



February 8, 2010

VIA FACSIMILE & U.S. MAIL

Dr. Cynthia E. Azari
President, Fresno City College
Fresno City College Administration
1101 East University Avenue
Fresno, California, USA 93741
Telephone: (559) 442-4600
FAX: (559) 485-3367

Re: Health Science Instruction

Dear Dr. Azari:

It has come to the attention of the American Civil Liberties Union of Northern California (ACLU) that a professor at Fresno City College – Dr. Bradley Lopez – is teaching a health science class in which he presents as “fact” and “science” inaccurate information that reflects his own highly discriminatory and religiously-based views. Given his position of authority in the classroom, the presentation of these views constitutes an official advancement of sectarian doctrine, and potentially creates a hostile environment for lesbian, gay, bisexual, and transgender (LGBT) students, among others.

We understand that a number of students have complained about Professor Lopez, in this academic year and years past, yet Fresno City College (FCC) has not acted on these complaints. Although Professor Lopez does have free speech rights, neither factually inaccurate instruction nor theological inculcation is protected speech in a community college. To the contrary, as a tax-supported entity, FCC must of course comply with state and federal law, which prohibit religious indoctrination in public education. State law also requires that FCC take affirmative steps to combat sexual orientation bias, and, indeed, FCC represents itself to prospective students and donors as a school in which each student is valued and respected. This promise cannot be met in classes in which anti-LGBT bias is taught as “fact.” The ACLU therefore urges FCC to act expeditiously and take whatever steps are necessary to ensure that its health classes provide accurate and unbiased information, so that the school can be a welcoming place for all students.

Factual Background

We understand that Professor Lopez teaches a class entitled “Health Science I,” which FCC students can take to satisfy the “Lifetime Wellness” requirement of a general associate

NANCY PEMBERTON, CHAIRPERSON | M. QUINN DELANEY, LINDA LYE, PHILIP MONRAD, VICE CHAIRPERSONS | DICK GROSBOLL, SECRETARY/TREASURER
ABDI SOLTANI, EXECUTIVE DIRECTOR | CHERI BRYANT, DEVELOPMENT DIRECTOR | LAURA SAPONARA, COMMUNICATIONS DIRECTOR | ALAN SCHLOSSER, LEGAL DIRECTOR
MARGARET C. CROSBY, ELIZABETH GILL, JULIA HARUMI MASS, MICHAEL RISHER, JORY STEELE, STAFF ATTORNEYS | NATASHA MINSKER, NICOLE A. OZER, DIANA TATE VERMEIRE, POLICY DIRECTORS
STEPHEN V. BOMSE, GENERAL COUNSEL

degree. According to the course catalog, this class is intended to cover the following topics: “Contemporary scientific concepts and medical information designed to promote health, prevent disease, increase life span and improve the quality of life involving the cardiovascular system, physical fitness, nutrition, emotional health, human sexuality, sexually transmitted diseases, reproduction and birth control, heredity, substance abuse, cancer, consumer and environmental health and health care systems.” As with any subject, students who sign up for Health Science I anticipate that they will receive accurate and up-to-date information on the topics listed in the course catalog.

Professor Lopez, however, presents a number of the topics in Health Science I in a way that is not only highly inaccurate, but is overtly religious and demonstrates anti-LGBT bias. For example, in recent lectures, Professor Lopez has:

- Repeatedly referenced the Bible and used it as teaching tool, for example assigning as homework a question as to Jesus’ genetic makeup; and
- Shown a slide listing “homosexuality facts,” including that homosexuality is a “biological misapplication of human sexuality” and said that the “recommended treatment” is “psychological counseling” or “hormonal supplements”;
- Presented LGBT people as a burden on and/or threat to society, claiming, for example, that anything but a heterosexual union provides a “one-sided foundation for raising children”;
- Presented abortion as the killing of human beings, characterizing abortion – as “the leading cause of death in the United States” (because there are a million abortions a year);
- Quoted Psalm 139:13-16 of the Bible and described it as “empirical” evidence that human life begins at conception (in support of the claim that abortion is murder);
- Followed a slide on climate change in a presentation on “environmental health” with a slide containing a Biblical quote about the world ending in fire, and said “that is the real global warming we should be worried about.”

In mid-November 2009, two FCC students – Jacqueline Mahaffey and Jay Matthews – submitted grievances against Professor Lopez, complaining that his class presented inaccurate and biased information and that he was teaching religious doctrine as scientific fact. It is our understanding that Mr. Matthews additionally spoke with various FCC administrators, at least one of whom suggested to Mr. Matthews that there had been a number of complaints over the years about Professor Lopez.

Professor Lopez submitted responses to the student grievances in mid-December 2009, which note his disagreement with the concept of the separation of church and state and argue generally that he provides students only with “measured, scientific information in current issues in health.” We understand that FCC may additionally have opened an investigation against

Professor Lopez, but neither Mr. Matthews nor Ms. Mahaffey have been informed by the school as to the status of this investigation or what steps FCC plans to take with regard to the content of Professor Lopez's Health Science I class, which he is teaching this coming semester as usual.

Legal Analysis

1. *FCC must ensure that its instruction does not inculcate sectarian doctrine in violation of the federal and state constitutions.*

FCC is legally obligated to prohibit instruction that promotes theology in violation of the First Amendment to the United States Constitution and Article I, Section 4 and Article XVI, Section 5 of the California Constitution. For federal Establishment Clause purposes, instruction must (1) have a secular purpose; (2) neither advance nor inhibit religion; and (3) not foster an excessive government entanglement with religion. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971); *see also Brown v. Woodland Joint Unified School District*, 27 F.3d 1373 (9th Cir. 1994) (applying *Lemon* test in context of instructional speech).

The California Constitution is even stricter in its requirement that public school education be secular. Article I, section 4 prohibits any official display of preference for one religion over another. *See Feminist Women's Health Center, Inc. v. Philbosian*, 157 Cal. App. 3d 1076, 1092 (Cal. App. 1984) ("The California Supreme Court has interpreted this section as being broader than the federal guarantee because preference is forbidden even when there is no discrimination.") (citing *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 796 (Cal. 1978)). Article XVI, section 5 further forbids any government entity from aiding a "sectarian purpose," either financially or symbolically. This sweeping provision has been interpreted as banning "any official involvement, whatever its form, which has the direct, immediate and substantial effect of promoting religious purposes." *California Educational Facilities Authority v. Priest*, 12 Cal. 3d 593, 605 n.12 (Cal. 1974).

Professor Lopez's instruction in Health Science I violates both clauses of the California Constitution and the federal Establishment Clause, as he uses his position to inculcate fundamentalist theological concepts of science to community college students. As described above, Professor Lopez has presented as "empirical" evidence portions of the Bible that state that life begins at conception and that abortion is murder – a viewpoint that the California Court of Appeal has held to violate constitutional guarantees of the separation between church and state. *See Feminist Women's Health Center*, 157 Cal. App. 3d at 189-191 (finding that the belief that a fetus is a human being and abortion is murder constitutes a particular religious viewpoint, and law promoting that viewpoint violated federal and state constitutions). Professor Lopez has also presented certain events described in the Biblical account of Revelations as certain to occur, putting these events on the same level of "fact" as climate change. In both instances, the "facts" presented by Professor Lopez are grounded entirely in his personal religious views, and therefore he is using his position as a professor to promote theological concepts.

Nor does Professor Lopez have a free speech right to teach a secular class from a sectarian perspective. *See, e.g., Edwards v. California University of Pennsylvania*, 156 F.3d 388, 491-92 (3rd Cir. 1998) (holding that a university professor had no First Amendment right to compel university to allow him to teach an “Introduction to Educational Media” class from a religious perspective); *see also Pelozo v. Capistrano Unified School District*, 37 F.3d 517, 522 (9th Cir. 1994) (school district could restrict teacher from talking with students about religion because “the interest of the State in avoiding an Establishment Clause violation may be a compelling one justifying an abridgment of free speech otherwise protected by the First Amendment”) (internal quotations omitted).

In sum, FCC is required to prevent Professor Lopez from engaging in religious indoctrination in his Health Science I class.

2. *FCC can and should mandate accurate and unbiased health instruction.*

In addition to prohibiting religious indoctrination, FCC can and should require that its health instruction is accurate and unbiased. Although Professor Lopez describes his own classes as presenting “measured, scientific information,” it is clear from his recorded lectures, as well as reports of students, that in many instances he is simply teaching anti-LGBT bias.

As described above, Professor Lopez has presented to his students as “facts” his views that homosexuality is a disease that can be cured, and that same-sex couples are inferior parents in comparison to heterosexual couples. For decades, however, the scientific consensus has been that: “Same-sex attractions, behavior, and orientations per se are normal and positive variants of human sexuality—in other words, they do not indicate either mental or developmental disorders.”¹ And efforts to change sexual orientation are ineffectual and can cause psychological damage. *See id.* at p.4. Further, “there is no evidence to suggest that lesbian women or gay men are unfit to become parents or that psychological development among children of lesbian women or gay men is compromised relative to that among offspring of heterosexual parents.”²

Not only are Professor Lopez’s views on sexual orientation not supported by science, but they are also contrary to the laws and policies of the state of California. As a public institution of higher education in California, FCC has an affirmative obligation “to combat racism, sexism, and other forms of bias, and a responsibility to provide equal education opportunity.” Cal. Ed. Code § 66521; *see also* Cal. Code Reg., tit. 5, § 59300. The Equity in Higher Education Act makes plain that “[h]arassment on schools grounds directed at an individual on the basis of personal characteristics or status creates a hostile environment and jeopardizes equal education opportunity as guaranteed by the California Constitution and the United States Constitution.” Cal. Ed. Code § 66252(c). And the Act provides that “[i]t is the intent of the Legislature that

¹ Report from the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation, p.2 (2009), *available at*: <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>

² American Psychological Association, Lesbian and Gay Parenting, p. 15 (2005), *available at*: <http://www.apa.org/pi/lgbt/resources/parenting-full.pdf>

each postsecondary educational institution undertake education activities to counter discriminatory incidents on school grounds and, within constitutional bounds, to minimize and eliminate a hostile environment on school grounds that impairs the access of students to equal educational opportunity.” Cal. Ed. Code § 66252(f).³

Moreover, FCC presents itself as an institution in which all students are equally valued. The “Nondiscrimination Policy and Obligations” statement, available on FCC’s website, provides: “Fresno City College does not discriminate on the basis of race, color, national origin, sex, handicap, age, or sexual orientation in any of its policies, procedures, or practices in compliance with . . . California State Law.” And the “Fresno City College Ethics Statement” lists as a core school value “respect,” which it defines as “demonstrate[ing] a high regard for the rights, diverse opinions, and life styles of all community members. It is our responsibility to establish a climate of mutual respect to protect the rights and freedoms of others.”

FCC cannot meet its obligation to combat bias based on sexual orientation if it teaches as “fact” in its health instruction that homosexuality is a disease, and that LGBT people are a burden and/or threat to society. Nor do such teachings allow FCC to fulfill its promise to prospective students and donors that the FCC community is one in which each student – including each LGBT student – is equally valued and respected. Indeed, the concern for objective, accurate, and unbiased information is particularly compelling in a health science class, which not only purports to teach “scientific concepts,” but also provides information vital to the health and life choices of its students. It is for this reason that the California Education Code specifically requires that “all factual information presented” in sexual education in public high schools must be “medically accurate and objective.” Cal. Ed. Code § 51933(b)(2). FCC therefore can and should take whatever steps are necessary to ensure that every health science class presents both accurate and unbiased information.

Professor Lopez’s free speech interests do not change this conclusion. “[T]he curriculum of a public educational institution is one means by which the *institution itself* expresses its policy,” and schools therefore retain the authority to direct curriculum. *Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002) (emphasis added); *see also Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1015-16 (9th Cir. 2000), *cert. denied* 532 U.S. 994 (2001) (citing cases affirming schools’ rights to determine curriculum). FCC’s interests in ensuring accurate instruction and in combating anti-LGBT bias also clearly outweigh Professor Lopez’s interest in using his position to present as “fact” and “science” his personal discriminatory and religious-based views. *See Connick v. Myers*, 461 U.S. 138, 150-51 (1983) (public employee speech entitled to First Amendment protection only if employee’s interest as a citizen in making statement on matter of public concern outweighs government’s interest in effective fulfillment of its responsibilities to

³ “[P]rior to receipt of any state financial assistance or state student financial aid” FCC is in fact required under the California Education Code to provide assurance to the chancellor’s office that “each program or activity” conducted by FCC will be conducted in compliance with the Equity in Higher Education Act. Cal. Ed. Code §§ 66291-92. If these measures still fail to ensure a bias-free environment for students, the Act also provides a private right of action. Cal. Ed. Code §§ 66292.3, 66292.4.

the public).⁴ Of course, outside of the classroom, Professor Lopez is fully entitled to express his personal views on whatever topic he chooses.

Conclusion

The ACLU is, quite frankly, startled and dismayed to hear that a tax-supported California institution of higher education is allowing sectarian and anti-LGBT bias to be taught as “fact” and “science” in a health class in 2010. We urge FCC to act immediately to ensure that all its health classes provide only accurate and unbiased information. Please let us know no later than **February 15, 2010** the steps FCC plans to take to address this problem and to make sure that the school is in compliance with federal and state law and remains a welcoming and inclusive place for all students.

Sincerely,



Elizabeth Gill
Staff Attorney
LGBT & AIDS Project

cc: Dr. Thomas A. Crow, Chancellor, State Center Community College District (by fax and e-mail to: tom.crow@scccd.edu)
Board of Trustees of the State Center Community College District, c/o the Executive Secretary (by e-mail to: BOT570@scccd.edu)
Fresno Chapter, ACLU of Northern California

⁴ The First Amendment test that applies to instructional speech by public university and college professors has not been clearly established in the Ninth Circuit. See *California Teachers Association v. State Board of Education*, 271 F.3d 1141, 1148-49 (9th Cir. 2001) (applying in the context of instructional speech, the test developed by the Supreme Court for student speech in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)). Under the *Hazelwood* test, schools may regulate instructional speech so long as the regulations are “reasonably related to legitimate pedagogical concerns.” *Id.* Given that Professor Lopez’s speech is not protected even under the greater speech-protective test described above (that applies generally to public employees), it is irrelevant what test actually applies.