



FREE SPEECH, DISCRIMINATORY HARASSMENT AND MENTAL HEALTH...

NAVIGATING A MYRIAD OF ISSUES IN A UNIVERSITY SETTING

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DISCUSSION

- Introduction
- First Amendment Overview
- Freedom of Expression Policy (RPD 4-21)
- UW Tools (Admin. Code, policies, etc.)
- Title VI & Discriminatory Harassment
- ADA
- Classroom Management Considerations



BRIEF HISTORY OF FIRST AMENDMENT SPEECH RIGHTS





U.S. CONSTITUTION: FIRST AMENDMENT

- Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
 - Ratified in 1791



APPLICATION OF THE FIRST AMENDMENT

- **Public Institutions of Higher Education**

- State/governmental entities
- Bound by U.S. Constitution (state constitutions may have corresponding provisions)
- Policies and practices need to comply with constitutional requirements (vagueness, overbreadth, viewpoint discrimination)

- **Private Institutions of Higher Education**

- Not subject to the Constitution, including First Amendment
- Establish own policies and procedures
- Still subject to controversy – not all may agree that policies and procedures are adequate



NOTABLE HISTORICAL MOMENTS

- Alien and Sedition Acts (1798)
- Pre-Civil War Speech on Slavery
- 1920's
- Current presumptions



NOTEWORTHY CASE

SUPREME COURT RULING: Student expression is constitutionally protected and may not be censored unless school officials can show that the expression:

- (1) Would result in a material and substantial disruption of normal school activities or
- (2) Invades the rights of others.

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



LEGAL CHALLENGES – FIRST AMENDMENT

- **Challenges arise out of efforts to regulate conduct**
 - Policies that attempt to regulate speech
 - Specific actions taken against individuals—chilling, retaliating, etc.
- **Balance legal obligations under other federal, state, and university anti-discrimination/harassment requirements**
 - Examples – Title IX, **Title VI**, Board of Regent Policies
 - Constitution supersedes statutes and policies – they must meet its standards



LAWFUL RESTRICTIONS ON SPEECH

- **Time**

- What is permissible at noon may be impermissible at 1am.

- **Place**

- What is the forum?

- **Manner**

- Is the educational mission of the university being disrupted?



LAWFUL RESTRICTIONS ON SPEECH (CONT.)

- **Place**

- Traditional (or Designated) Public Forum
- Limited Public
- Non-Public Forum



CLASSROOMS = NON-PUBLIC FORUMS





VIEWPOINT-BASED DISCRIMINATION

- First Amendment prohibits discriminating against speech, expression, or a speaker based **solely** on the viewpoint that it expresses.
- Mind the viewpoint vs. content distinction.
- Viewpoint discrimination is ***always*** prohibited – regardless of the forum (or lack thereof).



EXCEPTIONS TO FIRST AMENDMENT PROTECTIONS

- True Threats
- Incitement
- Fighting Words
- Obscenity
- Libel/Defamation
- Substantial Disruption
(in the educational setting)



HATE SPEECH

- There is no hate speech exception to the First Amendment.
- “Right to offend and right to be offended”
- Even speech that causes extreme emotional distress is protected under the First Amendment (*Snyder v. Phelps*, 562 U.S. 443 (2011))
 - Westboro Baptist Church picketed soldier’s funeral, celebrating death of soldiers



REGENT POLICY DOCUMENT 4-21:

COMMITMENT TO ACADEMIC FREEDOM AND FREEDOM OF EXPRESSION (HIGHLIGHTS)

- Students and employees have the freedom to discuss any problem that presents itself, as the First Amendment of the U.S. Constitution and Article I of the Wisconsin Constitution permit.
- Institutions may employ 1st Amendment-friendly regulations and permitting requirements for gatherings.
- Students and employees shall be permitted to assemble and engage in **spontaneous** expressive activity **as long as such activity does not materially and substantially disrupt the functioning of an institution.**



REGENT POLICY DOCUMENT 4-21:

COMMITMENT TO ACADEMIC FREEDOM AND FREEDOM OF EXPRESSION (HIGHLIGHTS)

UW institutions **may restrict** expressive activity not protected by the First Amendment of the U.S. Constitution or Article I of the Wisconsin Constitution, including any of the following:

- Violations of state or federal law.
- Discriminatory harassment.
- Sexual harassment.
- True threats.
- An unjustifiable invasion of privacy or confidentiality.
- An action that materially and substantially disrupts the function of an institution.
- A violation of a reasonable time, place, and manner restriction on expressive activities.



TOOLS TO ADDRESS EXPRESSIVE ACTIVITIES

- Facility Use Policies & UWS 21
- UWS 18 (Conduct on University Lands)
- UWS 17 (Non-Academic Misconduct)
- Non-discrimination Policies
- Expressive Activity Policies
- Political Activities Guidance



CHALLENGES WITH FREE SPEECH AND BIAS RESPONSE

Plaintiff sued **University of Michigan** challenging two university policies under First Amendment: Harassment Policy and Bias Response Policy.

University of Michigan: *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019)



CHALLENGES WITH FREE SPEECH AND BIAS RESPONSE

Plaintiff sued the **University of Texas at Austin** challenging four policies under the First Amendment: Harassment, Acceptable Use, Residence Hall Manual, and Hate and Bias Response.

University of Texas at Austin: *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020)



TITLE VI OF THE CIVIL RIGHTS ACT

- Prohibits discrimination **on the basis of race, color, or national origin** in programs or activities that receive federal financial assistance.
- All educational institutions, including pre-K, elementary, and secondary public schools and school districts, and **public and private colleges, universities,** and other postsecondary institutions **that receive federal financial assistance,** are required to comply with Title VI.



OFFICE FOR CIVIL RIGHTS:

FACTORS TO ESTABLISH A TITLE VI HOSTILE ENVIRONMENT

- ✓ Did a hostile environment based on race, color, or national origin existed; and
- ✓ Did the school have actual or constructive notice (i.e., the school knew or should have known) of the hostile environment; and
- ✓ Did the school fail to take prompt and effective steps reasonably calculated to:
 - end the harassment,
 - eliminate any hostile environment and its effects, and
 - prevent the harassment from recurring



BALANCING FIRST AMENDMENT AND TITLE VI (OCR GUIDANCE)

- In a situation where the First Amendment prohibits a public university from restricting the right of students to express persistent and pervasive derogatory opinions about a particular ethnic group, the university can instead meet its obligation by, among other steps, communicating a rejection of stereotypical, derogatory opinions and ensuring that competing views are heard.



BALANCING FIRST AMENDMENT AND TITLE VI (OCR GUIDANCE)(CONT.)

- Educational institutions can establish a campus culture that is welcoming and respectful of the diverse linguistic, cultural, racial, and ethnic backgrounds of all students and institute campus climate checks to assess the effectiveness of the school's efforts to ensure that it is free from harassment.
- Schools can also encourage students on all sides of an issue to express disagreement over ideas or beliefs in a respectful manner.



REMINDER...





DISABILITY & RECORDS LAWS



DISABILITY LAW

- Federal law protects students and employees from discrimination based on disability.
- The Americans with Disabilities Act (ADA) of 1990, the ADA Amendments Act of 2008 (ADAAA), and Section 504 of the Rehabilitation Act of 1973 are the major laws in this area, although state laws may add further protection.
- Title VIII of the Civil Rights Act of 1968 (Fair Housing Act) may also apply to decisions regarding students who live in residence halls or other university housing.



COUNSELING IMPACT ASSESSMENT REPORT 2022-23 ACADEMIC YEAR

- Nearly **15,000** students utilized campus counseling services across UW universities in 2022-23
- **Anxiety** (75% of counseling clients), **stress** (69%), and **depression** (64%) continue to dominate the issues for which students seek counseling.
- On post-counseling surveys, over **three-fourths of students continue to experience improvements** across a variety of self-reported metrics, including overall well-being and the specific issues for which they sought counseling, consistent with psychotherapy research in other settings.
- Compared to the academic years impacted by the **COVID-19 pandemic**, fewer counseling clients reported struggling with academics (33%) or thinking of leaving school (20%).
- UW students report **very high satisfaction with counseling services** and a strong desire for access to on-campus services.
- The student-to-counselor ratio was at its lowest level this year since tracking began, averaging 1,341:1, yet remains **higher than the recommended ratio of 1,000:1** in a high utilization environment.
- Beginning in January 2023, all UW universities except Madison implemented three telemental health and wellbeing services as a supplement to on-campus services: 1) You at College – online, personalized, self-help and skill-building portal addressing academic and career success, purpose and connection, and physical and mental well-being; 2) UW Mental Health Support 24/7 - Phone, text, and chat services with trained counselors, available 24/7; 3) Mantra Health – telecounseling and telepsychiatry services.



RECORDS

- Treatment records are not usually subject to HIPAA or FERPA
- Under FERPA “treatment records” are records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student’s choice.



PRACTICES TO CONSIDER

- Many are wired to pounce right now; try to establish a culture of respectful communication
- Utilize the vast array of resources available in the university; if unsure, ask!
- Follow best practices and ethical codes of your profession – often consideration of legal issues is incorporated
- For significant safety concerns, prioritize life and safety over worries about later legal liability
- Keep the professional dialogue going about supportive, non-punitive, restorative solutions
- Your legal offices are available to advise your decision-making team



Thank you for your participation
in this program.