

The New Administration and the Impacts on California Community College Students: A Discussion on Speech, Immigration and Title IX

California Community Colleges Chief Student Services Administrators Association (CCCCSSAA) Spring Conference | March 24, 2017

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Agenda

- **Issues Related to Free Speech & Academic Freedom**
 - District speech: exercising the institution's free speech rights.
 - Limits & options to managing speech that is offensive to others.
 - Academic freedom.
- **“Sanctuary Districts”**
 - What does it mean?
 - What are the risks?
 - ICE requests for student records & directory information.
- **“Title IX”**
 - What effect does the withdrawal of OCR's Dear Colleague letter re transgender students have, if any, in California.

Direction in a Time of Uncertainty

In presenting this information we first acknowledge:

- It responds to concerns based on election platforms that have yet to be actualized.
- Whether/how the new administration will actually change, interpret and enforce existing law, regulations & executive orders is unknown.
- This presentation provides information based on existing law...which could change.

Speech Issues

Issues Related to Free Speech and Academic

- Individual Speech
- Academic Freedom

Individual Free Speech Issues

- Claims of feeling “unsafe” due to speech of others:
 - Minority view in a politically charged environment;
 - Xenophobic speech.
- Not protected from acrimony, free speech of opponents.
- But can assure.
 - Fully protected against retaliation by administration, faculty.
 - Fully protected from any unlawful conduct.

Employee Speech: Is It Protected Speech?

The Two Part Test:

Is the District Employee Speaking:

1. As a private citizen?
2. On a matter of public concern?



Employee Speech: The *Pickering* Balance

Interest of employee, as a citizen, in commenting on matters of public concern

VS.

Interest of public employer in promoting efficiency of the public services

Student Speech

Remember that even offensive speech can be protected speech.

Education Code § 66301

No First Amendment Protection

- Child Pornography
- Defamation
- Obscenity
- “Fighting words”
- “True threats”

First Amendment

- What is a “true threat”?
 - Speech threatening student body is per se unprotected.
 - *Ponce* case – “true threat”.
 - But it is important to look at the context of the threat.
 - *Bauer* case - not “true threat”.

Free Speech – General Rules

- Very difficult to restrict speech in campus free speech area.
- Other areas can use “reasonable” and “viewpoint-neutral” restrictions (e.g., forums for limited topics, e-mail systems, etc.).
- In general, can halt speech that causes or threatens a substantial disruption on campus.
- Unlawful censorship can result in civil rights liability under 42 U.S.C. section 1983.

“Hate Speech”

- “Hate speech” thought to include protected classifications, including ancestry, national origin religion, race, gender, sexual orientation, etc.
- No “hate speech” exception to First Amendment.
 - *RAV v. St Paul*, 505 U.S. 377 (1992) (Scalia, J.)
- Potential exception if targets individual, actually violates rights to employment or education.
- Many institutions punish and take First Amendment risk.
- But institution can refrain from punishing, and use First Amendment to protect from liability.
 - *Rodriguez v. Maricopa CCD*, 605 F.3d 703 (9th Cir. 2010) (Kozinski, J.)

Academic Freedom Issues:

- Faculty have academic freedom rights
 - Through policies and contract
 - Through First Amendment right to academic freedom in “scholarship and teaching.”
- Colleges are likely to see increased concerns
 - Students recording in class
 - Social media
 - Protecting political speech
 - Example: Professor Watchlist <http://www.professorwatchlist.org/>

“Students, parents, and alumni deserve to know the specific incidents and names of professors that advance a radical agenda in lecture halls.”

Academic Freedom Issues

- Colleges also have recognized institutional right to academic freedom

Immigration: “Sanctuary” Districts & Other Issues

DACA: Overview

“Deferred Action for Childhood Arrivals”:

- Executive Order, not law or regulation.
- Represents Obama administration’s priorities regarding deportations and prosecutorial *discretion* to permit individuals to remain in the country for two years without fear of deportation.
- Also eligible for two-year employment authorization.
- Does not confer legal status or provide a pathway to citizenship.

DACA: Overview

DACA status available to undocumented individuals who had no lawful status on 6/15/12, and:

- Were physically present in U.S. on 6/15/12.
- Were under the age of 31 as of 6/15/12.
- Came to U.S. before 16th birthday.
- Have continuously resided in U.S. since 6/15/07.
- Are in school, graduated or have a certificate of completion or GED, or honorably discharged from the Coast Guard or Armed Forces.
- Haven't been convicted of a felony, significant misdemeanor, or 3+ misdemeanors, and don't pose a threat to national security or public safety.

California Law

- The California Dream Act allows undocumented students to receive in-state tuition and apply for the same financial aid opportunities available to legal residents and citizens.
- Not DACA dependent.

“Sanctuary District”: What Does it Mean?

- **After the 1/25/17 Executive Order “Sanctuary” has two meanings:**
 - Historic.
 - As defined in the Executive Order.

“Sanctuary District”: What Does it Mean?

Historic Usage:

- There is no legal definition for a “sanctuary district”.
 - Derived from the term “sanctuary city” for which there is also no definition.
- Being a “sanctuary district” doesn’t create a legal status for the institution.
- Being a “sanctuary district” doesn’t create legal protections for undocumented students.
- Being within a “sanctuary city” may not effect district.

“Sanctuary District”: What Does it Mean?

May include a range of policies or practices:

- Setting institutional tone/affecting institutional culture.
- Instructing employees not to inquire re immigration status.
- Providing services without regard to/inquiry regarding immigration status.
- Not dedicating resources to enforce federal immigration laws.
- Not cooperating with ICE or other federal authorities, except as required by law.
- Providing information & support to undocumented community members.

“Sanctuary District” — As Defined in the Administration’s 1/25/17 Executive Order

Executive Order: “Enhancing Public Safety in the Interior of the United States”:

- Defines “sanctuary jurisdiction” as willfully refusing to comply with 8 USC § 1373.
- Authorizes the AG to designate “sanctuary jurisdictions” for purpose of sanctioning them.
- Authorizes the AG to take enforcement action against entities that “prevent or hinder” federal law enforcement.
- Commands the Secretary of Homeland Security to take immediate steps to establish agreements with state and local law enforcement agencies to authorizes performance of immigration officers.

“Sanctuary District”: What Are The Risks?

Creating a false sense of security for undocumented students.

- Federal law enforcement authorities may enforce immigration and other federal law in an area without the assistance of the district or local police.

“Sanctuary District”: What Are The Risks?

Executive Order addresses three distinct areas:

- 1) Violations of law (INA).
 - Civil/criminal penalties.
- 2) Noncooperation.
 - Possible loss of funding.
- 3) Pressure to devote state & local resources to enforce federal law.
 - State of California may respond.
 - Unclear how federal government will respond: requiring state/local assistance may be unconstitutional.

Criminal and Civil Penalties

- **Immigration Nationality Act (INA)**
 - Prohibits concealing, harboring, or shielding from detection unauthorized aliens.
 - Must know that the person is in the U.S. illegally, or act in reckless disregard of that fact.
 - Applies to both individuals and organizations.
 - Penalties are fine, imprisonment for one year or less, or both.

(8 U.S.C. §1324)

What is Harboring, Concealing or Shielding from Detection?

- INA Does Not Provide a Definition.
- Federal Court Definitions.
 - Simple sheltering. (*U.S. v. Acosta de Evans* (9th Cir. 1976) 531 F.2d 428.
 - “Conduct tending substantially to facilitate an alien’s remaining in the U.S. illegally”. (*U.S. v. Lopez* (2d Cir. 1975) 521 F.2d 437.).

Is Failure to *Inform* “Harboring, Concealing, or Shielding”?

- No. The law does not impose an affirmative duty to inform law enforcement of illegal activity.
- ...*But*, a government entity or official may not prohibit or restrict any government entity or official from sending to, or receiving from, ICE information relating to immigration status, or prohibit them from “maintaining” such information. (8 U.S.C. Section 1373.)
 - Note: The executive Order defines “sanctuary” as a government agency that violates this section.

Protecting Privacy

- **Establish policies and procedures that limit the collection of private information from students such as:**
 - Social security numbers (“SSN”), or lack thereof;
 - Residency information, including residency in other countries;
 - High school and elementary schools attended in other countries;
 - Other information of this nature, including information that may bear on the student’s ability to obtain in-state tuition.

Protecting Privacy

- Audit policies to avoid employees' providing such information to agencies that request it, unless there is a specific legal requirement.
- Modify internal policies as needed to restrict administrators and employees from obtaining this information unless it is necessary to providing services to the student (for example, in the financial aid context).

Is Failure to *Cooperate* “Harboring, Concealing, or Shielding”?

- **Courts have not addressed this question directly.**
 - Requiring an officer to obtain a warrant or subpoena (if required by law) would likely *not* constitute harboring, concealing or shielding.
 - Helping someone escape while the warrant is being obtained likely *would* constitute harboring, concealing or shielding.
 - Other actions taken to thwart immigration officials’ enforcement activities may also constitute harboring, concealing or shielding.

Can Noncooperation Result in Loss of Federal Funding?

- Maybe...under the Executive Order.
 - No specific statute states that DOE funding can be withdrawn for failure to cooperate with ICE proceedings.
- However...
 - Executive Order exerts pressure to cooperate.
 - Most federal fund recipients certify that they will “comply” with all applicable laws.
 - Districts should review their funding documents.

In Light of Exec Order: Review Mutual Aid Agreements

- *At least for now, colleges:*
 - Do not have a duty to use their resources to enforce immigration law...(at least for now).
 - May enact policies that their police departments will not use their resources for immigration enforcement including questioning, detaining, or arresting individuals based on their legal status.
 - May maintain policies that campus police will not inquire about, or take action concerning, a suspect, witness or victim's immigration status.

But...

- These policies may not affect how local law enforcement conducts itself on college campuses.

In Light of Exec Order: Look at Mutual Aid Agreements

California Education Code, § 67381 (The Kristin Smart Campus Safety Act)

“Requires community college campuses to enter into written agreements with local law enforcement clarifying operational responsibilities regarding investigation of on-campus violent crimes; agreement must delineate the specific geographic boundaries of each agency’s operational responsibilities.”

What About ICE/DHS Requests for Student Records?

Legal Overview*

- Student education records aren't subject to nonconsensual disclosure, unless a specific exception applies.
 - But, where an exception applies, district may still require a lawful subpoena, warrant or judicial order.
- Directory information is not a “student record” and doesn't require consent to disclose.
 - But, districts must offer opt-out process for nondisclosure of directory information.

**Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (“FERPA”) 34 C.F.R. § 9.31(d); Cal. Educ. Code 76243(a)*

What About ICE/DHS Requests for Student Records?

Exceptions include:

- Disclosure to authorized representatives of the Comptroller General, Attorney General, Secretary of Education, or state or local educational authorities in connection with an audit of federal- or state-supported educational programs or with the enforcement of or compliance with federal legal requirements relating to those programs. (34 C.F.R. §§ 99.31 (a)(3) and 99.35.)
 - **Note:** Under current law, ICE and other federal agencies charged with enforcing immigration laws are not referenced as authorized representatives in FERPA or the Education Code.

What About ICE/DHS Requests for Student Records?

Exceptions also include:

- Student & Exchange Visitor Program (SEVP). Institutions are subject to on-site review at any time by an ICE Field Representative who has authority to ask for information on temporary and training visas.
- Students on temporary F, J or M visas generally waive their rights under FERPA.
- By signing a student/employee's H-1B visa petition.
- Under the US Patriot Act.

What About ICE/DHS Requests for Student Records?

- **Even where an exception applies the school has discretion not to release the information **UNLESS** pursuant to:**
 - Warrant
 - Court order
 - Subpoena
 - Must provide notice to subject student
 - Consent by subject student

What About ICE/DHS Requests for Student Records?

Objections To Disclosure

- If the college has a good faith basis, it can move to quash a subpoena/challenge administrative warrant or otherwise assert objections to bar disclosure.
- Once the issue is brought before a court via a motion, the Court determines whether disclosure is warranted.

What About ICE/DHS Requests for Directory Information?

Districts may:

- Choose not to designate any directory information.
 - But this requires individual consent to disclose. Impedes publishing yearbooks, honor roles, etc.
- Define directory information more narrowly.
 - For example: not include address or place of birth.
- Specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both.(34 CFR 99.37(d).
 - ***But remember:*** 8 U.S.C. Section 1373.
- Ensure annual opt out notice, process and forms are well publicized, understood and easy to access.

What Support May Districts Provide to Undocumented Students?

- Referrals to or promotion of resources
 - E.g., low cost immigration attorneys
- Counseling services
 - Students
 - Families
- Provide all-student education about DACA/address myths
- Provide faculty/staff development, resources, information
- Engage student government & clubs

Responding to Faculty Questions & Concerns

What do we do if an ICE officer comes to my classroom looking for one of my student?

- INA (8 U.S.C. §1324) prohibits concealing, harboring, or shielding from detection unauthorized aliens. Attempts to block or obstruct lawful exercise of authority by a federal immigration officer would likely be viewed as a violation of the INA.
- District should have protocols for faculty and staff to follow identify where federal immigration can go to enter campus buildings (e.g. warrants, subpoenas, etc.)

Responding to Faculty Questions & Concerns

Do immigration officers need a warrant to come onto campus and into my classroom?

- It depends.
- First, many parts of community college campuses are open and public spaces. We do not think a warrant is required to enter such spaces, or just to come onto a community college campus. In contrast, a warrant would be required to search a private office, where a warrant would otherwise be required.

Responding to Faculty Questions & Concerns

Do immigration officers need a warrant to come onto campus and into my classroom?

- A classroom at a public community college district is likely not a space where there is the “reasonable expectation of privacy” necessary to require a warrant just to enter the room to look for a person of interest.
- But, searching the contents of a room (file drawers, desks, etc. would likely be required.

Title IX and Protected Classifications Under California Law

Introduction to Title IX

- Prohibits discrimination on the basis of sex.
- Prohibits sexual misconduct that limits a student's ability to participate in educational programs and activities.

Gender Identify and Transgender Students

- Feb. 22, 2017, the Department of Education Office for Civil Rights (OCR) released a Dear Colleague Letter that "withdraws the statements of policy and guidance" in the May 13, 2016 Dear Colleague Letter related to gender identity and transgender students.

Feb. 22, 2017, OCR Dear Colleague Letter

“Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms.”

What is Title IX?

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Cal. Education Code Section 200

Education Code Section 200 states, “It is the policy of the State of California to afford all persons in public schools, regardless of their disability, ***gender, gender identity, gender expression***, nationality, race or ethnicity, religion, sexual orientation... equal rights and opportunities in the educational institutions of the state.”

Protected Classifications Under Cal. Fair Employment and Housing Act

RELIGIOUS CREED

MARITAL STATUS

RACE/NATIONAL ORIGIN/ANCESTRY/COLOR

DISABILITY/MEDICAL CONDITION

MILITARY AND VETERAN STATUS

GENETIC INFORMATION

**SEX (GENDER, PREGNANCY, GENDER EXPRESSION,
GENDER IDENTITY, ETC.)**

SEXUAL ORIENTATION

AGE

OPPOSITION TO HARASSMENT

ASSOCIATION/PERCEPTION

Discrimination

- Treating individuals differently ***because of***:
 - A protected classification.
 - A perception that an individual is a member of a protected classification.
 - An association with an individual of a protected classification or perceived protected classification.

Harassment

- Conduct that is:
 - Physical
 - Verbal
 - Visual
- Taken “***because of***” a protected classification
- Two types:
 - Quid Pro Quo
 - Hostile Work/Education Environment

“Hostile Work/Education Environment”

- Protected Classification
- Physical, Verbal or Visual Conduct
- Objectively and Subjectively Offensive (Unwelcome)
- Severe **or** Pervasive
- Unreasonably interferes with work or learning opportunities

Thank You

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