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LEGAL UPDATE

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To: **Presidents/Superintendents, Member Community College Districts**

From: **Patrick C. Wilson, Senior Associate General Counsel** PCW

Subject: **Protests at College Campuses**
Legal Issues and Options
Memo No. 06-2012(CC)

Attempts by a Community College District to limit protests at a college campus require a careful balancing of First Amendment rights against the inherent authority of Districts to protect the College's mission and facilities and to enforce its rules. This update discusses a range of options available to a District to address the problems that arise with protests on campus.

1) Time, Place and Manner Regulations

The courts have consistently held that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools of higher learning." The core principles of the First Amendment "acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission."

Nonetheless, the courts have long recognized that colleges have the inherent power to adopt regulations to protect the college and its property:

> "We hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; and that it may expect that its students adhere to generally

accepted standards of conduct." *Esteban v. Central Missouri State College* (8th Cir. 1969) 415 F. 2d 1077, 1089.

"A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings." *Widmar v. Vincent* (1981) 454 U.S. 263, 268 note 5.

Education Code section 76120 codifies this authority when it authorizes Districts to adopt regulations relating to free speech activities "which shall include reasonable provisions for the time, place and manner of conduct of such activities."

Thus, the District Board of Trustees is authorized to adopt reasonable time, place and manner regulations that govern free speech activities on its campus. The regulations must be content neutral, they need to be narrowly tailored to address legitimate concerns, and they must leave open ample alternative channels of communication. *Khademi v. South Orange County Community College District* (2002)194 F. Supp. 2d 1011.

a) Examples of valid time, place or manner restrictions.

The "Occupy" movement and other protesters have argued that "camping" on public property is protected symbolic speech. However, the courts have consistently found that over-night camping on public property, except in areas expressly approved for that purpose, is outside the protection of the First Amendment. In particular, protesters have no right to build structures or camp on public property.

For example, in *State v. Ybarra* (1976) 550 P.2d 763, the court of appeal in Oregon upheld a trespassing conviction as to a student who had erected a tent on the lawn at Portland State University.

In *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, the U.S. Supreme Court held that the National Park Service could deny permission to protesters who wished to sleep in temporary structures in Lafayette Park in Washington D.C. The Court held that expression under the First Amendment is subject to reasonable time, place and manner restrictions. Because the government had a valid aesthetic interest in maintaining its parks in an attractive and intact condition, the protesters did not have the right to camp in the park other than at designated campsites.

In *University of Utah v. Peterson* (1986) 649 F. Supp. 1200, the court found that shanties that had been erected by students at the University of Utah to protest apartheid were symbolic speech; however, the court required that the shanties be removed at night.

The University of Virginia adopted a regulation that prohibits structures on the main lawn of the university. When challenged as a violation of the First Amendment, the initial regulation was invalidated as overbroad; however, the revised "lawn" regulation was upheld in *Students v. O'Neil* 838 F.2d 735 (4th Cir. 1988). The court found that the regulation was properly based on valid aesthetic concerns and it did not prohibit other expressive activities by students on the lawn.

Similarly, a University of Texas regulation that prohibited the display of exhibits from 8 a.m. to 5 p.m. on the Main Plaza of the university was upheld. The court found that the university's interest in protecting the "visual portal of the university" was legitimate. The court noted that protesters could still gather and protest at the plaza; they just could not erect exhibits there. *Justice v. Faulkner* (unpublished) 2004 WL 3957872.

Another "place" regulation that was upheld was a prohibition at Madison College against demonstrations inside the buildings at the college. *Sword v. Fox* 446 F.2d 1091 (4th Cir. 1971). The court noted that college buildings are generally dedicated to classrooms, administrative offices, libraries, health centers or dormitories where order and study are expected. Because the activity at issue--a sit in--was deemed to be disruptive, the court found that the prohibition was valid, noting that protests were still allowed on campus outside of the buildings.

The courts have also endorsed a "manner" regulation that limits amplified or excessive noise generated by protesters, at least where the noise is disrupting legitimate activities. E.g. *Graynard v. City of Rockford* (1972) 408 U.S. 104.

b) Examples of regulations that have been found unconstitutional.

The complete prohibition of hand billing at the University of Arizona was found to be unconstitutional by the Ninth Circuit in *Jones v. Board of Regents* 436 F.2d 618 (9th Cir. 1970). The court observed that the complete ban of this type of core political speech could not be justified; a "place" restriction must still allow for alternate forums for protest.

Similarly, a complete ban on anonymous leafleting at the University of Texas was stricken by the Fifth Circuit. The court found that the asserted justification--to prevent littering--was not sufficient in light of the long established constitutional protection afforded to this type of speech. *Justice v. Faulkner* (unpublished) 2004 WL 3957872.

A ban on leaflets on windshields, parking lots and inside buildings at a California community college was invalidated as overbroad. The court found that the regulation would ban distribution of the campus newspaper and campaign materials, which are core speech. As such, the regulation was not "narrowly tailored" and therefore was invalid. *Khademi v. South Orange County Community College District* (2002) 194 F. Supp. 2d 1011.

Finally, a college cannot prohibit students from wearing political buttons or armbands on campus. *Tinker v. Des Moines Independent Community School District* (1979) 393

U.S. 503 (student was entitled to wear a black armband in class so long as the activity did not disrupt school activities).

2) Applicable Criminal Statutes

Numerous statutes have been enacted that may limit certain protest activities on campus.

a) Refusing to Leave a Public Building at Closing Time.

Penal Code § 602(q) provides that a trespass occurs when a person refuses to leave a public building after its regular time for closing.

This "time" restriction was upheld in *In Re Bacon* (1966) 240 C.A. 2d 34, where several students refused to leave the U.C. Berkeley administration building after the usual closing time. The court affirmed the trespass conviction, explaining that "business ceased when the building became regularly closed and those persons to whom the grievances were addressed were entitled to cease their active school duties and responsibilities for the day."

Similarly, in *Parrish v. Municipal Court* 258 C.A. 2d 497 (1968), the court upheld a trespass conviction for a defendant/protester who refused to leave a welfare office at closing time, explaining: "there's a time and place for everything."

b) "Lodging" at a Place, Public or Private, Without Permission of the Owner.

Penal Code § 647(e) provides that every person who "lodges" at public or private property without permission is guilty of disorderly conduct. The word "lodge" implies more than transient occupancy. This provision would support a ban on camping at a college campus.

c) Trespass.

Penal Code section 602(o) makes it illegal for a person to refuse to leave land, not then open to the general public, after having been requested to leave by the owner. This section can be used to enforce a reasonable time, place or manner restriction. For example, interpreting a similar statute, the Supreme Court of Hawaii upheld a trespass conviction after a student refused to leave a "sit in" at the university's ROTC building after having been requested to do so by the university president. The court held that a person can commit trespass on publicly owned property where his presence is not authorized. *State of Hawaii v. Jordan* (1972) 500 P. 2d 560.

d) Disturbing the Peace at a Community College.

Penal Code § 415.5 provides that any person who is not a registered student who maliciously and willfully disturbs another person by loud and unreasonable noise at a community college is guilty of a misdemeanor.

e) Obstruction of Teachers or Students at a Community College.

Penal Code § 602.10 provides that a person who, by physical force (including one who acts to impede access), willfully obstructs any student or teacher seeking to attend or instruct a class with the intent to prevent attending or instruction is guilty of malicious mischief.

f) Unlawful Assembly.

Penal Code §§ 407-408 provide that any person, in concert of another, who engages in a lawful act in a violent, boisterous or tumultuous manner is guilty of a misdemeanor. These sections must be carefully applied to avoid punishing legitimate speech.

g) Willful Disruption of the Orderly Operation of the Campus or Facility.

Penal Code § 626.4(a) provides that the chief administrative officer of a campus may notify a person that consent to remain on campus has been withdrawn whenever there is reasonable cause to believe that such person has willfully disrupted the orderly operation of the campus.

If the individual refuses to leave, he can be cited and an exclusion order issued prohibiting the student's return to campus for up to 14 days.

In *Braxton v. Municipal Court* (1973) 10 Cal. 3d, 138, the California Supreme Court applied this section to protests that had occurred at San Francisco State University. The Court found that the exclusion order process of § 626.4 could be utilized when:

(a) students or non-students engaged in overt acts of violence or otherwise engaged in illegal conduct which disrupts "the orderly operation" of the campus, and

(b) the student/non-student is provided with notice and a "hearing" prior to exclusion from the campus, absent exigent circumstances.

h) Non-Student Who Interferes with the Peaceful Conduct of the Campus.

Penal Code § 626.6 provides that a non-student who commits any act likely to interfere with the peaceful conduct of the activities of the campus may be directed to leave, and if he fails to do so, he may be excluded from campus for up to seven days.

3) Student Discipline.

A student (or non-student) who violates the Penal Code may be prosecuted criminally. In addition, it is common for Colleges to proceed against students under the student code of conduct. However, the student code of conduct cannot be used to punish a student for pure

speech activities that would be permissible off campus. Thus, Education Code § 66301 provides that a college district shall not discipline a student "solely on the basis of conduct that is speech or other communication that, when engaged in outside a campus ... is protected" by the First Amendment.

In *Crosby v. South Orange County Community College District* (2009) 172 C.A. 4th 433, the court considered a student's challenge to a regulation that resulted in minor discipline due to the student's violation of the District's Library Internet Use Policy. The student argued that the college's discipline violated section 66301. The court disagreed, finding that the College's library was not a traditional public forum and that the College was entitled to limit computer use in the library to educational and employment uses. Accordingly, the student's claim was dismissed.

Note that Penal Code § 626.2 provides that any student or employee of a community college who, after a hearing, has been suspended or dismissed from the college for disrupting the orderly operation of the campus and, as a condition of discipline, has been denied access to the campus, and thereafter willfully re-enters the campus, is guilty of a misdemeanor.

4) Injunctions.

When there is a continuing trespass or a continuing violation of the law, the District may seek a Court order (injunction) to enforce the law or its reasonable time, place or manner restrictions. *E.g. Madsen v. Women's Health Center* (1994) 512 U.S. 753 (narrowly drafted injunction limiting the time, place and manner of activities of abortion protesters at and near clinic was upheld).

5) Disorderly Conduct at a Board Meeting.

In the event of disorderly conduct at a Board meeting, the Brown Act provides as follows:

"In the event that any meeting is willfully interrupted by a group or groups of persons so as to render the orderly conduct of such meeting unfeasible and order cannot be restored by the removal of individuals who are willfully interrupting the meeting, the members of the legislative body conducting the meeting may order the meeting room cleared and continue in session. Only matters appearing on the agenda may be considered in such a session. Representatives of the press or other news media, except those participating in the disturbance, shall be allowed to attend any session held pursuant to this section. Nothing in this section shall prohibit the legislative body from establishing a procedure for readmitting an individual or individuals not responsible for willfully disturbing the orderly conduct of the meeting." Government Code section 54957.9.