



# NASPA POLICY AND PRACTICE SERIES

## The First Amendment and the Inclusive Campus Effective Strategies for Leaders in Student Affairs

Andrew Q. Morse

---

### OVERVIEW

Following numerous high-profile incidents involving provocative speakers and organizations on college and university campuses, student affairs leaders are revisiting free speech policies and practices to ensure alignment with the First Amendment. Student affairs educators are also exercising care and precaution to maintain the integrity of their institutional commitments to diversity and inclusion. This issue of *Policy and Practice* describes First Amendment principles, provides pertinent case studies, and summarizes effective practices to help leaders manage controversial speakers and demonstrators while promoting inclusive campus environments.

## THE AUTHOR

Andrew Morse is assistant to the president for board and governmental relations at the University of Northern Iowa (UNI). In this role, he oversees the Office of Governmental Relations, assists with strategic initiatives related to the Iowa Board of Regents, and directs the university's federal policy initiatives and priorities. Prior to UNI, he was a consultant and project director at Keeling & Associates. He served NASPA as director for policy research and advocacy, directing a portfolio of state and federal public policy research and advocacy initiatives in partnership with board members, volunteers, and association partners. He holds a Bachelor of Arts in psychology from UNI and Master and Doctor of Philosophy degrees in higher education administration from The University of Tennessee, Knoxville.

Copyright © 2018 by the National Association of Student Personnel Administrators (NASPA), Inc. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any storage and retrieval system without written permission from the publisher. NASPA does not discriminate on the basis of race, color, national origin, religion, sex, age, gender identity, gender expression, affectional or sexual orientation, or disability in any of its policies, programs, and services.

## EXECUTIVE SUMMARY

This issue of *Policy and Practice* offers strategies to address key aspects of managing controversial speakers and demonstrations on college and university campuses. Further, it provides ideas and examples for challenging divisive speech when appropriate; that is, engaging such speech as an opportunity for reflection and action in order to uphold the values and promote the intellectual vitality of our campus communities.

In addition to the architecture of federal law, court interpretation, and published best practices in the field, interviews with five vice presidents for student affairs who managed their campus's planning for and responses to controversial speakers and demonstrations following the 2016 presidential election guided the development of this brief. Their campuses range from midsize to large public and private colleges and universities in rural and urban settings. The identity of each participant has been kept confidential, given the sensitive subject matter and their leadership roles on campus. However, additional examples were obtained from publicly available news articles and scholarly literature.

Several limitations are worth noting for this brief. Five leading professionals were interviewed about the strategies and practices employed to manage controversial speakers or demonstrations on their campuses. However, this brief was not developed under the presumption that the practices employed by those interviewed will work effectively across institutions regardless of sector, size, political climate, and campus culture, to name a few factors that may nuance one campus's approach versus another. This publication is a guidepost for discussion and consideration for professionals who are tasked with leading and managing institutional planning for and response to controversial speech and demonstrations on campus.

Another important limitation to note is that only a few forms of divisive speech and demonstration are addressed in this brief; notably, campus planning for and responses to anticipated speakers and protests *with a physical presence on campus*. The brief does not explore controversial speech and demonstration in which the borders are not bound to a physical space, such as those that may occur via social media, or forms of speech or demonstration that occur without notice. Additional inquiry is needed to address the issues and considerations in planning for and responding to these and other forms of controversial speech.

This brief should be used to support, but not replace, the necessary conversations with senior leaders, attorneys, campus safety and facilities personnel, and others who must be involved in planning for and responding to controversial speakers and events. Upholding free speech is a necessary, but sometimes complicated, task for leaders in higher education. This brief serves as a resource to help inform discussion among campus leadership teams that must carefully consider the factors that ensure their campus's policies and practices protect free speech rights and uphold the integrity of their mission and values.



# The First Amendment and the Inclusive Campus

## Effective Strategies for Leaders in Student Affairs

Recent national headlines such as “War on Campus: The Escalating Battle Over College Free Speech” (McLaughlin, 2017), “The High Cost of Free Speech at Yale” (Weinstein, 2015), and “Campus Chiefs Violated Student Rights” (2017) have characterized the debate on the appropriate courses of action by campus administrators when controversial speech and demonstrations occur on campus. From Charlottesville to Berkeley, college and university leaders nationwide face the ongoing challenges of planning for and responding to divisive campus speakers and demonstrations.

These challenges are not just philosophical, but also practical in nature. How can college and university leaders make policies related to free speech clear and understood by the campus community and guests alike? How do leaders anticipate—and cover—the expenditures associated with controversial speakers or demonstrations that come to campus outside of the regular invitation process? For which scenarios can leaders plan, and for which can they not, and—in either case—who must be involved and in what capacity? What steps can leaders take to uphold the fabric of institutional values, as demonstrations and speech that run in stark contrast to these values are taking place? How can leaders best promote the safety of campus communities? These mark just a few top-level considerations for what is a deeply complex set of challenges confronting senior leadership teams.

### THE FIRST AMENDMENT: AN OVERVIEW OF LEGAL PRINCIPLES

Within parameters discussed throughout this brief, the First Amendment of the U.S. Constitution protects individuals from government restrictions on speech, expression, and assembly. The First Amendment applies to public, but not private, colleges and universities because they are considered government actors. However, the vice presidents of private colleges and universities who were interviewed for this publication often employed First Amendment legal principles to ensure a broad spectrum of viewpoints are represented on their campuses.

The following sections articulate the legal principles that form the contours of public campuses’ obligations for upholding First Amendment protections of free speech, expression, and assembly.

### TIME, PLACE, AND MANNER

The U.S. Supreme Court allows educational institutions, including colleges and universities, to apply “time, place, and manner” limitations on speech, including on campus speakers and demonstrators (*Cox v. New Hampshire*, 1941; *McCullen v. Coakley*, 2014; *Perry Education Association v. Perry Local Educators’ Association*, 1983; *Ward v. Rock Against Racism*, 1989). The purpose of time, place, and manner restrictions is to regulate speech without impeding constitutionally protected speech. The U.S. Supreme Court requires that these limitations not be favorable to one perspective or another, serve a significant government interest, be narrowly tailored to achieve that interest, and offer alternative options for speech. Public institutions, which are funded by taxpayer dollars, are considered government entities and, as such, are restricted from impeding speech beyond the narrow contours of time, place, and manner (*Perry Education Association v. Perry Local Educators’ Association*, 1983).

Restrictions on time may include designations on the length, frequency, or time(s) that such activities can occur. However, the courts have affirmed that time restrictions placed on speech must be reasonable. Public colleges and universities that restrict speakers or demonstrators from hosting events on campus during the daytime, for example, face the risk of violating reasonable time restrictions on campus. However, colleges and universities have used the time restriction to articulate that campus demonstrations cannot take place after midnight.

Limitations on place might include specifications regarding the areas of a campus that can be used for free speech, including areas of a campus that require a reservation. Public institutions must ensure that any restrictions on access to certain campus property ensure content neutrality, serve a significant government interest, be narrowly tailored to achieve that interest, and provide ample alternatives.

Manner restrictions do not limit content, but instead relate to the form of communication used to express certain views, such as control of volume so as to not affect the ability for a regularly scheduled class to convene.

## FORUM DESIGNATIONS

The U.S. Supreme Court has defined three types of public forum: traditional public forums, designated or limited public forums, and nonpublic forums (*Perry Education Association v. Perry Local Educators' Association*, 1983). Public colleges and universities can support the consistent, content-neutral enforcement of time, place, and manner requirements by defining in written policy the campus spaces that are treated as traditional, designated, and nonpublic forums.

Traditional public forums are open to all expression protected under the First Amendment. Public parks, sidewalks, and streets are typically treated as traditional public forums. Many First Amendment advocates have sought to establish all outdoor areas of public college and university campuses as traditional public forums.

By contrast, some public colleges and universities have established “free speech zones” in order to restrict speech, expression, or demonstrations to designated areas on campus. These spaces have come under court scrutiny in recent years. In *Van Tuinen v. Yosemite Community College District et al.* (2014), Modesto Junior College (MJC) barred three of its students from distributing copies of the U.S. Constitution in front of the student center. Representatives of MJC told students they must register an event in advance, and that all events must be held inside the institution’s free speech area. MJC settled its lawsuit upon revision of its campus policies to allow free expression in outdoor areas of campus.

However, at least one court has drawn distinctions between campuses’ First Amendment obligations regarding access to public forums of students, employees, and recognized campus organizations and that of outside individuals or organizations not sponsored by a campus affiliate. In *Bloedorn v. Grube* (2011), the U.S. 11<sup>th</sup> Circuit Court of Appeals ruled that physical likeness of public campus spaces to those of non-campus-based traditional public forums (e.g., public parks or sidewalks) is insufficient to conclude that such open spaces are bona fide traditional public forums. In the case of outside, unaffiliated speakers or demonstrators, the 11<sup>th</sup> Circuit Court ruled that the educational purpose of the public campus allowed Georgia Southern University (GSU) to limit the campus presence of those who are not sponsored by a member of the campus community—as long as the policy did not violate time, place, or manner restrictions.

In the case, Bloedorn—a traveling evangelist who frequently preached in outdoor locations on college and university campuses—sought an injunction on GSU’s policy that, for an unsponsored speaker not affiliated with the public institution, limited the duration and frequency of his speech on the campus. Bloedorn was confined to the designated free speech area, which was located at a popular pedestrian intersection of campus. According to GSU policy, the plaintiff was required to file advanced notice and receive approval to use the campus’s free speech zone, and he was limited to no more than an hour and a half once per month.

Designated/limited public forums are spaces where the public college or university restricts the space to certain participants. These forums are subject to time, place, and manner requirements in regulating, without violating, an individual or group’s free speech rights. The *Bloedorn v. Grube* case provides helpful insight on the limitations of designated public forums. In its Assembly and Demonstration Policy, GSU (2018) established all but the designated free speech zone as designated/limited public forums by articulating that (a) students, faculty, and staff—individually or in registered groups—were free to express their views in all parts of campus, and that (b) “persons unaffiliated with the university were free to express their views . . . in the Designated Public Forum Area” (para. 3). The policy intended to provide content-neutral limitations on the presence of unaffiliated speakers in order to provide priority access to students, faculty, and staff regarding the use of the space to achieve the educational purpose of the institution. The court ruled in favor of GSU, arguing that the institution had provided content-neutral regulation that was narrowly tailored to serve a legitimate government interest (e.g., the furtherance of its educational mission) and provided a sufficient forum for speech. The following excerpt from the opinion helped draw distinctions between traditional public forums and the public campus setting in relation to the presence of speakers or demonstrators who are unaffiliated with the institution:

Even though GSU’s campus possesses many of the characteristics of a public forum—including open sidewalks, streets, and pedestrian malls—it differs in many important ways from public streets or parks. . . . Perhaps most important, the purpose of a university is strikingly different from that of a public park. Its essential function is not to provide a forum for general public expression and assembly; rather, the university campus is an enclave created for the pursuit of higher learning by its admitted and registered students and by its faculty. (Section IIIA, para. 6)

In 2015, Texas A&M University updated its Rules on Freedom of Expression to prioritize the use of campus facilities for speakers or events to university-sponsored organizations. According to the rule, a request for space is required

for campus organizations seeking to hold an event that will draw 25 or more people. The sponsoring campus organization must identify at least one of its officers (e.g., president, vice president, secretary, or other) that will be in attendance for the duration of the event (Texas A&M University, 2015). In addition, the requesting organization is required to list basic details of the event and the planned activities of the speaker(s) or demonstrator(s), such as whether a rally, protest, or picketed march will take place. The rule states that the university reserves the right to locate the event to ensure that normative campus operations remain uninterrupted (Texas A&M University, 2015). This policy enables the university to employ a content-neutral approach to regulate the presence of outside speakers. Thus, the university can allow or restrict an outside speaker's request to use the campus's limited public forums, such as the student union or other meeting spaces, without regard to content.

Nonpublic forums are not open to public expression and are restricted to a particular purpose, such as departmental office spaces or on-campus housing. It is not lawful, for instance, to shout down a professor delivering a classroom lecture, or to hold a protest outside the private residence of a college or university employee.

## DUE PROCESS

The 14<sup>th</sup> Amendment to the U.S. Constitution provides individuals with due process rights under the law. Due process requires the government, including public colleges and universities, to ensure individuals, including students, receive appropriate notice of a violation of the law and the right to be heard through a hearing (U.S. Const. amend. XIV). Because public colleges and universities have little latitude to deviate from First Amendment protections in other public settings, it is critically important that leaders of these campuses establish policies and practices that ensure alleged violations of campus policy regarding speech, expression, and assembly afford students their rights to due process. For example, immediately expelling students for using highly inappropriate, discriminatory, and hateful language may create an opportunity for the affected students to pose a legal challenge regarding the campus's violation of their due process rights. Following the careful practices of providing notice and a hearing are steps that public college and university leaders should follow to uphold constitutional responsibilities while protecting the integrity of the institution's mission and values.

## THE FIRST AMENDMENT, CONTROVERSIAL SPEECH, AND HIGHER EDUCATION

When asked to consider requests by speakers or organizers whose content or goals contrast from their campus's mission and values, leaders in higher education face important decisions about the appropriate steps to respond to or plan for speech, expression, or assembly that may be controversial, or even incendiary. In some cases, the popular step may be to deny requests by such speakers or place contours on assembly that limit the presence of those whose views are met with protest or attempted obstruction. The problem, however, is that—with few exceptions—denying speech or expression creates risk for legal challenges to the constitutional soundness of a campus's free speech policies and practices.

The constitutional principles of (a) time, place, and manner restrictions; (b) forum designations; and (c) due process provide a broad framework for regulating—without hindering—speech, expression, and assembly on public college and university campuses. In the next section, a litany of case law defines the strict limitations of public colleges and universities to apply these principles to regulate speech, expression, or assembly. Of course, the inability to deny or heavily restrict many forms of controversial speech, expression, or assembly portends practical challenges for college and university leaders to uphold their consonant responsibility to affirm inclusive and culturally engaging campus environments. Later in this brief, campus leaders who have managed divisive speakers share strategies and practices for maintaining the integrity of their campus's mission and values while upholding the First Amendment.

## THE FIRST AMENDMENT AND THE MYTH OF PUBLIC CAMPUSES' PROTECTION FROM (MANY CASES OF) HATE SPEECH

Addressing the campus response to a visit by a controversial speaker or organization was a key challenge confronted by the vice presidents interviewed for this brief. One vice president said, “We got grilled for weeks leading up to the event as to why we were allowing [the individual] to speak when our campus touted itself as being a welcoming and inclusive place to diverse individuals.” Another shared, “Students were most upset with us when we did not reject [the individual] from coming to campus. Many told us they didn't feel safe or welcome here anymore.” Overwhelmingly, the feedback from campus constituents was negative, encouraging their leaders to limit—or restrict—the presence of the speaker or organization from the institution. In fact, the widespread concern shared with the vice presidents interviewed for this brief is reflected in a recent

Pew Research Poll that found a sizable proportion of the U.S. population believes there should be limitations on offensive speech (Wike & Simmons, 2015). More than one quarter of poll respondents across all age groups believe that the government should be able to place limits on speech that is offensive to minorities. Among millennials (ages 18–34), a full 40% believe the government should be able to place such limitations.

Although there is substantial public support for limiting offensive speech, there is an absence of legal architecture enabling governments—and, by extension, public colleges and universities—from doing so. While establishing or strengthening policies and practices that affirm institutional mission while upholding First Amendment responsibilities, it is important for student affairs leaders to understand that hate speech is largely protected—with a few exceptions described in this brief—in law.

In fact, the courts have overwhelmingly overturned campus policies that placed limits on speech or expression that offend others or are otherwise hateful in nature. More than five decades of case law have affirmed institutional obligations to allow such speech on campus. A sampling of court cases is summarized below.

### HEALY V. JAMES (1972)

Students enrolled at Central Connecticut State College sought to form a campus chapter of Students for a Democratic Society (SDS). The campus recognition would have granted the group access to campus facilities, the school newspaper, and the school bulletin board. The president denied the group's request on the grounds that the SDS promoted disruption. The U.S. Supreme Court decided that the college failed to provide convincing evidence that SDS activities would constitute unprotected speech. One of the critical issues argued in this case was the chapter's affiliation with the national SDS organization, which was unpopular with many at the time. The college denied the organization's request for recognition for fear that its unpopularity may have caused disruption on campus. Unpopularity was insufficient grounds for nonrecognition on campus.

### DOE V. UNIVERSITY OF MICHIGAN (1989)

Following incidents that involved the use of racial slurs on campus, the University of Michigan published a policy in 1989 that prohibited stigmatization or victimization of an individual on the basis of protected categories. Specifically, the policy read,

any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity,

religion, sex, sexual orientation, creed, national origin, age, marital status, handicap or Vietnam-era veteran status, and that

- a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety, or
- b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety, or
- c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University-sponsored extra-curricular activities. (Section IIIA)

Doe, a psychology graduate student who described his research as the interdisciplinary study of the biological bases of human differences in personality and mental abilities, alleged that controversial theories undergirding his field of study could be viewed as sexist or racist, and that the University of Michigan's policy could unfairly sanction him for conducting research. In an affidavit to the court, Doe also described his desire to talk about differences in his classroom discussions. In its review of the case, the federal court found with Doe and struck down the university's antidiscrimination policy on the basis that prohibiting speech solely on the basis that it is offensive or unseemly is unconstitutionally overbroad.

### UW–MILWAUKEE POST V. BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN (1991)

In 1988, the University of Wisconsin (UW) Board of Regents adopted a systemwide plan for diversity and inclusion, Design for Diversity, and directed each of its 26 campuses to develop nondiscrimination policies. In addition, the Board of Regents developed general guidelines that prohibited racist conduct, and assembled a workgroup to develop recommendations to amend each campus's student codes of conduct. The final policy adopted by the Board of Regents stipulated that:

The university may discipline a student in non-academic matters in the following situations:

- (2)(a) For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally:



1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
2. Creates an intimidating, hostile, or demeaning environment for education, university-related work, or other university-authorized activity. (Section IB)

The court found the Board of Regents' antidiscrimination policy unconstitutional, stating that UW's policy was

unduly vague because it is ambiguous as to whether the regulated speech must actually demean the listener and create an intimidating, hostile or demeaning environment for education or whether the speaker must merely intend to demean the listener and create such an environment. (Section IIB(2))

In their judgment, the court acknowledged that racism and bigotry violate the goals of education, but held that freedom of speech "is almost absolute in our land" (Section III, para. 2).

## COLLEGE REPUBLICANS AT SAN FRANCISCO STATE UNIVERSITY V. REED (2007)

In this case, the U.S. District Court of California was asked to decide whether a public institution can punish students for behavior that is "inconsistent with [the university's] goals, principles, and policies" (Section IA, para. 8), or for engaging in uncivil behavior, particular when such actions intend to intimidate, harass, or threaten another person. (Section IA, para. 8) The case followed an event at San Francisco State University (SFSU) during which the College Republicans hosted an antiterrorism rally where students stepped on Hamas and Hezbollah flags. Offended students filed charges on the basis that such actions intended to incite, were uncivil, and created a hostile environment.

Again, the court ruled with the plaintiffs on the basis of vagueness and overly broad language in the university's policy. The court ruled that prohibiting conduct viewed as "uncivil," or that by itself, independent of any real threat directed to a person, could be viewed as "intimidating" or "harassing" in its nature could apply to conduct that is protected under the First Amendment. In the following excerpt from the court's opinion, the court articulates instances of conduct in which incivility is protected under the First Amendment, but stood in violation of SFSU's policy:

The First Amendment difficulty with this kind of mandate should be obvious: the requirement "to be civil to one another" and the directive to eschew behaviors that are not consistent with "good citizenship" reasonably can be understood as prohibiting the kind of communication that it is necessary to use to

convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause. Similarly, mandating civility could deprive speakers of the tools they most need to connect emotionally with their audience, to move their audience to share their passion. (Section II, para. 33)

## DETERMINING WHEN PUBLIC INSTITUTIONS CAN ACT ON HATE SPEECH

Although case law has upheld protections for controversial content, even when such content can be broadly classified as hate speech, there are instances when a campus can punish individuals for using such speech. Speech is not protected when it constitutes a "true threat" to a specified target or it otherwise intends to incite violence. The courts have set parameters on speech that is not protected by the First Amendment (*Elonis v. United States*, 2015; *Virginia v. Black*, 2003). When speech or expression can be determined as a true threat to the safety or well-being of others, colleges and universities may restrict such speech. Incidents that may constitute a true threat require careful examination of the context of speech or expression before restricting the speech or punishing those who engaged in it.

- ◇ **Was the threat directed at an individual or specific individuals?** Generally, a true threat is made toward a specific individual or individuals.
- ◇ **Can the individual act on their hate speech?** For example, a speaker at a campus event who targets a specific individual during an in-person speech could have created a true threat because the individual's presence in the space would enable them to deliver on the threat.
- ◇ **Does the speech have the intent and likelihood of inciting violence?** Calling on a crowd to engage in direct acts of violence against a specific individual or set of individuals could be considered an intentional incitement of violence.

## WHEN RESPONSIBILITIES COLLIDE: THE RULE OF LAW AND MISSION INTEGRITY

College and university leaders, including those in student affairs, navigate the rule of law with the moral responsibility of inclusion on their campuses. Given the litany of case law protecting controversial—even incendiary—speech on campuses, efforts to limit the presence of those who represent views that many define as hate speech may lead to costly and unsuccessful litigation. Following a recent cancellation of a contractual agreement that would allow Richard Spencer to speak on the University of Auburn

campus, for instance, a federal judge ruled that the speech must go on under the protection of the First Amendment, citing that the institution's allegation of the potential for violence was speculative (Andrews, 2017; *Padgett v. Auburn University et al.*, 2017).

On the other hand, some colleges and universities have embraced a different tack by using the First Amendment to address the campus presence of hate groups or incendiary speakers. This year, two campuses within the University of Tennessee (UT) System—Knoxville and Chattanooga—were confronted by the uninvited presence of a white nationalist group. In a response to the protest, UT System President Joe DiPietro (2018) acknowledged the constitutional protections placed on even “ignorant” and “repulsive” speech, but called on higher education to invoke its educational mission to push back on the messages that groups such as these represent:

The ugly reality is, extremist groups are actively organizing, targeting colleges and universities in an attempt to be heard and to grow their ranks. Hate groups also target some universities on the basis of their principles of inclusion and commitment to free speech. . . . At UT Knoxville, the white supremacist group Traditionalist Workers Party was not invited to appear on campus, but followed UT policy on use of campus facilities by non-University speakers in seeking to conduct an event. Now, let me be clear: Every campus and enterprise of the statewide University of Tennessee system respects and upholds the constitutionally protected First Amendment right to free speech which, history has shown, also can include ignorant, repulsive speech. . . . The statewide UT system also respects and upholds principles that run counter to hateful speech—inclusion, tolerance and civility—that I emphasize here for every person who reads these words. . . . History is littered with the tragedy of unchecked hate, racism and violence. And at the University of Tennessee, we should bluntly call out what is wrong: Hate, racism and violence are wrong. There is no place for them on any of our campuses or university facilities. (paras. 2–8)

Frustration by our campus communities is, of course, warranted. Colleges and universities represent engines of knowledge and the pursuit of truth. They challenge the status quo and push against ignorance, challenging through their teaching and learning missions the scourge of intolerance, bigotry, and violence that continues to plague our nation. Other than serving as a reminder of the darkness that is created by bigotry and intolerance, these views should have no presence in higher education's light.

The vice presidents who were interviewed for this brief cited tensions between the First Amendment and maintaining safe, inclusive campuses for their students. For example, one vice president was asked by a student organization that opposed a controversial speaker on campus, “Why are you letting them here?” Another vice president was asked, “How can you say you care about diversity and inclusion?” The interviewees reflected on what it would have meant for their institution to deny space for a contentious speaker. One individual said the following:

If we would have said no, we knew [the speaker] was going to sue us. He would have won, and he would have also played the victim card to a national audience at a time when he and others just like him are trying to create a narrative [that] the colleges and universities are undermining freedom so they can increase members who believe in their cause. In this case, saying no would have helped him.

The responsibilities of free speech and inclusion do not have to undercut one another. Colleges and universities must find ways to protect free speech on their campuses while upholding the principles of higher learning, which must involve maintaining the integrity of our values for diversity and inclusion. We must also maintain our consonant responsibilities to promote the safety of the students, employees, and visitors on our campuses.

Indeed, colleges and universities are confronted with a complex set of tasks to ensure we maintain mission integrity while not running afoul with the law. Of course, there are leaders who have managed these consonant responsibilities and, in doing so, have established a foundation for others who are confronted with similar challenges to consider. The sections that follow share the experiences and insights of vice presidents who are leaders in managing the presence of hate speakers and events on their campuses.

## **PREPARING FOR AND MANAGING OFFENSIVE— BUT PROTECTED—SPEECH: THE VOICES OF LEADERS IN STUDENT AFFAIRS**

The vice presidents interviewed for this brief shared several practices they used when confronted with controversial speakers and events on campus in light of being tasked with protecting free speech while upholding values for diversity and inclusivity. Each vice president discussed the strategies and practices employed from their vantage point as both a member of the campus leadership team and the leader of the campus student affairs division. The vice presidents addressed considerations and actions prior to, during, and after the speaker or event.

Several strategies emerged through these conversations: coordination across units, communication strategies, safety, cost, and education. This brief summarizes the vice presidents' insights and experiences related to each strategy. The following recommendations may serve as a guidepost for readers who may be confronted with managing highly controversial speakers on their campuses, or as a resource for those who are otherwise curious about studying campus responses to divisive, or even hateful, speech.

## 1. INTEGRATE CAMPUS STAKEHOLDERS IN PLANNING, MANAGEMENT, AND ASSESSMENT

Each vice president interviewed for this brief spoke about the importance of, as one put it, “having an all-hands-on-deck” approach to planning for and managing speakers or events on campus. One vice president shared, for example, that their campus strove to maintain a “culture of collaboration” by ensuring that all campus partners that held a stake in any particular development or challenge confronting the campus were made aware of the issue and had an opportunity to help plan for or respond as a cross-functional team. The vice president shared, “We had a culture of collaboration and communication in place long before [the controversial speaker] came to our campus. That enabled us—our facilities, campus safety, communications, student affairs—to be ready.” For the vice president interviewees, embracing a culture of collaboration—a mutual sense of partnership across departments and divisions—allowed those who could help identify and address considerations related to safety, cost, and other needs to be engaged early in the process. This approach helped minimize the likelihood that any critical considerations were missed, and gave campus stakeholders time to prepare for the speaker or event on their campus.

The vice presidents offered the following observations and experiences to integrate campus partners in preparing for a divisive speaker or event:

- ◇ **Conduct cross-functional scenario planning (prior to a request).** Identifying and preparing for problems that may occur during the campus presence of an offensive speaker or organization—or during a protest or other demonstration—enables the campus to be prepared for potential incidents. Of course, no one can predict all possible scenarios during an event or demonstration, but examples of what has happened can provide guideposts to enable cross-functional campus teams to develop an integrated plan for preparing for and managing such incidents, should they occur on campus.
- ◇ **Pull stakeholders together (as soon as possible after a request).** Once a request has been received from a student or other campus organization seeking to host a speaker who may represent views that are highly offensive to some, the cross-functional team should convene to brief members and discuss security, cost, logistical, and other implications. This group can review the request and begin planning for the speaker, event, or demonstration. Regardless of if the group is responsible for evaluating whether the speaker's or organization's views represent constitutionally protected speech, the group should ensure that any limits on speech or expression do not violate time, place, and manner restrictions, forum designations, or the other First Amendment principles discussed throughout this brief.
- ◇ **Conduct cross-functional postassessment (for planned or spontaneous speech or demonstrations).** Following the speaker, event, or demonstration, the cross-functional team should convene to assess campus strengths or areas for improvement. Postassessments should be documented; include examples of what worked well or recommendations on what could be improved to strengthen campus policy and practice in support of campus goals to provide safe, open forums for the discussion and expression of ideas.
- ◇ **Ensure campus policies are consistently enforced and regularly assessed.** To avoid running afoul of First Amendment principles, campus policies regarding free speech and expression must be consistently enforced to avoid judgments that are not content neutral, do not advance a legitimate government interest, or provide insufficient alternatives for speech. Those involved in enforcing campus policy related to free speech and expression, requests by outside speakers and organizations, and requests by student groups and campus-sponsored organizations, as well as similar policies, should receive training on time, place, and manner restrictions, forum designations, due process, and other First Amendment principles.

## 2. COMMUNICATE WITH CAMPUS CONSTITUENCIES

The interviewed vice presidents from public colleges and universities shared that it is unreasonable to expect all members of the campus community, especially students, to know or understand campus obligations for upholding First Amendment rights. These vice presidents therefore recommended frequent and open communication across campus constituencies not only about what these obligations mean when an offensive speaker or organization comes to campus, but also about how the institution maintains the integrity of its mission and values. They offered the following suggestions for communicating with campus constituents when faced with the campus presence of offensive speech or expression:

- ◇ **Presidential statements matter.** The University of Florida, University of Michigan, and UT provide powerful examples of the messages that college and university presidents can send to the community to contrast their institution's mission and values from offensive, constitutionally protected speakers and organizations seeking to hold events or demonstrations on their campuses (Davenport, 2018; DiPietro, 2018; Fuchs, 2017; Schlissel, 2017). Their statements give credence to the protection that offensive, intolerant speech is offered by the U.S. Constitution while also notifying readers that such views do not represent the values and principles of higher learning or a vibrant and inclusive society. Such statements also allow institution leaders to speak directly to their campus about the importance of the values and principles upheld by the institution, and to promote campus events or organizations that align with those values and principles.
- ◇ **Listen to and empathize with members of the campus community.** Members of campus communities care about one another. They disdain actions that tear down students, faculty, or staff. They hold to a high standard the important work of higher education and its power to transform lives. It is no surprise that when outside speakers and organizers aim to advance goals that run counter to an institution's mission and values—and the campus cultures that advance them—members of the community speak out. And, of course, as members of these communities, student affairs leaders may find themselves standing with their colleagues and students. As such, leaders in student affairs should listen to and empathize with the concerns of the campus community, and explain the campus's responsibilities for upholding First Amendment or other free speech responsibilities. Leaders in student affairs may also communicate alternative options prior to, during, or after the controversial speaker or event that represent the mission and values of the institution, or create spaces for members of the campus communities to share or express their views.

- ◇ **Communicate the (public) campus's First Amendment responsibilities.** Leaders in student affairs at public colleges and universities may also receive questions about why the institution is allowing a contentious speaker or organization to hold an event on campus. These are good opportunities to explain the campus's obligations to uphold the First Amendment, and to create space for members of the campus community to learn about alternative strategies to address offensive speech that do not violate constitutionally protected speech or expression. Such strategies include, but are not limited to, those listed in recommendation 5 (see page 14).

## 3. EMBRACE SAFETY AS THE RESPONSIBILITY OF THE CAMPUS—AND THE EVENT PARTICIPANTS

Protecting the safety of those who attend events or demonstrations involving controversial speech is, of course, a critically important task for campus leaders. During an interview for this brief, one vice president shared the following:

We walked through scenarios for weeks. We planned and thought through the logistics, the safety considerations of the physical space, the security we needed. But we also knew that the unexpected could happen. That there was still a chance that something bad could happen.

Without disclosing details that would reveal the identity of those interviewed, several examples illustrate the safety concerns that did arise during their campus events. Physical violence broke out near an event on one campus. Arrests occurred on several others. Spontaneous marches took place during some events, and attendees attempted to shout down the speakers at others. The vice presidents shared the practices they employed prior to, during, and after the event to promote the safety of the participants, the speaker or organization, and others. What follows is a summary of these practices:

- ◇ **Set expectations on campus.** Several vice presidents interviewed for this brief talked about assertively and diplomatically setting the expectation with students through in-person visits and other communication channels that violence would not be tolerated prior to, during, or after the divisive event or demonstration on their campus. Some embraced in-person expectation setting as an opportunity to have a dialogue and to promote alternatives to violence, such as nonviolent counterprotest, alternative programming, or peer discussion, that enable students to address their concerns or frustrations with the speaker's or organization's offensive views or goals.

- ◇ **Screen for weapons.** The vice presidents recommended checking bags and screening for weapons at each entrance to the facility housing the controversial speaker or event.
- ◇ **Distribute participation notices at the door of the event.** One vice president suggested that attendees of an event featuring a contentious speaker be provided with a written notice at the door of the venue that outlines their responsibilities as a participant. The vice president suggested that the waiver explicitly state that the attendee cannot assault, shout down, or otherwise unreasonably disrupt the speaker, and that engaging in such conduct will lead to the attendee's removal. The vice president recommended that the waiver clarify that speaking or even loud noises are permitted, but that neither should rise to a volume that will prohibit the speaker from delivering their message.
- ◇ **Maintain reasonable distance between protestors and counterprotestors.** Each vice president acknowledged that the divisive speaker or organization generated protests and counterprotests on their campus. In an effort to minimize the threat of conflict or violence, the vice presidents sought to establish and maintain a reasonable distance between the groups. They talked about having the groups on opposite sides of a street, or across from one another in a popular campus courtyard.
- ◇ **Build police support for campus-based protests and demonstrations into the agreement for police cooperation and mutual aid with local law enforcement.** Several vice presidents spoke about the importance of their mutual aid agreement to manage security costs. They built provisions in their agreement with local law enforcement that enabled each police force to call on the other for the provision of additional officers for large gatherings, demonstrations, or other needs as negotiated during the formation or renewal of the agreement. One vice president expressed caution that perhaps the frequent use of the mutual aid agreement to manage large campus gatherings or demonstration may prompt local law enforcement to renegotiate the terms of the agreement. On further reflection, however, the vice president stated that it was unlikely that enough inflammatory speakers would target their campus to pose a threat to the long-term stability of their mutual aid agreement with local law enforcement, urging other campuses to adopt similar provisions as a cost-saving strategy.
- ◇ **Train current staff to perform nonsecurity roles during events and large gatherings.** During large gatherings or demonstrations, a campus requires many personnel to manage crowds and intervene when behavior appears suspicious or out of the ordinary. Student affairs staff and other non-law enforcement personnel are neither trained in security nor credentialed to provide law enforcement functions. However, such employees can be helpful eyes and ears for campus and local law enforcement to intervene prior to or in a moment of violence or other suspicious activity. Staff can be trained to watch for suspicious behavior and notify law enforcement of such activity. They can also help ensure the orderly management of participants entering into and leaving the meeting space of the controversial speaker.

#### 4. MANAGE COSTS ASSOCIATED WITH CONTROVERSIAL SPEAKERS OR EVENTS

Citing the six-figure security costs associated with controversial speakers reported in national news, several vice presidents offered insights about the importance of managing such costs. As seen in recent national news coverage, for example, security costs for the University of California, Berkeley, ran six figures each for events featuring Ben Shapiro, Milo Yiannopoulos, and Ann Coulter (Strickland, 2017; Watanabe, 2017). All interviewees affirmed that their campuses did not have the resources for annual security costs in the million-dollar range just to cover divisive speakers. However, they acknowledged that covering security was necessary from a risk management standpoint—even though the campus had not invited the speaker or organization. One vice president noted, “We could not let hate speech bankrupt our university, but we had to make sure our students were safe.” Another said, “Our campus had limited resources to manage [the speaker], so we had to think differently about how we managed the event.” Having prepared their campuses for offensive and incendiary speakers on their campuses, the vice presidents acknowledged that managing security expenses helped reduce the overall cost of the event. They offered several strategies that may help other campuses maintain security at reasonable costs.

- ◇ **Assess security costs for groups or speakers.** Assessing security costs for outside groups or speakers is a practice embraced by many colleges and universities. However, at least one lawsuit has challenged this practice, raising questions about whether the courts may affirm, revise, or deny acceptable practice for assessing such costs.

At the University of Cincinnati, for instance, an individual who is not a representative of the institution filed a suit for \$2 million in damages. The court ordered the university to reduce the assessed security cost of \$10,833 for the speaker's planned engagement on campus (*Padgett v. Pinto*, 2018; Winn, 2018). The university responded that, like all other nonsponsored groups or individuals, the speaker is required to pay costs for their use of campus facilities, which include security fees, and that these costs represent "a mere fraction of the costs" (Winn, 2018, para. 5) the university anticipated incurring for the event. In April 2018, however, Spencer's representative dropped the suit without reaching a settlement out of court (Cammarata & Biek, 2018). Any future court action on campus requirements or latitudes to assess costs remains unclear at the time of this writing.

## 5. REMEMBER THAT EDUCATION IS OUR MISSION—AND STRENGTH

Free speech is fundamental to higher education's teaching and learning mission. Upholding campus free speech promotes inquiry, critical thinking and analysis, and dialogue. For public colleges and universities, the freedoms of speech and expression are fundamental rights protected by the First Amendment, and many private-sector institutions embrace values and principles of free speech in their campus policies and practices. In planning for or responding to controversial speech, vice presidents for student affairs are often faced with the responsibility to affirm their campus's commitment to diversity and inclusion while upholding free speech rights and principles. There is no universal solution to ensure individuals will not feel excluded by divisive speech, nor is there a guarantee that such speech—including hate speech—will be free from campus borders. By embracing education, college and university leaders can advance the institution's mission and values by offering programs—before, during, or after an incendiary speaker or demonstration—that speak to the institution's commitment to deep learning, inclusion, and care. In addition, leaders may consider offering programs that use such events as an opportunity to educate their campus communities about broader legal principles and responsibilities. Such strategies to achieve these objectives include the following:

◇ **Provide open forums on free speech in higher education.** Prior to hosting a high-profile, contentious speaker, one large public research university facilitated open forums to discuss the principles of free speech and how they apply to the public campus. The campus embraced this practice following significant concern shared by students, faculty, and staff that the individual was permitted to speak. The open forums featured faculty whose expertise on the First Amendment was met with an opportunity for members of the campus

community to share their concerns and engage in a productive, empathic dialogue while providing an educational opportunity regarding the legal requirements of the campus.

- ◇ **Hold panel discussions on social issues.** In response to the controversial speech events on their campuses, vice presidents also recognized the opportunity to encourage productive discussion about social justice issues. Students, faculty, and staff organized panel discussions to cultivate reflection and provide direction to attendees who sought an alternative to the views expressed by the speaker.
- ◇ **Offer First Amendment training for students, faculty, and staff.** Before hosting a divisive speaker, one public university provided students, faculty, and staff with training on the requirements of the First Amendment on their campus. Training facilitators reviewed with attendees time, place, and manner restrictions articulated by the U.S. Supreme Court and how these applied to campus facilities, and the contours and latitudes of types of speech that cannot be restricted at the institution.
- ◇ **Welcome diverse perspectives, emphasize critical thinking, and teach civil discourse through curricular and cocurricular learning.** The ability to think critically is fundamental to higher learning. Critical thinking requires students to wrestle with difficult, and sometimes uncomfortable or controversial, views that may represent ideas or values vastly different from their own. It's imperative to emphasize the fundamentals of critical thinking so students are prepared to engage diverse views in a productive, constructive, and meaningful manner. Educating students to think and listen carefully, and generate conclusions only after a careful review of multiple sources of evidence, enables them to navigate a vibrant world comprising myriad perspectives, endless access to information, and daily narratives of hostile and divisive discourse. Higher education's learning mission is essential to promote a safe and vibrant society.

## CONCLUSION

Higher education may be a target for groups seeking to diminish the important work we do to educate an increasingly diverse society for lives of purpose and opportunity, but our work will remain unchanged. Of course, the controversy stirred at some colleges and universities by hateful groups or speakers has once again raised deep questions about the latitude of colleges and universities—particularly those in public settings—to restrict or limit the campus presence of incendiary views on campus. The First Amendment serves as an important guidepost for the responsibilities of colleges and universities. But we should leverage education as our strength to strip the foolish, empty ideologies of disunity, bigotry, and intolerance of their merit. This brief offered strategies and practices for minding First Amendment responsibilities and leveraging institutional mission and values to support safe and inclusive campus environments

## RECOMMENDED READING

Association of Governing Boards. (2017). *Freedom of speech on campus: Guidelines for governing boards and institutional leaders*. Retrieved from [https://www.agb.org/sites/default/files/u27335/report\\_2017\\_free\\_speech.pdf](https://www.agb.org/sites/default/files/u27335/report_2017_free_speech.pdf)

Axmacher, R., Banahan, L., Beassie, R., Gomez, F., Hutchens, N., Melear, K. B., . . . Sun, J. C. (2014). *Responding to campus protest: A practitioner resource* (*Legal Links*, Vol. 1, No. 2). Retrieved from NASPA–Student Affairs Administrators in Higher Education website: <https://www.naspa.org/rpi/reports/responding-to-campus-protests-a-practitioner-resource>

LaBanc, B. H., Melear, K. B., Fernandez, F., Hutchens, N. H. (2018, Spring). Freedom of speech: At what cost? *Leadership Exchange*. Retrieved from <https://www.naspa.org/publications/leadership-exchange>

Miller, R., Guida, T., Smith, S., Kiersten Ferguson, S., & Medina, E. (2017). Free speech tensions: Responding to bias on college and university campuses. *Journal of Student Affairs Research and Practice*, 55(1), 27–39. <https://doi.org/10.1080/19496591.2017.1363051>

Rush, B. S. (2018). *Free speech on campus*. New Haven, CT: Yale University Press.

## REFERENCES

- Andrews, T. (2017, April 19). Federal judge stops Auburn from canceling white nationalist Richard Spencer speech. Protests and a scuffle greet him. *The Washington Post*. Retrieved from [https://www.washingtonpost.com/news/morning-mix/wp/2017/04/19/federal-judge-stops-auburn-from-canceling-white-nationalists-speech-violence-erupts/?utm\\_term=.e85221fc88f5](https://www.washingtonpost.com/news/morning-mix/wp/2017/04/19/federal-judge-stops-auburn-from-canceling-white-nationalists-speech-violence-erupts/?utm_term=.e85221fc88f5)
- Bloedorn v. Grube, 631 F.3d 1218 (11th Cir. 2011).
- Campus chiefs violated student rights. (2017, December 6). *The News and Sentinel* (Parkersburg). Retrieved from [http://www.register-herald.com/opinion/editorials/campus-chiefs-violated-students-rights/article\\_3e08fbc2-1023-5cda-8ef4-935e9f11a80c.html](http://www.register-herald.com/opinion/editorials/campus-chiefs-violated-students-rights/article_3e08fbc2-1023-5cda-8ef4-935e9f11a80c.html)
- College Republicans at San Francisco State v. Reed, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).
- Cox v. New Hampshire, 312 U.S. 569 (1941).
- Davenport, B. (2018). *Racism is not welcome on our campus*. Retrieved from University of Tennessee, Knoxville website: <https://chancellor.utk.edu/2018/02/07/racism-is-not-welcome>
- DiPietro, J. (2018). *UT president issues statement on extremist activity*. Retrieved from University of Tennessee System website: <https://news.tennessee.edu/2018/02/08/ut-president-issues-statement-on-extremist-activity>
- Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).
- Elonis v. United States, 575 U.S. (2015).
- Fuchs, K. (2017). *Personal message from President Fuchs*. Retrieved from University of Florida website: <http://statements.ufl.edu/statements/2017/10/personal-message-from-president-fuchs.html>
- Georgia Southern University. (2018). Georgia Southern University Division of Student Affairs student union facilities & event services: Policies. Retrieved from <http://students.georgiasouthern.edu/union/about/policies>
- Healy v. James, 408 U.S. 169 (1972).
- Kammarata, K., & Biek, K. (2018, April 26). Richard Spencer's lawsuit against the University of Cincinnati is over. *Newsy*. Retrieved from <https://www.kivitv.com/newsy/richard-spencers-lawsuit-against-the-university-of-cincinnati-is-over?autoplay=true>



McCullen v. Coakley, 573 U.S. (2014).

McLaughlin, E. (2017, May 1). War on campus: The escalating battle over college free speech. *CNN*. Retrieved from <https://www.cnn.com/2017/04/20/us/campus-free-speech-trnd/index.html>

Padgett v. Auburn University et al. (M.D. Ala. 2017).

Padgett v. Pinto (S.D. Ohio. 2018).

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983).

Schlissel, M. (2017). *Request by Richard Spencer to speak on the U-M campus*. Retrieved from University of Michigan website: <http://president.umich.edu/news-communications/letters-to-the-community/request-by-richard-spencer-to-speak-on-the-u-m-campus>

Strickland, P. (2017, September 25). Milo Yiannopoulos' security cost UC-Berkeley \$800,000. *Al Jazeera*. Retrieved from <https://www.aljazeera.com/news/2017/09/milo-yiannopoulos-security-cost-berkeley-800000-170925080606054.html>

Texas A&M University. (2015). *Appendix XI: Texas A&M rules on freedom of expression*. Retrieved from <http://student-rules.tamu.edu/append11>

United States Department of Labor Wage and Hour Division. (2008). *Fact Sheet #21: Recordkeeping requirements under the Fair Labor Standards Act (FLSA)*. Retrieved from <https://www.dol.gov/whd/regs/compliance/whdfs21.pdf>

UW-Milwaukee Post v. Board of Regents of the University of Wisconsin, 774 F. Supp. 1163 (E.D. Wis. 1991).

Van Tuinen v. Yosemite Community College District et al. (E.D. Cal. 2014).

Virginia v. Black, 538 U.S. 343 (2003).

Ward v. Rock Against Racism, 491 U.S. 781 (1989).

Watanabe, T. (2017, September 20). UC system will chip in at least \$300,000 to help Berkeley pay security costs for controversial speakers. *Los Angeles Times*. Retrieved from <http://www.latimes.com/local/lanow/la-me-ln-uc-berkeley-security-20170920-story.html>

Weinstein, B. (2015, December 13). The high cost of free speech. *Fortune*. Retrieved from <http://fortune.com/2015/12/13/yale-free-speech-campus>

Wike, R., & Simmons, K. (2015). *Global support for principle of free expression, but opposition to some forms of speech: Americans especially likely to embrace individual liberties*. Retrieved from Pew Research Center website: <http://www.pewglobal.org/2015/11/18/global-support-for-principle-of-free-expression-but-opposition-to-some-forms-of-speech>

Winn, Z. (2018, January 11). Richard Spencer supporter sues Univ. of Cincinnati over security fees. *Campus Safety*. Retrieved from <https://www.campussafetymagazine.com/university/cameron-padgett-richard-spencer-lawsuit-univ-cincinnati-security-fees-protests>

## NASPA'S RESEARCH AND POLICY INSTITUTE

NASPA's Research and Policy Institute (RPI) intentionally links research, policy, and effective student affairs practice in support of student success and the strategic priorities of the association. RPI generates scholarship and conducts policy analysis to articulate student affairs contributions to student success, learning, and development; interpret information that advances practice and policy conversations; and connect the many research and policy activities of NASPA members to increase reach and impact.



**NASPA.**

Research and Policy  
Institute

NASPA—Student Affairs Administrators in Higher Education  
111 K Street, NE, 10th Floor | Washington, DC 20002  
tel 202.265.7500 | fax 202.898.5737  
[www.naspa.org](http://www.naspa.org)