


Free Speech Issues on Campus

Chief Student Services Officers (CSSO) Annual Conference | March 25, 2019

Presented by: Eileen O'Hare-Anderson and Pilar Morin

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Free Speech Issues on Campus
Chief Student Services Officers Association
Annual Conference | March 25, 2019

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Agenda

- Constitutional Free Speech Law
 - Employee and Student Free Speech
- Free Speech: Public Forum Principles
- Academic Freedom
- Limiting Use of Facilities

Constitutional Free Speech

- “Congress shall make no law . . . abridging the freedom of speech, or of the press”

– *U.S. Constitution, First Amendment*

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Constitutional Free Speech

- “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.”

– *California Constitution, art. I, section 2.*

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Free Speech – General

- Certain speech is not protected
 - “Substantially disrupts” college/university operations; or
 - Speech that is not protected by the First Amendment.
 - Defamation
 - “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

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DOES NOT Include Right to:

- Incite actions that would harm others (e.g., “[S]hout[ing] ‘fire’ in a crowded theater.”);
- Make or distribute obscene materials; and
- Burn draft cards as an anti-war protest.

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(Protected) DOES Include Right to:

1. Not speak;
2. Of students to wear black armbands to protest a war;
3. To use certain offensive words and phrases to convey political messages;
4. To use certain offensive words and phrases to convey political messages;
5. To advertise commercial products and professional services (with some restrictions); and
6. To engage in symbolic speech (e.g. burning the flag in protest).

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Free Speech: Public Forum Principles

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On-Campus Speech

- A community college campus does not consist of a single forum, but rather can be “subdivided” into four different types of forums:
 - Traditional public forum
 - Designated public forum
 - Limited public forum
 - Non-public forum

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Free Speech – General

- What type of public forum is at issue:
 - Traditional
 - Sidewalks, streets, student union areas, and parks
 - Designated
 - Opened up for any speech
 - Limited
 - Only certain groups or topics
 - Non-public forum
 - Administrator and faculty offices and college electronic billboard, letterhead, internal mail systems

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Free Speech – General

- Traditional and Designated public forums
 - Restrictions on content must have
 - Compelling interest
 - Be narrowly tailored
- Non-Public and Limited public forums
 - Reasonable
 - Viewpoint-neutral

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Forum Analysis – College Campus

- Generally courts find:
 - Free speech zones = Designated Public
 - Offices, classrooms = Non-Public
 - Other areas = Limited Public or Non-Public
 - College policy can specify all areas as non-public forum, except free speech zones
 - Caution: subject to challenge; courts can disagree with college's designations

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Forum Analysis – Free Speech Zones

- Allocated for expressive activities (students, outsiders, employees)
- Courts will approve if
 - Large areas of campus
 - Sufficient number of areas
 - Close to wide audience (foot traffic, etc.)
- Caution: Some courts skeptical of speech zones
- Law in area is developing

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On-Campus Speech Issues

Common topics that can create controversy on campus - although District must be viewpoint-neutral

- *Religious messages critical of protected groups*
- *Speech relating to violence and weapons*
- *Graphic displays on abortion*
- *Protests*
- *Speech on LGBTQ issues*
- *Speech targeting or bullying members of community (students, faculty, employees)*
- *Groups whose strategy is to violate District procedural policies to provoke a response*

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Speech: Employee v. Student Speech

Free Speech – Employees

- Individuals are deemed to give up some free speech rights when they come to work for the Government
- But speech of “public concern” by individual speaking as a citizen is entitled to First Amendment protection – *Pickering* Test

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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?



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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

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Case Study – Employee Speech

The College assigns each employee an email address. There are also lists such as “All College,” and “All Faculty,” which employees on campus use to trade recipes, report traffic, solicit donations, etc. Prof. Smith sends a mocking email to “All Faculty” on Columbus Day, extolling it as a Great White Holiday; he opines that Caucasian people and Christian values are superior to others in the United States. This sets off a torrent of angry responses from Latino and Native American faculty followed by even nastier ones from Prof. Brown.

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Case Study – Employee Speech

Latino and Native American faculty demand that Prof. Brown be punished. Can the College do so?

- ***Is the speech protected?***
- ***Can the college create rules that limit and monitor certain controversial and hurtful viewpoints?***

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Case Study – High-Level Policymaking Employee Speech

An associate VP of Human Resources at a college writes a letter to a local newspaper challenging a story's comparison of gay rights to civil rights, and taking the religious position that homosexuality is a matter of "choice." The VP uses her name/photo but does not mention the college. The letter is published and the college discharges her because of it.

Free speech violation?

Dixon v. University of Toledo, 702 F.3d 269
(6th Cir. 2012)

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Education Code and Student Free Speech

- Governing boards and administrators cannot make or enforce any rule subjecting any student to disciplinary action based solely on:
 - The student's speech or
 - Other communication that would otherwise be constitutionally protected speech when engage in outside of campus
- Districts cannot place prior restraints on student speech

Ed. Code section 66301

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Education Code and Student Free Speech

- District policies and procedures cannot interfere with the right of students to exercise free expression including, but not limited to,
 - The use of bulletin boards,
 - The distribution of printed materials or petitions, and
 - The wearing of buttons, badges, or other insignia

Ed. Code section 76120

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Student Speech

Remember that even offensive speech can be protected speech.

Ed. Code section 66301

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Broad Student First Amendment Rights Recognized

- Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”
- Can only be disciplined if speech “materially and substantially interferes” with discipline and operation of school, or
- “Collid[es] with the rights of others”

Tinker v. Des Moines Independent Community School District,
(1969) 393 U.S. 503

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Student Speech - Supreme Court Cases (High School)

- Public high schools can restrict speech if:
 - *Tinker* (1969): “material and substantial disruption”
 - *Fraser* (1986): speech “plainly offensive,” which is “inconsistent with basic educational mission”
 - *Hazelwood* (1988): school exercising editorial control of school-sponsored newspaper and “legitimate pedagogical concerns”
 - *Morse* (2007): speech promotes illegal drug use

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Education Code and Student Free Speech

- Exceptions - where that expression is:
 - Obscene, libelous or slanderous according to current legal standards, or
 - Which so incites students as to create a clear and present danger of the commission of unlawful acts on community college premises, or
 - The violation of lawful community college regulations, or
 - The substantial disruption of the orderly operation of the community college

Ed. Code section 76120

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“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.).

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Case Study

- Instagram group created by student with handle, @yungcavage, giving access to other students;
- Only those who were part of the group could see, follow, comment, or like;
- About 40 posts about school students and school personnel with racist and derogatory comments, often with a picture identifying the target.

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Case Study

- The postings were derogatory and racists, for example:
 - A “Ku Klux starter pack” featuring a noose, a burning torch, a black doll, and a white hood.
 - A school student and basketball coach, both of whom are African-American, with nooses drawn around their necks.

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Case Study

- One female student borrowed a follower's phone after hearing about it and copied photos to her own phone;
- News spread around school;
- By lunchtime some of the targeting students gathered in the hallway, distraught, some crying; and
- Eventually the creator of the posts shuts it down.

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Case Study

- School disciplines
 - The creator of the posts and site; and anyone who followed.
- Questions:
 - ***Do you think all who commented in support should be punished?***
 - ***How about those students that "liked" the posts?***
 - ***Does it matter if some posts were generically racist, i.e. not targeting anyone?***

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Court's Ruling

- School argued the conduct substantially disrupted the school and infringed on the rights of other students.
- Court found:
 - Liking the post is expression; analyze under First Amendment;
 - Follower of post who did not comment or like; also protected under First Amendment.

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Court's Ruling

- Those who liked and commented in support of posts targeting specific students:
 - The court found that their behavior “meaningfully contributed” to the campus disruptions; their discipline was justified under rules.
 - The online denigration of a student’s race or ethnicity and the threat of violence and any likes and comments expressly supporting those posts-interfere with a student’s right to be left alone.

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Court's Ruling

- Those who liked and commented on posts with generic racist posts:
 - Court found likes and comments favoring generally offensive, racist, or hateful speech that did not target specific student or employees is protected under the First Amendment and does not constitute harassment or bullying.
 - The court also found the school violated the speech rights of students who only followed the account, but did not like or comment.

Shen v. Albany Unified School District, 2017 WL 5890089

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Case Study

A student is expelled for creating hit list in of 22 students at his school. The student claimed the list was protected speech and that he was merely venting his anger. Moreover, the list was privately made in a journal that he did not share with others. His mother found the journal, and alerted his therapist who then called the authorities. The Student was not charged by the police.

Is this off campus speech protected?

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Case Study

The 9th Circuit Court of Appeals held that:

- The school district's decision to expel student did not violate student's right of free speech, and
- The student's expulsion did not violate parents' substantive due process rights.

McNeil v. Sherwood School District 88J (9th Cir. 2019) 2019
WL 1187223

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Case Study – Academic Freedom

Dr. Smith teaches an introductory class in contemporary art. As part of his teaching style, he persistently uses profanity and sexual themes to underscore the “shock art” that predominates his curriculum. One day, he targets two students, a male and female, by discussing their physical attributes as part of a discussion on commercial art and advertising. He makes sexist comments about their bodies and tells the class that sex sells. They both complain to the administration. The District admonishes Dr. Smith that he can teach art, but cannot use and vulgarities in his class, and he cannot harass students.

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Case Study – Academic Freedom

Dr. Smith claims the directives violate his speech and academic freedom rights. Is he correct?

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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
 - Social media
 - Protecting political speech
 - Example: Professor Watchlist <http://www.professorwatchlist.org/>
 - Students recording in class

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

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Academic Freedom Issues

- Colleges also have recognized institutional right to academic freedom.

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Case Study - Limiting Use of Facilities

A band of citizens erect tents outside the Administration Building as part of a political protest. The College does not allow overnight camping in any public area and asks the Occupiers to leave. The Occupiers claim camping is their expressive First Amendment right.

Is it?

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District Policies and Procedures

Board Policy and Administrative Regulation

- Speech: time, place and manner
 - For example:
 - Hour restrictions (not at night)
 - Noise restrictions (limit sound amplification)
 - Physically touch, strike or impede the progress of passersby
 - Solicit donations or sell items

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Thank You!

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