



April 8, 2021

Office of General Counsel

Student Affairs Hotdish

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Outline of Today's Presentation

- Discuss recent regulatory guidance of interest to ASA professionals focused on a shift in priorities and guidance with the change in administrations.
- Review some cases and legal developments of interest.
- First Amendment refresher.
- Questions/Discussion



Sources of Federal Regulation

- Statutes.
- Regulations.
- Executive Orders.
- Sub-Regulatory Guidance (Dear Colleague Letters, FAQ documents, handbooks, etc.).



New Title IX Regulations: Timeline

- November 16, 2018 US Department of Education Notice of Proposed Rule-making.
- Proposed rule officially published in the federal register on November 29, 2018.
- 60 Day Comment Period = January 28, 2019.
- Final Rule = May 6, 2020.
- Effective Date = August 14, 2020 (to incidents occurring on or after that date).
- Response = revised System Procedure 1B.3.1
- Litigation.

New Title IX Regulations: Summary

- Narrower definition of Title IX Sexual Harassment.
- Narrower jurisdiction.
 - Only program or activity of c/u.
 - In the United States.
 - Generally complainant and respondent must be a student at the c/u.
- Federally mandated due process standards.
 - Enhanced investigatory requirements.
 - Live Hearing before discipline.
 - Cross-Examination.

Minnesota State 1B.3.1

Procedure: Overall Process Map

- Old 1B.3.1 Procedure
 - Complaint, Investigation, Decision-maker, internal appeal, Ch. 14 if serious student sanction.
- New 1B.3.1 Procedure
 - Formal Complaint, Investigation (with enhanced requirements), Ch. 14, Decision-maker, internal appeal.
 - And remember 1B.1 and Student Code of Conduct for situations outside of new Title IX Sexual Harassment jurisdiction.

Title IX Regulations: Looking Forward

March 8, 2021 Executive Order:

- Directs Secretary of Education to perform 100-day review.
 - All Title IX regulations, orders, guidance documents, polices.
 - Directs specific consideration of sexual assault regulations.
 - Probable goal = to broaden scope, provide more discretion.

Our response:

- Continue with new procedure while monitoring events.
- OHE collected feedback on changes institutions would like to see (we submitted our comments to OHE).

Effect on litigation = may become moot.

- Will government take different approach to litigation?



Gender Identity and Sexual Orientation Discrimination

January 20, 2021 Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.

- Administration policy to “prevent and combat discrimination on the basis of gender identity or sexual orientation.”
- Directs federal agencies to review all existing orders, regulations, guidance documents, policies, and programs for consistency with that policy.
- Develop plan of action within 100 days.

Gender Identity and Sexual Orientation Discrimination (2)

Higher Education History:

- On May 13, 2016, the Department of Education and Department of Justice jointly issued a Dear Colleague Letter on Transgender Students (FAQs on expectations within higher education).
- On February 22, 2017, the Department withdrew this guidance.
- **Prediction** = anticipate new administration will re-issue some sort of guidance on this topic.

Remember:

Regardless of any changes at federal level, both Board Policy 1B.1 and the MHRA prohibit discrimination and harassment based on gender identity and sexual orientation.

Executive Order on Divisive Workplace Training

- On September 22, 2020, the President signed an “Executive Order on Combating Race and Sex Stereotyping.”
- Prohibits certain government contractors and grantees from providing workplace training that inculcates its employees in what the Order deemed “divisive concepts.”
- Biden administration rescinded this Executive Order (see Sec. 10 of “Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government” issued January 20, 2021).

Free Speech Regulation

- On September 9, 2020, the Department of Education published its final rule on “Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities,” implementing President Trump’s 2019 Executive Order.
- Conditions federal grants on complying with the First Amendment.
 - Non-compliance = Final judgment by a state or federal court of First Amendment violation.
 - Effect = Acts as an Additional penalty.
- Will new administration seek to withdraw or rescind this rule and/or provide guidance on enforcement.

Rescission of the Clery Handbook

- On October 9, the Department of Education rescinded the Clery Act Handbook (275 pages).
- Replaced with Clery Act Appendix (13 pages).
- Key points:
 - No change to Clery Act statutory and regulatory requirements.
 - Only change = swap of Appendix for Handbook.
 - Rationale = “help simplify Clery compliance.”
 - No reason to change anything for 12/31/20 compliance deadline.
 - We will review to see if the new guidance allows for simplifying future reports.
- Will New Administration Reinstate the Handbook?

DACA

- Summer 2020 – the United States Supreme Court held that the administration improperly ended the DACA program.
- January 20, 2021 Executive Order titled “Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)” (stating current administration’s policy).
- On March 26, 2021, the Secretary of Homeland Security announced that the Department will issue a regulation following the policy.
- Continued litigation and possible legislative action.

Cases: United States Supreme Court

Mahanoy Area School Dist. v. B.L.

- To be argued on April 28, 2021 (can a K-12 public school regulate off-campus speech that would materially and substantially disrupt the work and discipline of the school).
- May impact higher education – expect decision by end of June 2021.

Cases: continued

COVID tuition and fee litigation (many cases).

- For example: *Chong v. Northeastern University*, U.S. District Court, District of Massachusetts (October 1, 2020) (dismissing breach of contract and unjust enrichment claims for failure to refund tuition and certain fees for spring 2020 semester).

Minnesota Court of Appeals transgender student discrimination case.

- *N.H. v. Anoka-Hennepin Sch. Dist.*, 950 N.W.2d 553, (Minn. Ct. App. September 28, 2020) (holding that a transgender high school student states a claim for a violation of the Minnesota Human Rights Act and the Minnesota Constitution when a school district denied the student use of a locker room that is available to the students of the gender with which the student identifies and to which the student has socially transitioned).

Cases: continued

Student Organizations and the First Amendment.

- *Business Leaders in Christ v. University of Iowa*, 2021 WL 1080556 (8th Cir. March 22, 2021) (holding that the University violated the First Amendment when it refused recognition to a religious student organization based on the University's non-discrimination policy).
- **Key Fact.** Student organization was able to point to other recognized student organizations that did not follow the policy but were recognized.
- Court denied administrators qualified immunity (so money damages allowed).

Small Addition to Solomon Amendment

FY21 National Defense Authorization Act adds campus provided e-mail address to list of information available to military recruiters.



COVID-19

Please contact me if you have any student issues with the mask requirement and/or claimed accommodations to the mask requirement.



Civil Discourse on Campus Toolbox

Resources to help colleges and universities as they navigate through difficult conversations about current events on campus, protests, and work to advance social change.

- [Civil Discourse on Campus Toolbox](#)
 - Username: yourStarID@minnstate.edu
 - Password: your StarID password
 - Key Messages, Campus Planning, Legal Considerations, etc.



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:

- Speech that is not protected by the First Amendment such as
 - “Fighting words” (“where such advocacy is directed to inciting or producing imminent lawless action and is likely to 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

Student Classroom Speech

- Conflict sometimes happens in the “marketplace of ideas.”
- 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)

Forum Analysis (2)

Traditional Public Forum

- Public streets, sidewalks, parks
- Restrictions must satisfy strict scrutiny (government must have compelling interest in regulation and regulations must be narrowly tailored to fit that interest)
- No Content and Viewpoint discrimination
- OK to have reasonable time, place, and manner restrictions like:
 - Hour restrictions (not at night)
 - Noise restrictions (no sound amplification)
 - Permits

Typical Campus Forums

- Outdoor space
- Space reservation and rental
 - Classrooms
 - Auditoriums
- Bulletin Boards
- Key – Look to campus policy and procedure around the forum. What is your campus policy or practice regarding:
 - Bulletin boards.
 - Outdoor space areas.
 - Indoor space areas (the student union, etc.).
 - Space rental.
- Resource – [“Free Speech and Forum Analysis Checklist”](#)

General Posters and Banners

- Check your college/university facility use policy to determine whether there are public bulletin boards or other areas in which postings are allowed.
- If a bulletin board or other posting area is only for official use, mark it that way.
- Be consistent and content neutral in oversight of posting restrictions—whether violators re campaign related or nonpolitical messages.

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.”

Discrimination and the First Amendment (2)

- 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>



Student Protests: Summary

- Follow your policies.
 - Time, place and manner restrictions.
 - Examples: Protestors must leave by close of business day, no sound amplification.
 - Sample Facility Use Policy available at
 - https://mnsu.sharepoint.com/:w:/r/sites/connect/_layouts/15/WopiFrame.aspx?sourcedoc={6fe32e5b-eb7d-4124-bfd1-4c405753d992}&action=default.



Think About Other Institutional Responses

- Address speech with more speech
- Letter to the campus community on campus values
- Host a forum on the issues
- Assessment of campus climate



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