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Office of General Counsel

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# Student Speech Issues

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# Outline of Today's Presentation

- Review student speech cases and regulatory developments of interest.
- Discuss framework and rubrics for analyzing student speech issues.
- Questions/Discussion.



# 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 a 2019 executive order.
- Conditions federal grants on complying with the First Amendment.
  - Non-compliance = Final judgment by a state or federal court of a First Amendment violation.
  - Effect = Acts as an Additional penalty.
- On August 19, 2021, the Department of Education published an update on the Free Inquiry Rule (“we anticipate publishing a notice of proposed rulemaking \* \* \* to propose rescinding parts of the Free Inquiry Rule.”)

# The First Amendment

- Applies to public institutions
- “Congress shall make no law \* \* \* abridging the freedom of speech \* \* \*.” United States Constitution, Amend 1.
- Board Policy 3.1 Student Rights and Responsibilities



# The First Amendment

- 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 open 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:
- 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

# Cases: United States Supreme Court

## Mahanoy Area School Dist. v. B.L. (2021).

- High school student failed to make school's varsity cheerleading squad and subsequently posted 2 images on Snapchat expressing frustration with the school cheerleading squad, one containing vulgar language and gestures.
- School suspended student from the junior varsity cheerleading squad for one year for violating team and school rules.
- Student sued.
- **Holding:** School violated B.L.'s First Amendment rights.

# Mahanoy, continued

- Schools may regulate off-campus speech BUT interest is *diminished*.
- In this case, B.L.'s speech was protected criticism and school did not prevent evidence of substantial disruption.
- **DICTA:** Court recognized school's interest in regulating:
  - Bullying or harassment targeting particular individuals.
  - Threats aimed at teachers or other students.
  - Failure to follow academic rules.
  - Breaches of school security devices.
  - Other rationales?

# 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.

# Student Classroom Speech (2)

- 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.

# Typical Campus Forums (2)

- 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”
- Note: Typically cannot reserve unfettered discretion in policy or practice.

# 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
  - Typically cannot charge one group for security if not charging all groups for security
  - So cost of security is an element of the forum analysis

# 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.

# Student Organizations: Recognition

Institutions may impose reasonable, content neutral criteria in exchange for the benefits of recognition. For example,

- Certain number of members.
- GPA.
- Advisor.
- Constitution.
- Apply/Renew on periodic basis.



# Student Organizations: Recognition (2)

- An institution may not refuse recognition because of the student organization's viewpoint BUT may require the organization to
  - Obey campus rules.
  - Refrain from disrupting classes.
  - Obey all applicable federal, state, and local laws.

*Healy v. James, 408 U.S. 169 (1972).*

# Cases (2)

## Student Organizations and the First Amendment.

- *Business Leaders in Christ v. University of Iowa*, 2021 WL 1080556 (8<sup>th</sup> 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).

# Student Life/Activity Fee

“Funding decisions shall be made in a viewpoint neutral manner.” Board Policy 2.8 Student Life, Part 1; System Procedure 2.8.1.

*Board of Regents v. Southworth*, 529 U.S. 217 (2000).

# Student Organization Access to Campus Facilities

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# 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

- 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](https://mnsu.sharepoint.com/:w:/r/sites/connect/_layouts/15/WopiFrame.aspx?sourcedoc={6fe32e5b-eb7d-4124-bfd1-4c405753d992}&action=default).

# Institutional Responses

- Encourage student activism
- Encourage those with power and privilege to communicate diversity and inclusion commitments and goals
- Review speech policies
- Engage faculty in hosting discussion forums and other events to dive deeper into issues

# Institutional Responses (2)

- Create opportunities for relationship building and engagement with students – Students need to be seen and heard!
- Engaging students in diversity and inclusion experiences – not just those intrinsically interested
- Continually assess campus climate and respond to feedback

# Executive Order on Divisive Workplace Training

- On September 22, 2020, President Trump signed an “Executive Order on Combating Race and Sex Stereotyping.”
- Prohibited certain government contractors and grantee 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).
- BUT: This concept has found its way into legislation in a number of states (not in Minnesota at this time).

# Please Contact Us If We Can Be Of Assistance

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