FIRE

Foundation for Individual Rights in Education

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

May 13, 2011

David Urban
Liebert Cassidy Whitmore
6033 West Century Boulevard, Suite 500
Los Angeles, California 90045

Sent via U.S. Mail and Facsimile (310-337-0837)

Dear Mr. Urban:

FIRE is in receipt of your April 13 response to our March 18, 2011, letter. Thank you for your prompt reply. While we were pleased to hear from you, we disagree with both your legal arguments and your conclusion. Our response below further explains why Antelope Valley College indeed violated Professor Lance Hodge's First Amendment free speech and academic freedom rights.

First, your letter fails to indicate why what you deem to be a "threshold matter"—Professor Hodge's alleged decision to terminate his involvement in the grievance process established by his union's collective bargaining agreement—has any relevance to the First Amendment concerns implicated by the facts at issue. Per the terms of the current Collective Bargaining Agreement, Hodge's grievance is currently at Level Four, which provides for mediation. This mediation cannot be waived without mutual agreement of the parties (namely the District and the Federation), and there is no time limit for initiating mediation.[1]

Even if Hodge had terminated his involvement in the grievance procedure, which he has not, such a decision has no bearing on his ability to vindicate his First Amendment rights in court. *See Heath v. Cleary*, 708 F.2d 1376, 1378 (9th Cir. 1984) ("[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action [for a violation of constitutional rights] pursuant to § 1983.") (quoting *Patsy v. Board of Regents*, 457 U.S. 496, 507 (1982)). Courts have recognized this principle for decades, and Professor Hodge's alleged disinclination to complete the university's grievance process neither excuses nor ameliorates AVC's significant violation of his First Amendment rights. (Indeed, it is important to note that filing the grievance prompted further allegations to be levied against Hodge.[2])

[1] "Collective Bargaining Agreement between Antelope Valley College College District (AVCCD) and Antelope Valley College Federation of Teachers July 1, 2009–June 30, 2012," at 84.
[2] November 24, 2010, response to Hodge from AVC Assistant Superintendent/Vice President Shane Turner.

Moreover, contrary to your characterization, AVC certainly subjected Hodge to "discipline" or "sanction" based on his classroom speech. In *Blair v. Bethel School District*, 608 F.3d 540, 543 (9th Cir. 2010), the Ninth Circuit held that, in order to demonstrate First Amendment retaliation, an "adverse action" against an individual by school administrators is defined as an action that "would chill a person of ordinary firmness from continuing to engage in the protected activity." The adverse actions by AVC included, without limitation, rating Hodge's performance as "needs improvement" in the "Sensitivity to Diversity" category, assigning him to write a 10-page paper on antidiscrimination laws and diversity, requiring him to prepare and submit for administrative review a one-hour class on cultural diversity, and threatening further punishment if he taught the one-hour class he had prepared (regardless of whether it fulfilled AVC's requirement—which it did, being focused on precisely the designated subject). Reasonable faculty members in Hodge's position would be chilled from engaging in the protected speech at issue here, and it is clear that AVC's actions were intended to suppress precisely such speech. The Ninth Circuit has further held that "transfers of job duties and undeserved performance ratings, if proven, would constitute adverse employment decisions." *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (quotation marks omitted). Your letter expressly acknowledges that AVC's actions were taken to "remedy aspects of [Professor Hodge's] teaching that deprecated cultural beliefs," meaning to ensure that he never speaks in the way disfavored by AVC again.

Your letter also implies, without explicitly stating, that Hodge's classroom remarks are not protected by the First Amendment. However, Hodge's speech—which, your letter acknowledges, fails to rise to the level of actionable discrimination or harassment—was speech intended to convey the practical realities of treating patients of varying cultural beliefs. While Hodge neither derided particular cultural practices, nor intended to do so, the First Amendment's guarantees of free speech and academic freedom nevertheless protect a professor's ability to express viewpoints far more controversial than Hodge's comments. *See Dube v. State University of New York*, 900 F.2d 587 (2d Cir. 1990) (holding that the First Amendment protected a professor's in-class expression of his views that Zionism is racist). The Second Circuit has cautioned against disciplining "a college teacher for expressing controversial, even offensive, views lest a 'pall of orthodoxy' inhibit the free exchange of ideas in the classroom." *Vega v. Miller*, 273 F.3d 460, 467 (2d Cir. 2001) (internal citation omitted).

However, a "pall of orthodoxy" is exactly what AVC apparently seeks to achieve, given the college's vague, after-the-fact "suggest[ion]" that Hodge "use a neutral tone and respectful language when discussing cultural beliefs"; the negative performance review Hodge received; and the requirements imposed upon Hodge dictating how he must conduct future classes. AVC is not, as your letter suggests, entitled to violate his freedom of expression, his academic freedom, or AVCCD's Board Policy 4030 in order to prevent any and all "student complaints of discrimination or harassment" or student complaints of "infringement of [their] rights" that "could" result from his protected expression, such as the speech at issue.

The cumulative effect of AVC's efforts not only renders AVC's "suggestion" regarding how Hodge must teach so vague and broad as to make it both impossible to follow and susceptible to administrative abuse on the basis of viewpoint, but also prohibits the expression of particular viewpoints on matters of public concern. For example, if an AVC professor's lecture covered some cultures' practice of female genital mutilation and its detrimental effects on a patient, or

communicated the difficulties of dealing with patients from cultures that view medical professionals with distrust, a student might choose to complain that the professor has deprecated those cultures' beliefs and thus subject that professor to the same adverse actions as those suffered by Hodge here. Limiting professors, and indeed the college itself, to only those bland expressions about culture, race, gender, and related topics to which no student—even the most sensitive and easily offended student—might take exception is fundamentally inconsistent with academic freedom. Legitimate, pedagogically valuable views on controversial subjects might cause students offense, but that would be an unconstitutional and academically pernicious reason to eliminate these views from the classroom. AVC's viewpoint-based punishment will render it more difficult for Hodge and other faculty members to effectively and meaningfully teach their classes.

In this vein, we again remind you that Board Policy 4030, in addition to its protection of "controversial or unpopular" opinions, expressly grants autonomy to faculty members in the classroom with regard to "implementing the learning process":

> **[S]ince instructors are responsible for implementing the learning process, they therefore have the freedom to select materials, methods of application, and procedures in carrying out their job duties.** A faculty member is also **free to present and discuss subject matter in a practical and relevant format.** In areas of controversy, one has the right to express an opinion related to subject matter, and an expression of differing points of view should be allowed and encouraged. [Emphases added.]

Indeed, your claim that "[t]he District is entitled to preclude Mr. Hodge from a course of conduct before it actually results in a violation of laws prohibiting discrimination or harassment on the basis of protected classes" cites no supporting legal authority, and for good reason. Hodge's "course of conduct" that AVC seeks to preclude amounts to pure, protected speech, and a university may not intervene to suppress particular viewpoints or approaches when a professor's speech does not even come close to constituting actionable discrimination or harassment. *See Silva v. University of New Hampshire*, 888 F. Supp. 293, 316 (D.N.H. 1994) (holding that a university cannot punish as harassment a professor's classroom speech that compared sexual activity to writing an essay where the comments "were made for the legitimate pedagogical, public purpose of conveying certain principles related to the subject matter of his course.").

Finally, AVC must consider whether it truly plans to argue that courts should not grant the exception to *Garcetti v. Ceballos*, 547 U.S. 410, 438 (2006), raised by the *Garcetti* majority, for controversial speech by professors on matters of public import. Both Justice Kennedy's majority opinion and Justice Souter's dissenting opinion reflect concern that *Garcetti* will be applied to "imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'" *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting); *see also id.* at 425 (Kennedy, J.) ("There is some argument that expression related to academic scholarship or *classroom instruction* implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence.") (emphasis added). The *Garcetti* majority explicitly *declined* to extend its ruling to university professors, leaving the question for another day, *see id.* at 425. Given

Garcetti's exceptional treatment of speech in the academic context, AVC's argument that *Garcetti* permits AVC's punishment of Professor Hodge is untenable.

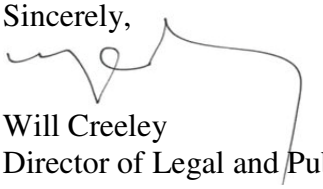
Indeed, courts within the Ninth Circuit have already held that the First Amendment still safeguards classroom speech in the wake of *Garcetti*. *See Sheldon v. Dhillon*, No. C-08-03438 RMW (N.D. Cal. Nov. 25, 2009) ("*Garcetti* by its express terms does not address the context squarely presented here: the First Amendment's application to teaching-related speech. For that reason, defendants' heavy reliance on *Garcetti* is misplaced."). In *Sheldon*, the district court held that "[i]n light of the *Garcetti* Court's reluctance to apply its public-employee speech rule in the context of academic instruction, the court must apply the existing legal framework for analyzing teacher's [sic] instructional speech." *Id.* at *12. The court thus denied a college's motion to dismiss by using the pre-*Garcetti* legal framework and assuming (at that stage in the proceedings) that "the instructional speech was within the parameters of the approved curriculum and within academic norms—i.e., that the defendants[']actions were not reasonably related to legitimate pedagogical concerns." *Id.* at *14.

Hodge's classroom speech, for which he was punished, was certainly within the parameters of the approved curriculum and within academic norms. Under the existing legal *Pickering-Connick* framework, therefore, his speech receives First Amendment protection, and AVC cannot retaliate against it on the basis of its content or viewpoint. *See also Rodriguez v. Maricopa County Cmty. College Dist.*, 605 F.3d 703, 710 (9th Cir. 2010) (holding, after *Garcetti*, that racially charged emails sent to all college employees by a math professor were protected speech that could not be punished since their "offensive quality was based entirely on their meaning, and not on any conduct or implicit threat of conduct that they contained."). According to the unanimous Ninth Circuit panel in *Rodriguez*, professors—even those in a supervisory relationship—"retain First Amendment rights and their speech is entitled to significant breathing space before it will be deemed harassment." *Id.* Hodge's speech does not even come close to actionable harassment, and AVC must afford Hodge the "breathing space" requirement to effectively teach his curriculum.

FIRE again asks that AVC remedy its unconstitutional punishment of Professor Hodge's protected speech. As specified in our earlier letter, we ask that all adverse actions undertaken in response to Professor Hodge's speech be rescinded and, to prevent speech at AVC from being impermissibly chilled, that AVC clarify to faculty and administrators that protected expression may never and will never be investigated or punished at AVC.

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

Sincerely,



Will Creeley
Director of Legal and Public Advocacy

cc:
Jackie L. Fisher, Sr., Superintendent/President, Antelope Valley College
Karen W. Cowell, Dean of Health Sciences, Antelope Valley College
Sharon Lowry, Vice President of Academic Affairs, Antelope Valley College
Shane Turner, Assistant Superintendent/Vice President, Human Resources and Employee Relations, Antelope Valley College
Earl J. Wilson, President, Board of Trustees, Antelope Valley Community College District
Betty Wienke, Vice President, Board of Trustees, Antelope Valley Community College District
Michael Adams, Clerk, Board of Trustees, Antelope Valley Community College District
Steve Buffalo, Board of Trustees, Antelope Valley Community College District
Jack Seefus, Board of Trustees, Antelope Valley Community College District
Mayela Montano, Student Trustee, Antelope Valley Community College District
Pilar Morin, Partner, Liebert Cassidy Whitmore