Speech on Campus: Selected Student Speech Issues

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Outline of Today’s Presentation

- Basic First Amendment Principles
- Classroom Speech
  - Substantial Disruption
  - Reasoned Exception
- Curricular Speech and Professional/Technical Programs
- Forum Analysis
- Speech Codes
- Student Media
- Student Organizations
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
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 such as
    - “Fighting words”
    - “True threats”
    - Unlawful harassment/discrimination
    - Obscenity, defamation
Basic Principles

- Speech may include verbal and nonverbal/symbolic communication (T-shirts, “Flag Burning,” etc.)
- Categories of Unprotected Speech
  - Advocacy of Illegal Conduct
  - Fighting Words (“True Threats”)
  - Obscenity
  - Defamation (Libel and Slander)
  - Lewdness (K-12 case)
  - Advocacy of Illegal Drug Use (“Bong Hits4Jesus”) (K-12 case)
Classroom Speech and Behavior

- Conflict sometimes happens in the “marketplace of ideas”
  - 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 study 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.
Classroom Speech and Behavior

- Faculty may appropriate manage discussion with rules
  - Reasonably related to pedagogical concerns
  - Related to teaching/learning and not pretext for viewpoint discrimination
  - Primary responsibility for managing the classroom lies with the faculty
  - Faculty may direct students to leave the class or activity for the remainder of the period
  - Longer suspensions or dismissal require referral to administrator (conduct process)
Social Media and the First Amendment

- Interaction between the free speech rights of students and the reasonable program rules of the institution
- Scope/Jurisdiction of the rules
- Key – Start with content, not format
  - What is the policy violation
  - Jurisdiction
- System Procedure 5.22.1 Acceptable use of Computers and Information Technology Resources
Social Media and the First Amendment

“[W]e hold that a university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards.”

Tatro v. University of Minnesota, 816 N.W.2d 509 (Minn. 2012).
Forum Analysis

- 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
Forum Analysis

- 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
Forum Analysis

- Nonpublic Forum
  - Public property not generally open for expressive activities such as:
    - Military bases
    - Government office buildings
  - Can 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” (will be posted with this webinar)
“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”)
“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 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).
Student Media

- Distinguish Student Media from Institutional Media such as an alumni magazine.

- Student Media
  - Editorial control by student editors and writers – not institution.
  - Board Policy 3.1.
Student Media

Student Organization: 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 on a periodic basis
- These rules in effect are a “Forum”
RECOGNITION, continued

- 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

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 matter restrictions are OK

Student Organization: Membership Discrimination

- Can a non-discrimination requirement be part of the institution’s content neutral criteria?
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.


Think About Other Institutional Responses

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

- October 9, 2014, OGC Webinar “Student Speech on Social Media.” [www.ogc.mnsccu.edu](http://www.ogc.mnsccu.edu).
- “First Amendment: Student Speech” FAQ document (will be posted with this webinar).
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