's Free Speech Agreement Guidelines¹ ("Guidelines"):

Users desiring space shall be directed to a "Free Speech Zone." On the Salem campus, this area is defined as a space at the base of the stairs in the lobby of Building 2, and shall be large enough to accommodate one six foot table and two chairs. Users shall contain their presentation and materials to this area only.

Users wanting to conduct Free Speech activities outdoors should contact the Office of Student Retention and College Life for scheduling and availability.

The Guidelines also state: "Users shall contain their presentation and materials to the designated 'Free Speech Zone.'" The "Free Speech Zone" is inadequate for Mr. Pearson's and Mr. Ramsey's desired expression.

To reserve the "Free Speech Zone," students must submit a Free Speech Zone Application,² which requires students to obtain approval from the Office of Student Retention and College Life at least one week in advance of their desired use of the table. Reasons an

¹ See Free Speech Agreement Guidelines, available at <http://www.chemeketa.edu/aboutchemeketa/collegelife/studentrights/documents/freespeechform.pdf> (last visited Mar. 8, 2011).

² See Free Speech Zone Application, available at <http://www.chemeketa.edu/aboutchemeketa/collegelife/studentrights/documents/freespeechapplication.pdf> (last visited Mar. 8, 2011).

application may be rejected are not specified in writing on the application, nor on any other known College document.

C. The College's Speech Code.

The College's 2010-11 Catalog includes the College's policy on Student Rights and Responsibilities. According to this policy, the College holds students responsible for "conduct[ing] themselves in accordance with the standards as set forth in this policy." The policy's "code of behavior" requires students to "[d]iscourage bigotry" and "not participate in . . . verbal abuse of any individual." See Student Rights and Responsibilities, *Chemeketa Community College Catalog* 234 (2010-2011). A student who violates the policy is subject to punishment.

The policy on Student Rights and Responsibilities also prohibits "discrimination or harassment." *Catalog* 237, Part VIII. The policy defines harassment as follows:

Harassment is any verbal, visual or physical behavior reasonably perceived by the receiver as unwelcome or offensive and refers in a demeaning way to a person's race, religion, color, gender, marital status, national origin, age, sexual orientation, disability, pregnancy and related conditions, family relationship, veterans status, or cigarette usage; creates a hostile or adverse work or educational environment. . .

Catalog 237-38, Part VIII.C. The policy gives examples of harassment that "[m]ay include, but are not limited to" "comments," and "jokes." *Catalog* 238, Part VIII.D.

LEGAL ANALYSIS

I. The College's "Free Speech Zone" Policy Violates the Students' First Amendment Rights.

The College's policy of prohibiting student speech unless it occurs in the "Free Speech Zone" is unconstitutional. Colleges and universities are "not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180 (1972). In fact, the "college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Id.* The "campus of a public university, at least for its students, possesses many of the characteristics of a public forum." *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981); accord *Flint v. Dennison*, 488 F.3d 816, 831 (9th Cir. 2007) (finding that while a student government election is a limited public forum, the university campus at large is a public forum for students); *Souders v. Lucero*, 196 F.3d 1040, 1044 (9th Cir. 1999) (suggesting the campus of Oregon State University is a public forum, just not a traditional public forum).

Because the College is a public forum for students, the "Free Speech Zone" is an unconstitutional limitation on free speech. *Widmar*, 454 U.S. at 268 n.5. In *Roberts v. Haragan*, 346 F. Supp. 2d 853, 861 (N.D. Tex. 2004), the court found that to the extent that Texas Tech's campus has "park areas, sidewalks, streets, or other similar common areas, these areas are public

forums, at least for the University's students, irrespective of whether the University has so designated them or not." The restriction of student speech to a small table on campus violates students' right to free speech on campus.

Further, the Guidelines and Application are a prior restraint on student speech and give administrators unbridled discretion to determine whether to allow speech in the "zone." Any regulation requiring authorization from a public official before expressive activity may occur in a public forum is a prior restraint on speech. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Prior restraints are presumptively unconstitutional and may not grant government officials unbridled discretion. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969); *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963). The Guidelines and Application grant total discretion to College officials like Starr to determine if and when speech is allowed. They also require students to obtain advanced permission before any speech activity may occur. There are no written criteria to guide these decisions, and no specified reasons that an administrator may deny permission for an expressive activity. Courts have struck down policies like these at other community colleges. *See Khademi v. S. Orange County Cmty. Coll. Dist.*, 194 F. Supp. 2d 1011, 1023 (C.D. Cal. 2002) (striking down policy that required advanced reservation for student free speech at community college); *Burbridge v. Sampson*, 74 F. Supp. 940, 953 (C.D. Cal. 1999) (enjoining requirement that students obtain permit to speak on campus). Because the College's policies are a prior restraint on speech and contain no standards to guide administrator's decisions, they are unconstitutional and must be changed.

Finally, the College's Guidelines and Application also allow for content-based discrimination. While the Guidelines and Application may be facially content-neutral, administrators can apply them in a content-based manner because their discretion is virtually unrestrained. *Forsyth County*, 505 U.S. at 133 n.10. This is demonstrated by Mr. Starr's statement that he would consider the content of Mr. Pearson's proposed Rwandan genocide signs before allow them on campus.

The College's "Free Speech Zone" virtually eliminates the ability of Mr. Pearson, Mr. Ramsey, and all students to speak freely on campus. In addition, the Guidelines and Application vest College administrators with unbridled discretion because they lack any standards for enforcement. As a result, Mr. Pearson was denied the ability to speak on October 25, 2010. The College must eliminate the "Free Speech Zone" and bring the other policies into compliance with the Constitution.

II. The College's Speech Code Violates Students First and Fourteenth Amendment Rights.

The College's policy on Student Rights and Responsibilities is unconstitutionally overbroad and vague. The College's harassment policy is facially overbroad because it bans speech based on the subjective reaction of listeners. It prohibits "unwelcome," "offensive," and "demeaning" behavior, without providing a constitutional definition of what those terms mean. What speech may be punished, when, and how, is not constrained by the College's policy and is left solely to the unfettered discretion of administrators and the subjective impressions of listeners. It also fails to require a showing of severity or pervasiveness before permitting

punishment. According to the Supreme Court, in a secondary school context—not to mention a university context where the Constitution demands less regulation of speech—only harassment that is “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities” loses its protection under the First Amendment and may be prohibited. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999). The College’s harassment policy fails to require a threshold showing of severity or pervasiveness before punishing “harassment,” “unwelcome,” “offensive,” or “demeaning” speech. Thus, the College’s policy is overbroad.

The College’s policy on Student Rights and Responsibilities is also unconstitutionally vague, because it fails to provide adequate notice, authorizes arbitrary and discriminatory enforcement, and chills free speech. See *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The College does not provide fair notice of prohibited conduct. Students must “discourage bigotry” and not participate in “verbal abuse.” They may not engage in “unwelcome or offensive” speech or speech that “refers in a demeaning way” to a person’s characteristics, including “pregnancy and related conditions.” These terms are not self-defining. See *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (“In order to determine what conduct will be considered ‘negative’ or ‘offensive’ by the university, one must make a subjective reference.”). Left undefined, the College can use the speech code to silence disfavored expression. The College’s policy on Student Rights and Responsibilities is unconstitutionally vague and overbroad.

DEMAND

In light of these clear constitutional violations, Mr. Pearson and Mr. Ramsey request that these barriers to student speech be removed by rescinding the “Free Speech Zone” policy and revising the policy on Student Rights and Responsibilities. Mr. Pearson and Mr. Ramsey are prepared to proceed to immediate litigation in federal court if necessary. However, in an attempt to avoid costly and protracted litigation, we are willing to assist you in revising these unconstitutional policies. As time is of the essence, please advise how the College wishes to proceed by **March 23, 2011**. Otherwise, Mr. Pearson and Mr. Ramsey intend to seek redress in federal court with the assistance of the Alliance Defense Fund Center for Academic Freedom.

I look forward to resolving these issues with you.

Best Regards,

ADAMS DAY & HILL

/s/ *Daniel A. Hill*

DANIEL A. HILL

Attorney at Law

cc: Richard Riggs, Chairman, Chemeketa Community College Board of Education
David J. Hacker, Esq. ✓