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Navigating the Marketplace of Ideas

Addressing Issues of Student and Faculty Speech

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Presenters



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Education Team

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Agenda

- Legal Standards
- Case Law and Hypotheticals
 - Free Speech vs. Nondiscrimination
 - Academic Freedom vs. Nondiscrimination
 - Avoiding Defamation

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Key Considerations

- Media cycle is extremely fast - can feel “instantaneous”
 - Timing of institutional decisions?
 - When/how institution respond publicly?
- Current societal climate heightens risks (e.g. reputation)
- Community instincts v. legal standards about speech protections
- Details matter
 - Exact speech at issue
 - Policy – particularly at private institution

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Freedom of Speech

- Unpopular speech is usually protected
 - First Amendment rarely allows “viewpoint discrimination”
- “Unprotected” speech is limited based on content

Defamation

Incitement

“Fighting words”

False advertising

HATE SPEECH???

“True threats”

Obscenity

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Bedrock Principle

“If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. The First Amendment does not recognize exceptions for bigotry, racism, and religious intolerance or ideas or matters some may deem trivial, vulgar, or profane.”

Dambrot v. Central Michigan University (E.D. Mich. 1993)

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Expression of “Offensive” Speech

“Free speech rights apply in the classroom (e.g., classroom lectures and discussions.... In addition, First Amendment rights apply to the speech of students and teachers... Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. [T]he offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR.”

2003 Revised Sexual Harassment Guidance at 22 (emphasis added)

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Context Matters

- Where was insult made?
- Was there political context?
- Was the target a public figure?



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Freedom of Speech in the Workplace

- Employees and Faculty
 - 3-prong inquiry governs whether a public institution can regulate faculty/employee speech:
 1. Is person speaking pursuant to official job duties?
(particularly challenging for faculty member speech)
 2. Is person speaking on a matter of “public concern”?
 3. Does the institution’s interest in promoting an efficient employment, and educational, environment outweigh the faculty member’s right to free speech?
 - Is academic freedom an exception?

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Private Institutions



- Not bound by the First Amendment
- Policy – defines scope of speech protections
- Can regulate some speech based on viewpoint

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Freedom of Speech *Students*

- Student Speech at Public Universities
 - Content-neutral “time, place and manner” regulations
 - Inquiry: Will the student’s expression substantially disrupt school operations?
- Supreme Court recently heard a case that may alter a university’s ability to hold students to codes of conduct with respect to off-campus speech
 - Third Circuit: high school’s authority to regulate speech does not extend to off-campus speech that, due to being on-line, makes its way into school
- Speech at Private Institutions?
 - Consider contract obligations



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Academic Freedom

- Challenging to define
- Often misunderstood
- Mostly contractual in nature – know your policies or institutional statutes

Academic freedom



WIKIPEDIA
The Free Encyclopedia

“Academic freedom is the belief that the freedom of inquiry by faculty members is essential to the mission of the academy as well as the principles of academia, and that scholars should have freedom to teach or communicate ideas or facts (including those that are inconvenient to external political groups or to authorities) without being targeted for repression, job loss, or imprisonment.”



Hon. Richard Posner

“[T]he term is equivocal. It is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher (or in some versions—indeed in most cases—the student) to pursue his ends without interference from the academy; and these two freedoms are in conflict.”

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Key concepts of academic freedom

- Protection beyond 1st Amendment, examples may include:
 - Focus on “academic inquiry, discourse, teaching, research, and publication,” “inside and outside classroom,” includes “public service”
 - Faculty and students
- Responsibilities/limitations may include:
 - Encourage “counter-speech”
 - Strive to “be accurate, exercise appropriate restraint and judgment, foster and defend intellectual honesty . . . and refrain from claiming to be an official spokesperson”



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Freedom of the Press

- Congress shall make no law abridging the freedom of the press
- In most cases, First Amendment prohibits censorship of student newspapers at public universities
 - *Hazelwood*, holding that high school could regulate content of student newspaper for reasons “reasonably related to legitimate pedagogical concerns,” may apply to “subsidized student newspapers at colleges” in very limited contexts
- Censorship concerns still exist at private universities
 - Policy considerations; contractual agreements

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Institutional Liability for Student Press

- Does the institution have a duty to supervise student newspaper?
 - University has no duty to supply verification guidelines to student editors
 - Publisher only has duty to supervise with knowledge of journalist’s incompetence
- Could University’s policies or practices regarding supervision give rise to a breach of contract claim?
- Can newspaper’s, or reporter’s, liability be imputed to the institution?
 - Defamation concerns are most prevalent
 - Negligence concerns *could* be raised, depending on state law

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Defamation, Slander, and Libel

- False statement of fact (*not opinion*), whether written (*libel*) or spoken (*slander*), published to a third party (*e.g.*, written on the internet, said to one person)
 - reputational harm – *defamation per se* (damages assumed) vs. *per quod*
 - element of fault turns on private vs. public figure analysis – “actual malice”
- Defenses and privileges are legally complex and state-specific
 - “innocent construction”; “substantial truth”; opinion; “fair comment”
 - Press-related privileges: “fair report”; “neutral report”
- Extremely fact specific standards
- Damage amounts uncertain but can be significant

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Illinois College Campus Press Act

At public institutions, “expression made by a collegiate student journalist, collegiate student editor, or other contributor in campus media is neither an expression of campus policy nor speech attributable to” the institution



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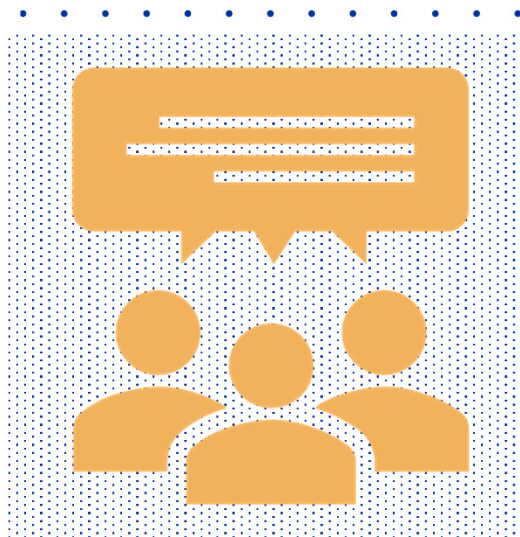
Other Considerations

- Non-discrimination
 - Legitimate interests in limiting discrimination/harassment may conflict with speech protections
 - Harassment definitions – policy violation can be different than violation of legal harassment standard
- Contractual Obligations

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Hypothetical

- Professor has a practice of using “Mr.” or “Mrs.” when addressing students.
- A transgender student requests that she be referred to as “Mrs.”
- The Professor objects to this request, on the grounds that compliance would violate his personal and religious beliefs

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Meriweather v. Hartop

- Professor requested that he put a disclaimer in his syllabus that he was following the pronoun policy under duress and explaining his views on gender identity, which was rejected.
- Professor was subject to discipline after being found to have created a “hostile environment” under Title IX for the student by referring to her, unlike other students, using only her last name (without “Ms.”)

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Meriweather v. Hartop

- District Court dismissed the case
 - Professor was speaking pursuant to his official duties
 - Professor’s speech did not touch on a matter of public concern
 - Professor’s speech *related* to a matter of profound public concern, but did not implicate broader social concerns
- Sixth Circuit reversed
 - Rule that speech made pursuant to official duties is not protected does *not* apply to professor’s in-class speech
 - Professor plausibly alleged he was speaking on a matter of public concern
 - “Pronouns can and do convey a powerful message implicating a sensitive topic of public concern”
 - Professor’s interests outweighed University’s interest
 - “Compromise” was win-win; no evidence student was denied educational benefits

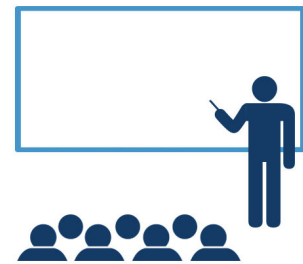
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Hypothetical

- Business management faculty's exam question in "dispute resolution" course describes workplace example with detailed reference to sexual assault
- Students in class complain question was too graphic, created needless stress during exam, and was even traumatizing
- Social media posts ensue, which leads other students to complain about 2-year history of insensitive classroom comments from same faculty member about gender and race-based issues
- "Apology" emails from faculty member include jokes and note faculty's prior efforts to help one complaining female student that "won't be repeated in future"
- Press picks up the story, Board suggests quick employment action



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Institutional Response

- Is professor's speech "protected"?
 - First Amendment – "pursuant to duties"
 - Academic Freedom – who decides that?
- Is there "harassment" and should consideration of all complaints be combined with exam question issue?
 - "Harassment" policy language is critical
- How quickly can this issue be "resolved"?

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Hypothetical

- Internationally famous former-athlete is now the head coach of a non-revenue sport that is rarely in the press
- Student-athletes complain about bullying by the coach and over-personalized levels of control, and many transfer
- Outside investigator is engaged by the institution
- Student newspaper publishes article with general descriptions of complaints and transfers, noting 70% of student-athletes who transferred were of the same race and quoting Athletic Director saying “we clearly have a problem”
- National media picks up the story and focuses on coach abuse
- Coach is furious. Hires counsel and wants the institution to publicly convey support
- Student newspaper editor stated that additional articles are in the works

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Institutional Response

What are the risks?



- Student-athlete mistreatment
 - Culture of sports programs on campus, and culture/mission of institution as a whole
 - Compliance with NCAA requirements
 - Title VI concerns – is this a race-based issue?
- Defamation (of the coach)
- Student newspaper’s rights to free press (if public)
 - Institution’s policy with regard to regulation of press
- Institutional reputation
 - How will students view the response? How will coaching staff, and other employees, view the response? How will the public view the response?
 - Media characterization?

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Institutional Response

How to manage these risks

- Complete investigation – as quickly as possible while being thorough
 - Carefully assess whether race-discrimination or harassment is part of the review
 - Document rationale, if it is not
- Explain liability/insurance issues to student newspaper
- Carefully manage institutional media messaging

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Hypothetical

- A facilities-management staff member at public institution reports that a co-worker in the office has made a series of derogatory statements about the Black Lives Matter movement and about the extra work the potential for protests has created for the office.
- Comments also allegedly include “those people should respect the University’s property” and “they might get themselves hurt if they don’t.”
- The accused staff member also reportedly has had some anger-management issues that have led to yelling and swearing incidents over a few years time, usually with students.
- The complaining staff member is Black and alleges this history of interactions has created a racially-hostile work environment.

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Institutional Response

What are the risks?

- Compliance with non-discrimination laws
 - Title VII– is the complainant being discriminated or harassed on the basis of his race?
 - Title VI– does the staff member’s history of tension with students relate to his statements now?
- Workplace efficiency and culture
- Staff member’s right to free speech
- Concern of mischaracterizing speech about a political belief as speech about race
- Institution’s mission

How to manage these risks

- Complete investigation under non-discrimination policy
 - Will prior conduct with students be an issue?
 - Seek out specific details about what was said
 - In finding, and any possible sanction, delineate between
 - Title VII concerns and other HR concerns (e.g. prior conduct with students)
 - Statements about a race-adjacent political issue and statements about race
- Consider, if aligned with institutional mission and reasonable with institutional needs, other ways to address the complaining employee’s concerns



Hypothetical

- A tenured faculty member at private university was accused of routinely touching female students in overly-personal but non-sexual ways, leading to an investigation and then a one-semester unpaid suspension, which the Provost's office described as a sabbatical to departmental colleagues to preserve privacy interests. Upon return to teaching, the professor also described his recent absence from campus to students in his current class as a sabbatical.
- One of the previously-complaining students learned that the suspension had been described as a "sabbatical." She posted a thread on Twitter, alleging the professor had "sexually harassed" her and the university had done nothing about it. She also tweets that the University's Title IX Coordinator "doesn't care about students." She ends her tweet "#MeToo" and it goes viral.
- The Provost's office is contacted by a local newspaper, advising that an article will soon be published about a professor accused of Title IX violation being merely placed on a paid sabbatical and asking for comment. A member of the Provost's office provides a comment that is quoted in an article stating, "there was a Title IX investigation, the results were confidential, and this faculty member was off campus last semester."
- A group of faculty members from another department advise the Dean that they will be publishing a statement on their department webpage decrying the university's "failure to respond" to "systemic sexual harassment on campus."

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Institutional Response: *Legal Risks*

Public/Media Response

- Protection of employee privacy and disciplinary records
- Protection of student privacy

Response to Faculty Statements

- Violation of academic freedom?

Is there a Title IX Concern?

Response to Student Statement

- What if the professor and/or Title IX coordinator want the university to say something about "defamation"?
 - Is "sexual harassment" defamatory here?
 - "Doesn't care about students" is likely an opinion
- What grounds could the school have to respond based on policy?

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Institutional Response: *Reputational Risk*

- Failure to address an issue that is being discussed on- and off-campus can create an impression of lack of concern
 - *But*, response could: create legal risk; come across as too defensive; come across as an admission of wrongdoing (creating more legal risk?)
- Suppression of speech critical of the University (as compared to speech that defames a particular person) can be a bad look

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Institutional Response

Legal vs. PR vs. Practical Approaches – all are needed

- Does the complaining student know that a sanction was issued? Or, because of the phrasing, does she think the faculty member took a paid sabbatical?
 - What can be shared with the student, aligned with university policy and any state law regarding disclosure of employee disciplinary information?
- Can, and should, the university re-evaluate its Title IX processes?
 - If so, opportunity to engage students and faculty in that process, demonstrate transparency
- Ensure any public statement from the university does not create new legal risk, for example:
 - An admission that processes could have been better vs. an admission of wrongdoing
 - Appropriately consider student and employee privacy

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Key Take-aways

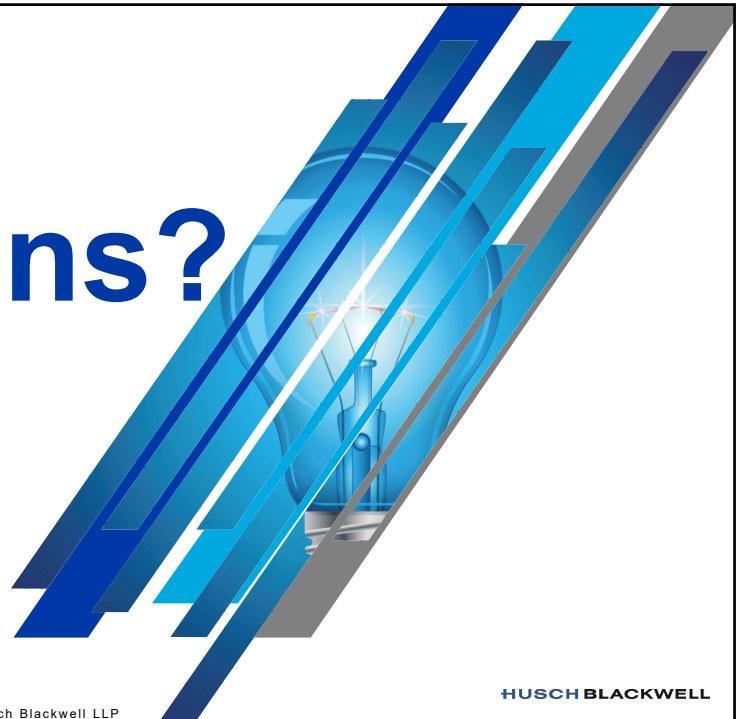
- Every “speech” situation is unique and details about what was said, by whom, to whom, and in what context matters
- Prepare key decision makers for challenge of balancing institution’s need to carefully assess details against impulse to promptly address issues or respond publicly
- “No comment” is less effective in social media age
- Expect difficult decisions and criticism, while seeking to adhere to institutional principles

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Questions?



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Thank You

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