



Association of
Title IX Administrators

August 15, 2024

Time with IX: Political Climate and First Amendment Rights

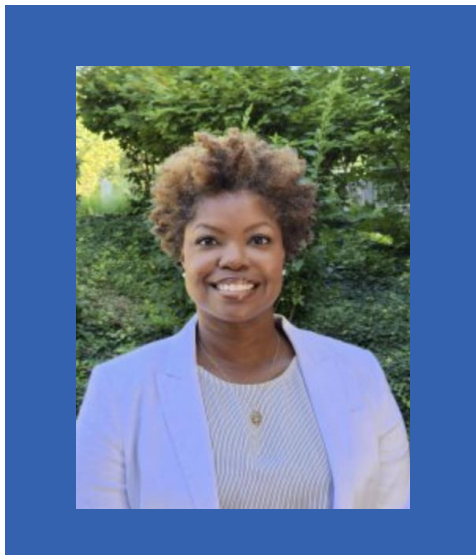
Presented by the ATIXA DEIB COP

Josie Hoover, D.Min., SHRM-CP

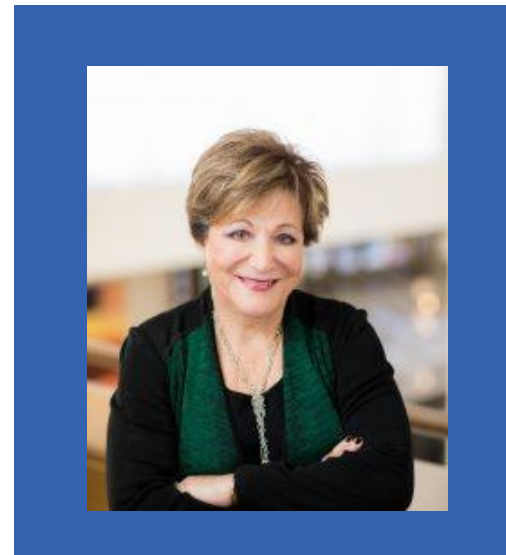
Sandra K. Schuster, J.D.

Today's Presenters

August 15, 2024



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Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is **never** to be construed as legal advice or an assurance of compliance. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law in your jurisdiction, any applicable state or local laws, and evolving federal guidance.

“

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.

”

Challenges on Campus

- **This fall we can anticipate:**
 - Challenges related to the historical presidential election
 - Abortion rights, Immigration Issues, Foreign Policy, the Economy, Gun Control
 - Recognition of the first anniversary of the October 7 massacres in Israel
- **Along with recurring issues**
 - Hate speech challenges
 - Threats, violence, property destruction
 - Disparate enforcement for different groups
 - Campus and facility access policy updates and revisions
 - Whether and when to call outside law enforcement

*American Council on Education, July 2024

Legal Standards

Seminal Cases of Unprotected Expression

<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942).	FIGHTING WORDS
<i>Miller v. California</i> , 413 U.S. 15 (1973).	OBSCENITY
<i>Brandenburg v. Ohio</i> , 39 U.S. 444 (1969).	INCITEMENT*
<i>Virginia v. Black</i> , 538 U.S. 343 (2003).	TRUE THREAT
<i>Milkovich v. Lorain Journal Co.</i> , 497 U.S. 1 (1993). <i>Hustler Magazine v. Falwell</i> , 485 U.S. 46 (1988).	DEFAMATION

Significant First Amendment Standards

- ***Chaplinsky v. New Hampshire***, 315 U.S. 568 (1942) – (“fighting words”) courts construe very narrowly
- ***Brandenburg v. Ohio***, 39 U.S. 444 (1969) – (“incitement of harm”) requires “imminent lawless action,” speech that merely advocates rather than incites violence would likely be protected
- ***Virginia v. Black***, 538 U.S. 343 (2003) – True threat requires expressed intent to intimidate, expanded by ***Counterman v. Colorado***, 600 U.S. 66 (2024) that requires that initiator of communication was actually aware of or reckless with respect to the threatening nature of the communication



Heckler's Veto

- Occurs in circumstances when opponents to a message block the delivery of that message by direct action or shouting down a speaker through protest
- Also occurs when a representative of the public entity accepts limits or restrictions on speech that override another speaker, or when the public entity restricts or cancels a speech based on anticipated or actual reactions of the opponents of the speech
- The Constitution requires the government to control the crowd in order to defend the communication of ideas, rather than to suppress them
- When the opposition moves from counter speech to violence the government may step in and is expected to protect the speaker and others



The Importance of Location in Regulating a First Amendment Activity at Public Institutions



Understanding Location (Forum)

▪ Traditional Public Forum

- Campus mall, public streets through campus, public sidewalks (most limited restrictions on speech)

▪ Designated Public Forum

- Areas the institution designates for “free speech” such as green space, green space around the school (also limited in ways we can restrict speech the same as Traditional Public Forum)

▪ Limited Public Forum

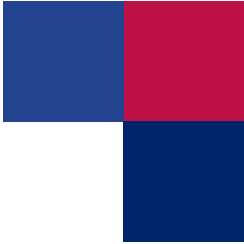
- Auditoriums, meeting rooms, athletic facilities (any limitations on speech must be reasonable based on the nature of the space)

▪ Non-public Forum

- Classrooms, offices (the broadest limitations applied here)



Analyzing the Activity Before Taking Action

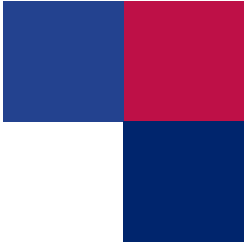


Considerations

- Free expression in public schools does not guarantee unfettered access to property simply because it is owned or controlled by a government entity
- Institutions have the right to impose reasonable regulations compatible with the educational mission by carefully applying the type of expression to the location of the expression and using a viewpoint neutral time, place and manner approach based on the location
- **Not all locations on campus have the same type of standards for restricting expression**

Private Colleges and Free Expression

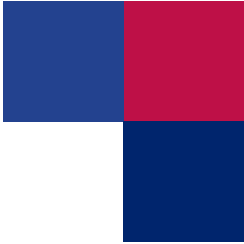
- Private colleges are not subject to Constitutional standards such as the First Amendment
- Private colleges must establish campus access and use standards and publish policies and protocol to identify who, what, when and how for accessing use of college space
 - The courts use these documents to provide the legal framework in evaluating the college's actions when challenged
- **Many private colleges have published statements on the website and in policies that mirror the rights and protections afforded the use of public space**



Three-Step Analysis

STEP 1: Are there 1st Amendment implications in the activity presented?

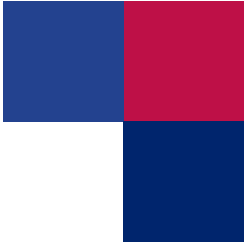
- Does it include any components of “expression” (not conduct)
 - Consider: not just speech, but leafleting, signs, bulletin boards, chalking, clothing, etc.
- Does it have a religious component?
- Does it involve a campus newspaper, radio, TV station?
- Does it involve a group activity on school property, i.e., demonstration, protest, walkout, rally?
- Is there a request for meeting room space in one of the classrooms?



Three-Step Analysis (Cont.)

STEP 2: Are there any clear exceptions to the 1st Amendment at issue?

- Each potential exception requires a separate analysis to the specific set of facts presented
- Courts will apply exceptions very narrowly
- Must be applied with extreme caution



Three-Step Analysis (Cont.)

STEP 3: Analysis of facts identified in Steps 1 & 2 in consideration of the location on campus (the “forum”)

- Any restriction based solely on the message to be delivered will always be prohibited (unless it’s one of the exceptions)
- The school can apply a content (message) neutral “time, place, and manner” limitation, but it must do so with careful consideration of the facts and the location and document the decision



Campus Access Policy Guidelines

Policy Considerations

- Identify locations on campus for protests/demonstrations
 - Create specific standards in those areas to include”
 - Limitations/prohibitions on structures of any type
 - Identify limits/prohibitions on attaching signs or symbols hung from the exterior of any University structure or property including buildings, and flagpoles
 - Specify prohibitions on any type of damaging or defacing University property
 - Be specific: walls, sidewalks, lampposts, sculptures
 - Develop prohibitions/guidelines for camping or creation of any type of shelter, cooking, electric heaters, generators or other similar devices
 - Prohibit portable toilets or public urination



Policy Considerations (Cont.)

- Specify that any form of expressive activity may not interfere with the educational process
- Specify that any form of expressive activity may not block ingress or egress to any building, facility, driveway, parking lot
- Specify when/where/how amplified sound may be used
- Identify any time restrictions consistent with the location of the expressive activity

Policy Considerations – Prohibited Activities

- Specify activities that are not permitted, consider including:
 - Illegal activities
 - Activities that deny the rights of other university faculty, staff or students
 - Activities that substantially obstruct or restrict the free movement of persons on any party of the campus
 - Activities that endanger or threaten the health or safety of any person
 - Activities that include the use of obscenities, defamatory statements or “fighting words”
 - Activities that damage property

Establish Protest and Demonstration Parameters

- Will you require registration for an on-campus demonstration?
 - Must it be approved? If so, by whom?
 - What are the conditions for approval?
 - Only campus community members?
 - Anyone?
 - Priority standards
 - Protest boundaries
 - Specific physical areas permitted and those specifically off-limits
 - Protest conduct
 - Threatening, intimidating, incitement of violence



Recommended Strategies

Preparation and Planning

- Establish Clear Policies
 - Publish, update, review with legal counsel, communicate to community
- Build Positive Relationships
 - Ensure open lines of communications with student groups, faculty and staff
 - Identify an individual to oversee or implement the dialogue between President (administration) and campus community
- Implement Training and Education
 - Regular training for campus public safety, staff on de-escalation techniques and respectful engagement
- Create a Crisis Management Plan
 - Practice scenarios, drills and tabletop exercises

Adapted from the IACLEA Guide for University Presidents to Handle Protests and Demonstrations



During a Protest or Demonstration

- Communicate
 - Dialogue is essential.
 - Maintain open, transparent communication with protest organizers
 - Use social media to inform campus about ongoing events and safety measures
- Supportive Presence
 - Ensure public safety is visible but not intimidating
 - Role of public safety should be to facilitate protest not inhibit it
 - Provide necessary resources (first aid, water, restrooms)
- Respect and Engagement
 - Approach protest with a respectful and empathetic attitude
 - Consider meeting with protest leaders to listen to concerns
- Safety and Security
 - Prioritize safety of all participants, bystanders and campus property
 - Be prepared to call in additional resources if situation escalates



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Questions?



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