



## Foundation for Individual Rights in Education

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March 15, 2011

Chancellor Gene D. Block  
Chancellor's Office  
University of California, Los Angeles  
Box 951405, 2147 Murphy Hall  
Los Angeles, California 90095-1405

*Sent by U.S. Mail and Facsimile (310-206-6030)*

Dear Chancellor Block:

As you know from our letters to you in August 2009 and August 2010, the Foundation for Individual Rights in Education ([www.thefire.org](http://www.thefire.org)) unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, due process, freedom of association, religious liberty and, as in this case, freedom of speech on America's college campuses.

FIRE is contacting you today out of concern over the threat to freedom of expression posed by University of California, Los Angeles' (UCLA's) investigation of a student for harassment because of a short video she published on the video-sharing website YouTube.

This is our understanding of the facts; please inform us if you believe we are in error. On Friday, March 11, 2011, UCLA student Alexandra Wallace posted a video on YouTube. In the video, which is less than three minutes long, Wallace expresses a "rant" about a "problem" that concerns her, stating that some Asian students at UCLA do not use "American manners." She states that the families of many Asian students in the apartments around her "don't teach their kids to fend for themselves" because they do chores for the students.

In the video, Wallace then complains that some Asian students "talk on their cell phones in the library" while she is studying for finals. She expresses what the students sound like to her, saying, "Oh, ching chong ling long ting tong, oh!" She states that her reaction to such students is to grimace at them and hold her finger to her mouth to suggest, "It's a library; we're trying to study, thanks!"

On Monday, March 14, Associate Vice Chancellor and Dean of Students Robert J. Naples reportedly told UCLA student newspaper the *Daily Bruin* that UCLA had begun to investigate the video for possible charges including harassment:

“We’ll be taking a look at the language that she uses in the video to see if it violates any codes under the student code, perhaps regarding harassment,” Naples said.

However, the student code in no way usurps the authority of the First Amendment, Naples said. [Available at [http://www.dailybruin.com/index.php/blog/off\\_the\\_press/2011/03/viral\\_youtube\\_video\\_called\\_repugnant\\_by\\_ucla\\_administration.](http://www.dailybruin.com/index.php/blog/off_the_press/2011/03/viral_youtube_video_called_repugnant_by_ucla_administration)]

Naples is correct: As a public institution, UCLA is both legally and morally bound by the United States Constitution. See *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 192 (1988) (holding that “[a] state university without question is a state actor.”). We trust that you understand that the First Amendment’s guarantee of freedom of expression fully extends to public universities like UCLA. See, e.g., *Healy v. James*, 408 U.S. 169, 180 (1972) (citation omitted) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”); *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”).

To be clear: UCLA may not punish protected expression because of its viewpoint.

One of the primary reasons that so-called hate speech is tolerated under the First Amendment is that there is not and cannot be agreement on what speech is “hateful” and therefore undeserving of the Constitution’s protection. The Supreme Court has noted that “[t]he hallmark of the protection of free speech is to allow ‘free trade in ideas’—even ideas that the overwhelming majority of people might find distasteful or discomforting.” *Virginia v. Black*, 538 U.S. 343, 358 (2003), quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In his concurring opinion in *Whitney v. California*, 274 U.S. 357, 375 (1927), Supreme Court Justice Louis D. Brandeis wrote:

[The Founding Fathers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty ....

Brandeis sagely added:

If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

By itself, “hateful” or “offensive” speech cannot be punished by UCLA. In fact, the Supreme Court has stated that free speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to

anger.” *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). The protection of individual expression is even more important at a university presumably dedicated to being a marketplace of ideas. Indeed, UCLA’s Policy on Speech and Advocacy states, “The University is committed to assuring that all persons may exercise the constitutionally protected rights of free expression, speech, assembly, and worship.”

In particular, the expression in Wallace’s video clearly does not constitute discriminatory harassment. As University of California (UC) System President Mark C. Yudof explained to all ten UC chancellors on October 15, 2009, the UC System (including UCLA) adopted a new discriminatory harassment policy in part to avoid the “legal vulnerabilities” of the previous policy. Specifically, the old policy failed to track the actual standard for peer-on-peer hostile environment harassment announced by the Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 652 (1999), which defined actionable sexual harassment as conduct 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.” Additionally, harassing conduct also has to be (1) unwelcome, (2) discriminatory, (3) on the basis of a protected class status, and (4) directed at the complaining individual. The UC System’s new policy largely tracks the *Davis* standard with regard to students and treats all kinds of discriminatory harassment under the same standard. Specifically, UCLA defines harassment as

conduct that is so severe and/or pervasive, and objectively offensive, in [sic] that so substantially impairs a person’s access to University programs or activities, that the person is effectively denied equal access to the University’s resources and opportunities on the basis of her or his race, color, national or ethnic origin, alien niche [sic], sex, religion, age, sexual orientation, gender identity, marital status, veteran status, physical or mental disability, or perceived membership in any of these classifications.

Wallace’s short video fails to meet the thresholds of severity and pervasiveness required under both *Davis* and UCLA’s policy. Moreover, the video does not substantially impair (if it impairs at all) anyone’s access to anything at UCLA. Of course, students can choose to watch or not as they see fit. As the Supreme Court recently counseled, “[i]n most circumstances, the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, ... the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.” *Snyder v. Phelps*, 2011 U.S. LEXIS 1903, 1928 (2011) quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–211 (1975) (internal quotation marks omitted).

While it is permissible to open an investigation of student expression on the basis of complaints that, if true, would be actionable by UCLA, the investigation must cease immediately as soon as the speech is determined to be protected, as is the case here. Anything else would serve to unconstitutionally chill expression at UCLA. FIRE commends to you the language of a March 31, 2001, memorandum to the University of Alaska System chancellors from then-President Mark Hamilton:

Noting that, for example, “The University supports the right of free speech, but we intend to check into this matter,” or “The University supports the right of free speech, but I have asked Dean X or Provost Y to investigate the circumstances,” is unacceptable. There is nothing to “check into,” nothing “to investigate.”

FIRE urges you to immediately end the disciplinary investigation of Wallace’s video and, to avoid sustaining the chilling effect of this investigation on campus, announce to the UCLA community that protected speech will not be investigated or punished at UCLA. FIRE hopes to resolve this situation amicably and swiftly; please respond to FIRE by Thursday, March 31, 2011.

Sincerely,



Adam Kissel

Vice President of Programs

cc:

Scott L. Waugh, Executive Vice Chancellor and Provost, University of California, Los Angeles

Janina Montero, Vice Chancellor for Student Affairs, University of California, Los Angeles

Robert J. Naples, Associate Vice Chancellor and Dean of Students, University of California, Los Angeles

Kevin S. Reed, Vice Chancellor for Legal Affairs, University of California, Los Angeles

Patricia M. Jasper, Senior Campus Counsel, University of California, Los Angeles

Mark C. Yudof, President, University of California

Charles F. Robinson, Vice President for Legal Affairs and General Counsel, University of California