

THE NCHERM GROUP LLC

First Amendment on Campus

Presented by

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PRESENTER



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Agenda

- First Amendment Review
- The four Forums – Time, place & manner restrictions
- Unprotected speech
- Challenges we face in higher education
- Protests and Student Activism
- Academic Freedom
- Online speech
- Controversial external/invited speakers
- Keys for Addressing First Amendment Crises




Mattress Performance (Carry That Weight) Rules of Engagement:

Materials:

1. One XL-twin mattress, the same size and model as the mattresses provided in Columbia University Housing.

Description:

1. Whenever I am on Columbia University Housing, I must have the mattress with me.
2. When building, the building must be built with the mattress.
3. I may not see the mattress. How ever, I must help either to help or carry it for me. I can accept the mattress when head owned by CU, owned by CU, in a safe place.
5. When I am not owned by CU, I must have the mattress with me.

A woman with long dark hair, wearing a black dress, stands with her arms crossed next to a wall covered in handwritten text. The text is written in black marker on a light-colored wall.





First Amendment

- What constitutes harassment?
- Trigger Warnings
- Academic Freedom
- Safe Space – “I don’t feel safe”
- Free speech zones
- Mental Health – self-harm and/or harm to others
- Police/public safety involvement

First Amendment

- First Amendment covers:
 - Religion
 - Speech
 - Assembly
 - Press
 - Right to Petition the Government (protests)
- Government cannot **unreasonably** limit these rights or **unreasonably** constrain expression
- Civil Discourse is a hallmark freedom of the Constitution
 - Public institution cannot prohibit expression or speech simply because it is disagreeable or offensive

First Amendment

- Policies must be **viewpoint-neutral**
 - Content neutral & narrowly tailored.
- Policy must relate to the forum (location) and the purpose of the forum
- What is a forum?
 - In education, a “forum” refers to one of four distinct areas on a public campus with differing rights to access (and speech)
 - Public Forum
 - Designated Public Forum
 - Limited Public Forum
 - Non-Public Forum

Public Forum

- Places that by their very nature are open to the public to use and engage in free expression, even spontaneous free expression.
- Area where speech and expression are most protected on-campus.
- “Viewpoint discrimination” prohibited
- Examples: Campus streets and sidewalks

Designated Public Forum

- On-campus locations the school designates for open discourse (free speech zones)
- Often includes large open spaces on the campus.
- Can only limit speech or expression for a **compelling** reason that represents a **significant institutional interest**, such as not interfering with the educational process (such as disrupting class) or blocking entrances or exits to buildings
- The school cannot require sign-ups for use of these areas, unless they are in high demand.
- The school can still impose **reasonable** limitations (such as no amplified sound) as to: Time, Place, and Manner

Limited Public Forum

- Areas on-campus designated for a specific purpose, such as an auditorium, academic buildings, sports fields.
 - Any limitations placed in this area only needs to meet a **reasonable standard** and can be limited based on the type of location.
 - Schools can require sign ups or reservations for use of these areas.
 - For inside areas, the use can be limited to College groups or activities, and the school may charge a fee (again, using a reasonableness standard)

Non-Public Forum

- Final designation for location.
- Can limit use more than other three forum categories, but we still cannot control the message other than to limit the message to being related to the class or the type of office.
- Examples: campus offices, classrooms.
- Common issues: sit-ins, administrative meeting disruption

Forum Decisions

- Campus space can be made available for the expression of views that may be controversial or provocative, consistent with a **uniformly applied** campus policy and subject to the resolution of **safety and resource usage** concerns, e.g.:
 - The number of participants in the available space
 - The availability of security personnel, and
 - Avoidance of substantial disruption of institutional operations (AGB, 2017).

Unprotected Speech

■ Fighting Words

- Words which "by their very utterance, inflict injury or tend to incite an immediate breach of the peace."
- **Never** been applied by the courts.
- Hate Speech is protected by the First Amendment

■ Obscenity

- Whether 'the average person, applying contemporary community standards' would find that the work, 'taken as a whole,' appeals to 'prurient interest'; or
- Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
- Whether the work, 'taken as a whole,' lacks serious literary, artistic, political, or scientific value.

Unprotected Speech

- **Hostile Environment Harassment**

- **Title IX (Sex/Gender):**

- Severe, pervasive (or persistent) and objectively offensive such that it unreasonably interferes with a person's ability to participate in an educational program or activity

- **EEOC (All protected classes):**

- Harassment becomes unlawful where:
 - Enduring the offensive conduct becomes a condition of continued employment, or
 - The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Unprotected Speech

- **Incitement of Lawless Action**

- Must incite someone to “Imminent lawless action”
- Not just upsetting someone
- Often requires specificity as to manner and target

- **True Threat**

- Where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

- **Defamation**

- Making untrue statements about another which damages their reputation.
- Libel (written/literary) & Slander (spoken)
- Truth is a total defense; Speaker typically must know it is false

Challenges

- Conflict between protecting free speech and those who find such speech offensive, threatening or oppressive
 - Especially when our campuses promote inclusion and civility.
 - Whose rights should take precedence?
 - Who decides who is right? Who draws the boundary lines?
 - Who pays the costs if safety is an issue?
- A 2016 Gallup Poll Study showed:
 - 78% of students supported exposing students to all types of speech, BUT
 - 69% said there should be limitations on slurs or other offensive language.

Challenges

- “I don’t feel safe”
 - Increasingly, students, faculty and employees expect the college to protect them from speech or expression that is inconsistent with institutional values and individual comfort levels.
 - Balancing expectations vs. upholding the constitution.
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Protests and Student Activism

- Colleges are currently enrolling a much more activist-oriented generation.
- Impatience with pace of change
- Role of social media
- Heightened news coverage
- Controversial speakers
- Sit-ins
- Lists of demands
- Role of faculty and staff

Academic Freedom

- Created by the AAUP in 1940 (is not law)
 - The right of **faculty** (especially tenured) to engage in scholarly inquiry, writing and teaching
 - “Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning.”
 - Is an important right as it fosters free and open discussion of ideas – including controversial subjects and opinions.
 - Speech or expression must be pedagogically connected to the course, its learning outcomes, the faculty member’s specialty, and is not merely gratuitous.

Online Speech

- Jurisdiction – Control over context and control over the person engaging in the behavior
 - On-campus – Use caution restricting; broad First Amendment protections
 - Off-campus – Typically requires a nexus to campus community; substantial college interest
- Employee
- Student
- Guest/visitor
- College equipment (e.g.: phones, computers, internet service, etc.) vs. private equipment

Keys for Addressing First Amendment Crises

- Communication and listening are key
- Foster open dialogue
- Need to address situations quickly and uniformly
- Setting community expectations
- Apply appropriate institutional policies and procedures for enforcement and discipline
- Use tabletop exercises
- Use the PIN model (Positions, Interests, Needs)



QUESTIONS?

Contact Information

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