ALLIANCE DEFENSE FUND
Defending Our First Liberty

May 25, 2012

Bill Garrett, President
Governing Board
Grossmont-Cuyamaca Community College District
8800 Grossmont College Drive
El Cajon, California 92020
Via U.S. Mail and email to bill.garrett@gcccd.edu

Agustín Albarrán, Associate Dean
Student Affairs
Grossmont College
8800 Grossmont College Drive
El Cajon, California 92020
Via U.S. Mail and facsimile to (619) 644-7906

Re: Notification of Violation of Student's First Amendment Rights and Demand for Immediate Action

Dear Messrs. Garrett and Albarrán:

I represent Roberta Steele, a student at Grossmont College ("College"), who contacted the Alliance Defense Fund ("ADF") regarding a violation of her constitutional rights to freedom of speech and due process of law. By way of introduction, ADF is a legal alliance that defends America's first liberty—religious freedom. We are dedicated to ensuring that religious students enjoy rights to speak, associate, and learn on an equal basis with all other students. I ask that you immediately rectify the following situation.

FACTUAL BACKGROUND

A. Suppression of Ms. Steele's Constitutionally Protected Speech.

According to our information, Ms. Steele is president of The Forgiven ("Club"), a Christian club at the College. This year, the Club had a two month ongoing reservation to use two tables and 6-8 chairs on campus to advertise the Club and distribute information about it. The Club intended to use the tables and chairs for the National Day of Prayer on May 3, 2012. On May 2, Ms. Steele called to confirm the reservation and was told that it expired on April 26. Ms. Steele asked if she could extend the reservation and was told to inquire at Student Affairs.

On her way to Student Affairs, Ms. Steele saw that there were four tables and a rack of chairs near the location where she would have needed them the next day, and she knew that the College's facilities department set up events on short notice. Ms. Steele went inside the Griffin Center to Student Affairs hoping to extend the reservation. Upon arriving at Student Affairs, Director of Student Affairs Sara Glasgow would not allow the extension. She told Ms. Steele to submit another facility request form, which Ms. Steele did. Ms. Steele requested tables and chairs for May 3, 10, and 17, 2012. By email dated May 2, Ms. Glasgow denied the request for May 3 and 10 because College policy requires students to make table reservations ten business days in advance of the intended use.[1]

On May 3, Ms. Steele dropped off Club flyers and Bible tracts at the Associated Students of Grossmont College office. As she was leaving the north side of the Griffin Center, she saw students outside collecting petition signatures and the Cross Country Club distributing flyers to students. It was then she thought about handing out the Club's flyers in the same location as these other individuals. Ms. Steele stood outside on the north side of the Griffin Center and offered the flyers to students, giving them only to those students who wanted them. When she had 4-5 cards left, she moved closer to the entrance of the Student Center to finish handing them out. It was then Mr. Albarrán confronted her, asked her what she was doing, and told her she knew better. He told her she could not distribute flyers because it violated College policy. When she asked Mr. Albarrán about the petitioners and the running club, he said those circumstances were different.

At 2:28 p.m. on May 3, 2012, Mr. Albarrán's administrative assistant emailed Ms. Steele and notified her of "a matter of great importance on the future of your student status at Grossmont College." The email requested Ms. Steele contact immediately the Student Affairs Office to make an appointment with Mr. Albarrán to discuss Ms. Steele's flyer distribution earlier that day. The email also notified Ms. Steele that Mr. Albarrán and his office took punitive measures against Ms. Steele by placing an academic enrollment hold on Ms. Steele's student account because of this incident, which prevents her from adding/dropping classes until the matter is resolved.

At 4:26 p.m. on May 3, Ms. Steele responded to Mr. Albarrán by email, noted she had just spoken to his office by phone, and requested the presence of an attorney if the meeting could have a negative impact on her scholastic record.

Mr. Albarrán responded at 5:00 p.m. on May 3. He wrote that he witnessed Ms. Steele distributing flyers about the Club earlier that day near the Griffin Center. He indicated that Ms. Steele's flyer distribution violated College policy and that it needed to occur in the Campus Free Speech Areas. He also indicated that the activity of the signature gatherers was different from Ms. Steele's distribution of flyers. Mr. Albarrán told Ms. Steele that she must seek pre-approval to distribute flyers pursuant to the Campus Posting Guidelines "if you are wishing to affix posters/leaflets/flyers to any district structures" or seek pre-approval of the Student Affairs Office for a "'tabling' event such as you were essentially doing today without a table." Finally,

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[1] Grossmont College Club Manual § III(e)(ii), Event Planning, *available at* http://www.grossmont.edu/student_activities/docs/ICC%20Club%20Manual%20Updated%208.11.pdf (last visited May 25, 2012).

Mr. Albarrán accused Ms. Steele of directly disobeying Ms. Glasgow's directive that Ms. Steele apply for approval to distribute flyers ten working days in advance of the intended activity.

At 7:43 p.m. on May 3, Mr. Albarrán sent another email to Ms. Steele. Mr. Albarrán stated that she is "being called to [] answer to allegations of student misconduct, raised by me, Agustín Albarrán/Associate Dean, Student Affairs." He also denied her request to bring an attorney to the meeting.

Scott Barr, Ms. Steele's scholastic advisor at the College, contacted Mr. Albarrán's office on May 4 and asked if he could attend the meeting with Ms. Steele. Mr. Albarrán denied the request.

Ms. Steele met with Mr. Albarrán on May 15, 2012, whereupon he again accused Ms. Steele of violating College policies by not obtaining pre-approval to "table" and distribute flyers, engaging in speech outside the Campus Free Speech Areas, and disobeying a directive from a College employee. Despite Ms. Steele's attempt to clarify the situation, Mr. Albarrán threatened her with a formal disciplinary hearing, unless she agreed to sign a warning letter admitting to violating College policies. Mr. Albarrán likened the warning letter to a doctor prescribing a cold pack and ibuprofen for a finger injury, rather than administering stitches or amputating the finger. In other words, if Ms. Steele did not take her medicine and sign the letter, Mr. Albarrán intended to proceed with a formal hearing, which could "amputate" and expel her from the College. Ms. Steele did not sign the warning letter, so Mr. Albarrán wrote "VOID" across each page and gave it to her.

Finally, we are aware that two of the Club's posters, which were stamped by the College to remain up until May 30, have been taken down. A police report has been made.

B. The District's "Speech: Time, Place, and Manner" Policies, and The College's Facilities Use Policy.

Grossmont-Cuyamaca Community College District ("District") Board Policy ("BP") 5550 states that the "colleges in the District are non-public forums, except for those areas that are generally available for use by students or the community, which are limited public forums."[2] The policy further states that

> administrative procedures promulgated by the Chancellor shall not prohibit the right of students to exercise free expression, including but not limited to the use of bulletin boards designated for such use, the distribution of printed materials or petitions in those parts of the college designated areas generally available to students and the community, and the wearing of buttons, badges, or other insignia. Students shall be free to exercise their rights of free expression, subject to the requirements of this policy.[3]

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[2] Grossmont-Cuyamaca Community College District Board Policy 5550, *available at* http://www.gcccd.edu/governing-board/documents/policies/ch5/BP%205550.pdf (last visited May 25, 2012).
[3] *Id.*

Administrative Procedure ("AP") 5550 further conditions students' rights to free expression on compliance with District policy.[4] AP 5550 designates the District's campuses as non-public forums, except for designated areas generally available to students and the community, which are designated as limited public forums subject revocation at any time.[5] AP 5550 requires students to obtain advanced permission before engaging in speech activities in the District's free speech zones:

> The use of areas generally available to students and the community is subject to the following: Persons using areas generally available to students and the community and/or distributing material in the areas generally available to students and the community must register with the Student Affairs Office prior to speaking, presenting, or distributing material.[6]

AP 5550 also prohibits the literature distribution anywhere outside the District's speech zones.[7]

The College's Facilities Use Policy requires students to apply to use a campus facility, which includes tables and chairs, and apparently also includes simple flyer distribution, "no less than ten (10) working days in advance of the event to allow for sufficient time for the Campus Facilities and Operations Office to verify availability and preparation for the event."[8] Late applications may cause the request to be denied.

LEGAL ANALYSIS

I. The District's Speech Zones Violate the First Amendment.

The District's policy of prohibiting student speech unless it occurs in a designated speech zone is unconstitutional and unlawful under the First Amendment and California law. 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).

Federal courts in California and the Ninth Circuit have held that a college campus is a public forum, or have analyzed it as such. *See 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); *Khademi v. S. Orange Cnty. Cmty. Coll. Dist.*, 194 F. Supp. 2d 1011, 1024 (C.D.

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[4] Grossmont-Cuyamaca Community College District Administrative Procedure 5550, *available at* http://www.gcccd.edu/governing-board/documents/procedures/ch5/AP%205550.pdf (last visited May 25, 2012).
[5] *Id.*
[6] *Id.*
[7] *Id.*; *see supra* note 1 at § III(e)(xi).
[8] *See supra* note 1 at § III(e)(ii).

Cal. 2002) (finding the generally available areas of a community college campus are public fora because they are open to the public); *Burbridge v. Sampson*, 74 F. Supp. 2d 940 (C.D. Cal. 1999) (finding a community college campus to be a public forum because it is open to the public); *cf. O'Toole v. Superior Court*, 44 Cal. Rptr. 3d 531 (Cal. Ct. App. 2006) (analyzing a permit requirement for nonstudent speech on a community college campus as a prior restraint in a public forum, using strict scrutiny). Other federal courts across the country have found that the outdoor areas of university campuses are public fora. *See, e.g., Bowman v. White*, 444 F.3d 967, 979 (8th Cir. 2006); *Justice for All v. Faulkner*, 410 F.3d 760, 768-69 (5th Cir. 2005); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 861 (N.D. Tex. 2004); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 582 (S.D. Tex. 2003).

Aside from federal law, California law supports the conclusion that the campuses of the District are public fora. California law presumes and requires that community college students are permitted to engage in expressive activities on community college campuses. Cal. Educ. Code § 76120 states that the "governing board of a community college district shall adopt rules and regulations relating 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 those activities." California law further provides that community college campuses are open to the public for expressive use. Cal. Educ. Code § 82537(a) provides:

> There is a civic center at each and every community college within the state where the citizens . . . may meet and discuss . . . any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside.

See also Cal. Educ. Code § 82537(b). In *Burbridge*, the court cited § 82537 as support for its conclusion that "there is no doubt that the forum at issue—the facilities and areas on campus which the college has made generally available for use by students and the community at large . . . have been opened to the public." 74 F. Supp. 2d at 948. Indeed, the simple fact that these institutions are referred to as "community" colleges underscores their role as a place to facilitate intellectual development and the exchange of ideas for the population residing in their vicinity—especially for students. Under applicable precedent, the District must allow students to engage in expressive activity in the common areas of campus. BP 5550 and AP 5550 violate the First Amendment and California law because they prohibit students from speaking freely in the common areas of campus and instead limit student free speech to small speech zones.

II. The District's Requirement that Students Get Prior Approval Before Speaking Is an Unconstitutional Prior Restraint on Speech.

Because "students enjoy First Amendment rights of speech and association on the [college] campus . . . the denial of use of campus facilities for . . . appropriate purposes must be subjected to the level of scrutiny appropriate to any form of prior restraint." *Widmar*, 454 U.S. at 268 n.5 (citing *Healy*, 408 U.S. at 181, 183) (internal quotations omitted). Any regulation requiring authorization from a public official before expressive activity may occur in a public forum is a prior restraint on speech. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130

(1992). The District claims to value free speech by students, but at the same time, the District enforces draconian policies designed to stifle and punish the exercise of First Amendment rights. BP 5550 and AP 5550 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 California community colleges. *See Khademi*, 194 F. Supp. 2d at 1023 (striking down policy that required advanced reservation for student free speech at community college); *Burbridge*, 74 F. Supp. at 953 (enjoining requirement that students obtain permit to speak on campus).

In order to survive constitutional scrutiny, a regulation or scheme amounting to a prior restraint in a public forum must meet several requirements. First, it may not delegate overly broad discretion to a government official. *Forsyth Cnty.*, 505 U.S. at 130. Second, any prior restraint that controls the time, place, or manner of speech must not be based on the content of the message. *Id.* Finally, the regulation must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication. *Id.* It is enough that the District's policies fail just one of these requirements to render them unconstitutional; but as discussed below, they fail each requirement.

A. The District's Policies Grant Administrators Unbridled Discretion to Censor Speech.

The Supreme Court consistently condemns regulations on speech that vest discretion in an administrative official to grant or withhold a permit based upon broad criteria unrelated to the proper regulation of public places. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969). If the permit scheme involves the appraisal of facts, exercise of judgment, and formation of an opinion, the danger of censorship is too great to be permitted. *Forsyth Cnty.*, 505 U.S. at 131. Neither BP 5550 nor AP 5550 provide any criteria administrators like Mr. Albarrán or Ms. Glasgow are supposed to use when deciding whether to grant or withhold a student's request to speak on campus. Nor does the College Club Manual provide any criteria. As it stands, student free speech is regulated at the whim of administrators.

B. The District's Policies Permit Content and Viewpoint Discrimination, and Enabled Mr. Albarrán to Censor Ms. Steele's Speech Because of Her Viewpoint.

"Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). The District's policies are not content-neutral because they allow administrators to regulate speech without any criteria restraining their decisions. This alone, even without any evidence of actual content-based discrimination, is enough to find these regulations facially unconstitutional. *Forsyth Cnty.*, 505 U.S. at 133 n.10. Yet there is actual evidence of discrimination by Mr. Albarrán. He allowed students to gather signatures for a petition and distribute flyers about a running club, but prohibited Ms. Steele from distributing Christian flyers and is punishing her for it. That is unconstitutional content and viewpoint discrimination. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995)

C. The District's Policies Are Not Narrowly Tailored to a Significant Government Interest.

A prior restraint on speech in a public forum must also be narrowly tailored to serve a significant government interest. In order to satisfy this requirement, a regulation must promote a "substantial government interest that would be achieved less effectively absent the regulation," but must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). We do not dispute that the District has an interest in maintaining its college campuses for educational purposes. But under clear precedent, BP 5550, AP 5550, and the Facilities Use Policy are not narrowly tailored to serve that interest and are facially unconstitutional prior restraints on this basis as well.

To engage in any expressive activity on campus, Ms. Steele must first seek the permission of the Student Affairs Office. And, if she desires to use a campus table for her speech activity, she must seek permission ten working days in advance. Spontaneous and anonymous expression are prohibited completely by these policies.

"Advance notice or registration requirements drastically burden free speech. They stifle spontaneous expression." *Rosen v. Port of Portland*, 641 F.2d 1243, 1249 (9th Cir. 1981); *see also Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166-67 (2002) (striking down permit requirement because it disables spontaneous and anonymous speech). The Ninth Circuit has struck down seven day, *Grossman v. City of Portland*, 33 F.3d 1200, 1204, 1207-08 (9th Cir. 1994), and even one day advanced notice requirements, *Rosen*, 641 F.2d at 1249, because they lacked narrowly tailoring and disabled spontaneous and anonymous speech.

The District's and College's policies prevent spontaneous and anonymous speech because they require students to get permission before they engage in speech and to get approval ten business days before they may use a campus table for their club. And while the College may have a legitimate interest in coordinating uses of campus facilities, that does not require advanced notice for one student or ten business days notice for a table. *See Roberts*, 346 F. Supp. 2d at 870 (striking down two day notice requirement at Texas Tech University because it was not narrowly tailored to the universities interest in preserving its educational mission).

D. The District's Policies Do Not Leave Open Alternative Channels of Communication.

Finally, the BP 5550, AP 5550, and the Facilities Use Policy do not leave open ample alternative channels of communication. The District restricts student speech to designated areas, yet never tells students where those areas are. Thus, these areas may not encompass the speaker's intended audience, and if the speech zone is reserved already, a student may not speak at all. *See Burbridge*, 74 F. Supp. 2d at 951 (finding restriction of student speech to "preferred areas" on campus did not provide ample alternative channels of communication).

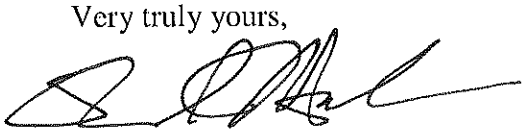
The District's and College's policies violate the First Amendment because they are unconstitutional prior restraints on speech that give administrators unbridled discretion, regulate speech based on its content, are not narrowly tailored to the District's interests, and fail to leave students with ample alternative channels of communication. As a result, Mr. Albarrán not only censored Ms. Steele's protected speech, but is now in the process of punishing her for it.

DEMAND

In light of these clear constitutional violations, my client demands that you immediately (1) cease and desist from pursuing further punitive measures against her, (2) expunge from her student file any allegation of wrongdoing arising from this incident, (3) allow her to distribute her flyers, (4) restore her full access to her student account, and (5) remove these barriers to student speech by rescinding BP 5550, AP 5550, and the Facilities Use Policy and revising these policies to conform to constitutional norms. As litigation is one possibility, we also advise you to take all steps necessary to prevent the destruction of any documents connected with, discussing, or relevant to the incidents described herein.

Be advised that my office has extensive experience litigating these types of matters. Please notify me in writing by close of business on **June 8, 2012,** that you are taking the corrective measures outlined above. If I do not receive confirmation by then, my client will immediately proceed with litigation and seek a court order against the District to remedy these constitutional violations.

Very truly yours,



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