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Office of General Counsel

Dealing with Campus Climate Issues: The First Amendment and Related Legal Issues

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OUTLINE OF TODAY'S PRESENTATION

- Advance planning for issues that might arise out of protests, demonstrations, or other speech issues.
- First Amendment primer.
- Thinking about other appropriate administrative responses.
- Resources.



ADVANCE PLANNING

- Colleges and universities are the subjects of public attention on a daily basis. Management of a significant issue is comprised of two main concerns:
 - The problem or incident giving rise to the situation must be addressed and resolved. This, of course, depends upon the problem.
 - The campus must address the ensuing public, stakeholder and media attention because of its responsibility to the public and because of possible harm to reputation.

RECOGNIZING AND ANTICIPATING THE EXISTENCE OF A POSSIBLE ISSUE

- Ideally, campus response to a significant issue begins before there is media attention. College and university administrators and key communicators have the responsibility to recognize the emergence of a potential situation.
- You all know the types of problems on college campuses that currently trigger public attention and scrutiny.
- This webinar focuses on campus climate, speech issues, protests and demonstrations.

COMMUNICATE

It is important that persons who learn of potential protests, demonstrations, or other speech issues such as a speaker room rental, communicate with those campus employees who are responsible for these particular type of issues.

In addition and as circumstances warrant, campus officials must communicate with appropriate contacts at the system office such as the General Counsel's Office and Marketing and Communications.

COORDINATE

It is important that the campus internally coordinate its response to any significant situation. Key internal stakeholders may be campus security, facilities, student affairs, and other senior leaders.

Depending on the circumstances, coordination with law enforcement and other local or state officials should also be considered.

ADVANCE PLANNING AND PRACTICE

- You may wish to consider a tabletop exercise of a hypothetical scenario to test your institutional policies and responses.
- One resource is the “[2016 National Seminar and Tabletop Exercise for Institutions of Higher Education Manual](#),” promulgated by the United States Department of Homeland Security and involving a campus speech scenario.

THE FIRST AMENDMENT

- “Congress shall make no law * * * abridging the freedom of speech * * *.”
United States Constitution, Amend 1.
- Applies to public institutions.
- Board Policy 3.1 Student Rights and Responsibilities.
 - In thinking about speech issues, it is often helpful to think about: Who is speaking?
 - A Student?
 - A Faculty Member?
 - A Third Party?
 - Where?
 - In a classroom during class?
 - In an outside campus forum area?
 - On a bulletin board?
- Different legal rubrics may apply depending on the answers to these questions.

PUBLIC INSTITUTIONS ARE SUBJECT TO THE FIRST AMENDMENT

- Campuses are “peculiarly marketplaces of ideas” -- merely offensive ideas may not be shut off in the name of “conventions” of decency. The First Amendment generally protects speech from government sanction but not speech that:
 - “Substantially disrupts” college/university operations; or
 - Speech that is not protected by the First Amendment.
 - “Fighting words” (“where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).
 - “True threats” (“a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another”).
 - Unlawful harassment/discrimination.
 - Obscenity, defamation.
 - OK to have reasonable time, place, and manner restrictions like:
 - Hour restrictions (not at night)
 - Noise restrictions (no sound amplification)
 - Permits

MINNESOTA STATE BOARD POLICIES

- [Board Policy 3.1](#) Student Rights and Responsibilities.
- Board Policy 3.1, part 2. Freedom of Expression.
 - Students shall be free to support causes by orderly means that do not substantially disrupt the regular and essential operation of the institution.
 - Students shall be free to take reasoned exception to the data or views offered in any course of student and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.
- Faculty may manage discussion with appropriate rules.
 - Reasonably related to pedagogical concerns.
 - Not pretext for viewpoint discrimination.

FORUM ANALYSIS

- Applies to Physical Space.
 - Traditional (public streets, sidewalks).
 - Designated (bulletin boards, campus outdoor space, room rentals, etc).
 - Nonpublic (classroom during class, offices).

TRADITIONAL PUBLIC FORUM

- Public Streets, Sidewalks.
- Government must have a compelling interest in regulations and regulations must be narrowly tailored to that interest.
- No content and viewpoint discrimination.
- OK to have reasonable time place and manner restrictions such as
 - Requiring a permit.
 - Hour restrictions.
 - Noise restrictions.

DESIGNATED PUBLIC FORUM

- Designated Public Forum.
 - Not normally open to public for expressive activity but designated by institution for that purpose.
 - Examples:
 - Bulletin boards.
 - Campus outdoor space.
 - Reservation of classrooms, auditoriums for non-institutional purposes.
 - Can have reasonable time, place and manner and content restrictions but no viewpoint discrimination.
 - KEY – Look to policies or practices establishing the forum such as your campus bulletin board policy, campus facility use policy, etc.

NONPUBLIC FORUM

- Nonpublic Forum.
 - Public property not generally open for expressive activities such as:
 - Military bases.
 - Government office buildings.
 - OK to have reasonable restrictions.

TYPICAL CAMPUS FORUMS

- Outdoor Space – “Free Speech Zones.”
- Space Reservation and Rental.
 - Classrooms.
 - Auditoriums.
- Bulletin Boards.
- Key – Look to campus policy and procedure around the forum.
- Resource – “Free Speech and Forum Analysis Checklist.”

STUDENT ORGANIZATION ACCESS TO CAMPUS FACILITIES

- If access, then access on a content and viewpoint neutral basis (this includes religious groups).
- BUT time, place and manner restrictions are OK.
- Security.
 - May alert campus security and/or local law enforcement.

THIRD PARTY ACCESS TO CAMPUS FACILITIES

- Forum Analysis.
 - If access, then access on a content and viewpoint neutral basis (this includes religious groups).
 - BUT time, place and manner restrictions are OK.
- Security.
 - May alert campus security and/or local law enforcement.

COUNTER-PROTESTS

- Analyze context.
 - Substantial Disruption?
 - Forum?
- Security.
 - May alert campus security and/or local law enforcement.

SPEECH CODES

- Term sometimes used in relation to campus prohibitions that purport to limit or restrict certain speech.
- Courts have struck down as vague or overbroad
 - “The expression of one’s belief should be communicated in a manner that does not provoke * * * another.
 - “No person shall participate in acts of intolerance that demonstrate malicious intentions towards others.”
- Resource – July 28, 2003 OCR Dear Colleague Letter on the First Amendment (“OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment”).

DISCRIMINATION AND THE FIRST AMENDMENT

- July 28, 2003 OCR DCL on the First Amendment.
 - “OCR’s regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution.”
 - “* * * the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment.”
 - “Harassment * * * must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.”
 - Instead, “harassment must be sufficiently serious (i.e., severe, persistent or pervasive) as to limit or deny a student’s ability to participate in or benefit from an educational program.
- <http://www2.ed.gov/print/about/offices/list/ocr/firstamend.html>.
- See also, *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (where church protested at a soldier’s funeral, court held “speech cannot be restricted simply because it is upsetting or arouses contempt.”)

SPEECH CODES

- Lesson – Care in drafting definitions of prohibited conduct in student conduct code and anti-harassment and discrimination policies.
- Board Policy 1B.1 defines protected class harassment as “verbal or physical conduct that is directed at an individual because of his or her protected class, and that is sufficiently severe, pervasive, or persistent so as to have the purpose or effect of creating a hostile work or educational environment.”
- Letters from Advocacy Organizations (refer to OGC).

PROTESTS AND DEMONSTRATIONS: SUMMARY SLIDE

- Identify and analyze state and local laws and ordinances including local safety restrictions, such as Fire Marshal's limits on occupancy.
- Consult constitutional policies on protests.
- Time, place and manner restrictions.
 - Protestors must leave by close of business day.
 - Some buildings should be off limits because of no public access, threat of injury.
- Free speech zones.
- Written permit requirements.
- Student Code of Conduct.
- Follow existing policies and procedures.
- Advice from General Counsel's Office on First Amendment issues.

THINK ABOUT OTHER INSTITUTIONAL RESPONSES

Depending on the circumstances, you may consider other appropriate institutional responses such as:

- Addressing speech with more speech.
- Writing a letter to the campus community.
- Hosting an alternative forum on the issues.
- Performing an assessment of campus climate.

EMPLOYEES' FIRST AMENDMENT SPEECH RIGHTS

Employees bring speech claims under 42 U.S.C. § 1983, which provides for damages for violations of constitutional or other federal rights. Section 1983 claims may be brought only against individuals, not the State or its agencies. In general, a public employer may not take an adverse employment action against an employee that “infringes [upon] that employee’s constitutionally protected interest in freedom of speech.”

RIGHT OF EMPLOYEE VS. RIGHT OF EMPLOYER

The right of a public employee to free speech and a public employer's right to regulate an employee's speech is "a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." (*Pickering-Connick* test.)

DOES THE EMPLOYEE SPEAK AS A CITIZEN?

- The threshold questions are whether the employee spoke as a “citizen” and whether the speech was about a matter of public concern. Factors considered:
 - The time, manner and place of the speech;
 - The context in which the speech occurs;
 - The degree of public interest in the speech.

SPEECH PURSUANT TO JOB DUTIES

The Supreme Court has held that no First Amendment protection arises if a government employee speaks on matters of public interest but does so in the course of his or her employment duties and thus not as a citizen. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

LEGITIMATE INTERESTS OF THE STATE AS AN EMPLOYER

- A court must balance the interest of the public employee, as a citizen commenting upon matters of public concern, against the interest of the State, as employer, in regulating the employee's speech to prevent disruption or other adverse effects on the efficiency of the public employer's operations. Factors considered:
 - The need for harmony in the office or workplace;
 - Whether the government's responsibilities require a close working relationship to exist between the employee who asserts a First Amendment claim and co-workers when the speech in question has caused or would cause the relationship to deteriorate.

STATE EMPLOYERS HAVE THE RIGHT TO CHOOSE SPOKESPERSONS

The law recognizes an important distinction between speech as an employee and speech as a citizen because government employers have the right to determine who will speak to constituents on their behalf.

DECISION-MAKERS MAY HAVE QUALIFIED IMMUNITY

The doctrine of qualified immunity protects government officials from liability for civil damages if the challenged action “does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added). A right is considered to be “clearly established” if “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

CONTACT THE OFFICE OF GENERAL COUNSEL

Free speech law is very fact specific. Please contact the Office of General Counsel if you are considering disciplining an employee for anything speech-related.

RESOURCES

- Model Facility Use Policy.
<http://minnstate.edu/system/ogc/studentaffairs.html>.
- March 10, 2016 OGC Webinar “Speech on Campus.”
<http://minnstate.edu/system/ogc/webinars.html>.
 - “First Amendment: Student Speech” FAQ document.
 - “Free Speech and Forum Analysis Checklist.”
- December 8, 2016 OGC Webinar “Crisis Management.”
- October 9, 2014, OGC Webinar “Student Speech on Social Media.”
- July 28, 2003, OCR FAQ on the First Amendment.
<http://www2.ed.gov/print/about/offices/list/ocr/firstamend.html>.

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