OFFICE OF THE ATTORNEY GENERAL GUIDE TO FIRST AMENDMENT ISSUES ON PUBLIC COLLEGE CAMPUSES

The Supreme Court describes a public college campus as a "marketplace of ideas."[1] The freedom of speech is the foundation of this marketplace. As campus dynamics continue to evolve, and some misunderstand the value of open debate and the limits of this robust constitutional right, the freedom of speech should remain a core principle of Texas's public colleges and universities.

The Office of the Attorney General of Texas provides this guide as an overview of First Amendment issues involving students on public college campuses. It discusses settled issues that all colleges should understand, as well as emerging issues and questions facing college administrators. The guide is organized into two parts: A First Amendment primer, and frequently asked questions (use of campus facilities, student organizations, and content of student expression). The goal of this guide is to help administrators as they work to protect the freedom of speech for all students and provide the safest environment possible to Texas's future leaders.[2]

FIRST AMENDMENT PRIMER

Use of Campus Facilities for Speech

The First Amendment to the United States Constitution protects students' rights to engage in all sorts of expressive conduct on college campuses—including oral speech, leaflets, signs, displays, debates, concerts, visual or performing arts, and even silence. As government entities, Texas's public colleges and universities cannot legally maintain or enforce policies that discriminate against students because of their ideological viewpoints. Public colleges may adopt reasonable time, place, and manner rules for student speech, in fulfilling their obligations to operate and maintain effective and efficient institutions of higher education, so long as the rules do not restrict substantially more speech than is necessary to achieve the college's legitimate interests. There is no one-size-fits-all policy.

Like any government-owned property, the standard by which the constitutionality of any regulation of speech on a public university campus must be

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[1] *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

[2] This document provides general guidance to Texas colleges and universities in a complex area of First Amendment law and is not to be used by the public for legal advice. Because the law is constantly changing and each factual situation is unique, the Office of the Attorney General does not warrant, either expressly or impliedly, that the law, cases, statutes, and rules discussed or cited in this document have not been subject to change, amendment, reversal, or revision. This guide is not a substitute for legal advice and administrators should consult their institution's legal counsel. Individuals with legal questions or requiring legal advice should contact an attorney.

evaluated "differ[s] depending on the character of the property at issue."[3] The first step in the analysis is to "identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic."[4]

Recent decisions from the U.S. Supreme Court identify three types of fora: a traditional public forum, a designated public forum, and a limited (or nonpublic) public forum.[5] But earlier Supreme Court decisions and those from the U.S. Court of Appeals for the Fifth Circuit, which has jurisdiction over Texas, add a fourth forum by distinguishing between a limited public forum and a nonpublic forum.[6] Within these fora, there are different types of restrictions on speech that may or may not be permissible. Viewpoint restrictions are those that prohibit speech concerning only one side of a certain subject matter. Generally speaking, rules regulating speech based on the viewpoint being expressed are unconstitutional, no matter the forum. If viewpoint discrimination were permissible, unpopular viewpoints could easily be silenced or suppressed.[7] Content-based restrictions prohibit speech about a certain subject matter, regardless of the viewpoint expressed in the speech about that subject matter.[8] Content-based regulations of speech in a traditional or designated public forum must be justified by compelling state interests (strict scrutiny). Policies that restrict speech regardless of the content of the speech are content-neutral. Content-neutral regulations of the time, place, and manner of speech in a traditional or designated public forum must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[9] However, content-based or content-neutral time, place, and manner restrictions in a limited public forum need only be reasonable and viewpoint neutral.[10]

"Traditional public fora are those places which by long tradition or by government fiat have been devoted to assembly and debate."[11] Public streets, sidewalks, and parks are common examples of traditional public fora.[12] In these fora, rules governing speech are subject to the strictest scrutiny—in other words, they

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[3] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).
[4] *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).
[5] *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2251 (2015).
[6] *Justice for All v. Faulkner*, 410 F.3d 760, 765–66 (5th Cir. 2005); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 860 (N.D. Tex. 2004).
[7] For example, a public university may not exclude a student-run magazine from student activity fee funding simply because the magazine expresses a religious point of view. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995).
[8] For example, placing different restrictions on ideological, political, and temporary signs is a content-based restriction on speech. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).
[9] *Perry Educ. Ass'n*, 460 U.S. at 45. For example, a city noise regulation at an outdoor amphitheater, which the city intended to protect nearby residents from excessive noise, was a content-neutral time, place, or manner restriction on speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989).
[10] *Rosenberger*, 515 U.S. at 829.
[11] *Cornelius*, 473 U.S. at 802.
[12] *Justice for All*, 410 F.3d at 765.

rarely survive judicial review.[13] Reasonable time, place, and manner restrictions on speech are allowed, but any restriction based on the content of the speech must satisfy strict scrutiny, which means it must be "narrowly tailored to serve a compelling government interest," and restrictions based on a speaker's viewpoint are prohibited.[14] While the Supreme Court has never described a university campus as a traditional public forum, it has described it as "possess[ing] many of the characteristics of a public forum,"[15] and other courts have found some specific areas of a university campus, such as public sidewalks, to be a traditional public forum.[16]

A designated public forum exists where "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose."[17] Examples of this type of forum include school meeting facilities,[18] municipal theaters,[19] and state fairgrounds.[20] "Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum."[21]

A limited forum "exists where a government has 'reserv[ed a forum] for certain groups or for the discussion of certain topics.'"[22] Examples of this type of forum include student activity fee programs,[23] after-hours use of school facilities by community organizations,[24] and mailboxes for teachers at school.[25] Nonpublic fora include property not traditionally open to the public for free expression, such as military installations.[26] Restrictions on speech in a limited or nonpublic forum need only be reasonable and viewpoint neutral.[27] However, keep in mind that some government property may be one forum to one type of person and a different forum

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[13] *Id.*
[14] *Pleasant Grove City v. Summum*, 555 U.S. 467, 469 (2009).
[15] *Widmar v. Vincent*, 454 U.S. 263, 274 n.5 (1981).
[16] *Brister v. Faulkner*, 214 F.3d 675, 681 (5th Cir. 2000).
[17] *Summum*, 555 U.S. at 469.
[18] *Widmar*, 454 U.S. 263.
[19] *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).
[20] *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).
[21] *Summum*, 555 U.S. at 470.
[22] *Walker*, 135 S. Ct. at 2250 (citing *Rosenberger*, 515 U.S. at 829).
[23] *Rosenberger*, 515 U.S. 819.
[24] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001).
[25] *Perry Ed. Ass'n*, 460 U.S. at 45.
[26] *See Justice for All*, 410 F.3d at 765. Some courts treat nonpublic and limited fora the same. *See Am. Freedom Def Initiative v. King Cty., Wash.*, 136 S. Ct. 1022, 1023 (2016) ("a limited public forum [is] also called a nonpublic forum[.]") (Thomas, J. and Alito, J., dissenting from denial of certiorari). Because the applicable standard is the same in a "limited" or "nonpublic" forum, the two are treated the same here. *See, e.g., Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 687 (1992) (O'Connor, J., concurring) ("[R]estrictions on speech in nonpublic fora are valid if they are 'reasonable' and 'not an effort to suppress expression merely because public officials oppose the speaker's view.'" (citation omitted)).
[27] *Justice for All*, 410 F.3d at 765–66.

to another. For example, a certain area of campus may be both a designated public forum for students and a limited public forum for nonstudents.[28]

The Supreme Court describes colleges as the "marketplace of ideas,"[29] and a "voluntary and spontaneous assemblage . . . for students to speak and to write and to learn."[30] According to the Court, therefore, the "campus of a public university, at least for its students, possesses many of the characteristics of a public forum."[31] The types of rules a public college or university may adopt depends on the character of the property and the nature of the rule. Indoor areas differ from outdoor areas. Outdoor areas differ from one another. Additionally, the rules applicable to student speech do not necessarily apply to nonstudent speakers.

Student Organization Policies

Students have a First Amendment right to associate to further their personal beliefs.[32] At the same time, a public college or university may constitutionally impose some limitations or restrictions on the exercise of that right. A college or university should consider maintaining a policy or handbook describing the requirements for forming a new student organization or maintaining an existing one, how to obtain administrative approval of such an organization, and the privileges of formal recognition.

Harassing, Biased, and Offensive Speech

The Free Speech Clause of the First Amendment limits a college's ability to interfere with a student's right to speak his or her mind, no matter how unpopular, controversial, or disagreeable his or her ideas may be to others.[33] This is not to say that a student has an unfettered right to say anything in class or on campus, only that a vast amount of speech remains protected even if it is offensive. The Supreme Court has carved out narrow categories of speech that do not receive First Amendment protection: "fighting words" (*i.e.*, speech that provokes immediate violence), "incitement to imminent lawless action," words that create a "clear and present danger" (*e.g.*, falsely shouting, "Fire!" in a crowded theater), "obscenity" (*i.e.*,

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[28] *Id.* at 766–67.
[29] *Healy v. James*, 408 U.S. 169, 180 (1972).
[30] *Rosenberger*, 515 U.S. at 836.
[31] *Widmar*, 454 U.S. at 268 n.5; *see also Ward*, 491 U.S. at 791.
[32] *Healy*, 408 U.S. at 181.
[33] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (holding flag burning is protected speech); *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("[M]ere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'").

depictions of hard-core sexual acts), child pornography, fraud, and defamation (*i.e.*, telling lies about a person that harm the individual's reputation).[34]

Policies designed to prevent these types of speech must satisfy the level of scrutiny applicable to the relevant forum, as discussed above. Such policies must also take care to avoid being overly broad, being vague, or vesting officials with unbridled discretion. Overbreadth, vagueness, and unbridled discretion are unconstitutional in all restrictions on student speech, but may be likely to appear in policies designed to target harassing, biased, or offensive speech. This has played out in litigation across the nation, including in Texas.

A campus policy must not apply so broadly that it touches protected speech activity of others, even where it validly applies to some. A restriction is "overbroad" in violation of the First Amendment where it captures "a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep[.]'"[35] In 2004, a Texas court held that a university's policy of prohibiting "threats, insults, epithets, ridicule, or personal attacks, or the categories of sexually harassing speech," was overbroad in violation of the First Amendment.[36] Such a policy, while no doubt intended to protect against harassing, biased, or offensive speech, is too broad because it could capture plenty of speech that a public university cannot constitutionally prohibit.

In order to pass constitutional muster, speech restrictions must also be appropriate in specificity such that it is reasonably clear which speech is prohibited and which speech is allowed. This requirement encourages policy makers to make policies with precision. "[W]here a vague [provision] abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms."[37] A vague restriction on student expression violates the First Amendment because it "denies fair notice of the standard of conduct to which a [student] is held accountable[.]"[38] Vagueness and overbreadth often (but not always) go hand-in-hand.

Speech restrictions that "delegate overly broad discretion to a government official" are unconstitutional under the "unbridled discretion" doctrine.[39] For example, a court invalidated a university's policy limiting "potentially disruptive"

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[34] *See Schenck v. United States*, 249 U.S. 47, 52 (1919) (clear and present danger); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words and defamation); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (inciting imminent lawless action); *Miller v. California*, 413 U.S. 15, 24 (1972) (stating the three-part test for "obscenity"); *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (fraud); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (child pornography)..

[35] *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

[36] *Roberts*, 346 F. Supp. 2d at 872.

[37] *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (citations and punctuation marks omitted).

[38] *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1183 (6th Cir. 1995).

[39] *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 129 (1992).

speech, because it gave the dean too much discretion to apply this policy to student speech.[40] The policy did not include any objective guidelines or safeguards that would prevent the dean from exercising his discretion in an unconstitutional manner (for example, in a manner that discriminated against speech based on its viewpoint). Courts outside of Texas have reached similar conclusions.[41]

This does not mean that colleges and universities are powerless to protect their students from harassment—even when some of harassment takes the form of speech. However, higher education institutions should look to Title IX to develop their anti-harassment policies. Title IX allows colleges and universities to prohibit student-on-student harassment when it is "so severe, pervasive, and objectively offensive" that it "undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[42] Incorporating this objective standard in an anti-harassment policy allows higher education institutions to stop harassing behavior while still protecting free speech. Failure to incorporate an objective standard into a harassment policy creates a risk that the policies will not withstand a constitutional challenge.[43]

While Title IX specifically protects students from sexual harassment, courts apply similar standards in cases of racial or disability discrimination or harassment.[44] Thus, a college may punish a student who continually refers to another student in the classroom using an epithet, because such speech could constitute severe, pervasive, and objectively offensive speech.[45] In an effort to reduce sexual harassment on campus, the Texas Legislature enacted protections for students who report sexual harassment, and defines such harassment as "unwelcome, sex-based verbal or physical conduct that . . . is sufficiently severe, persistent, or pervasive that the conduct interferes with a student's ability to participate in or benefit from educational programs or activities."[46] Finally, colleges and universities may prohibit

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[40] *Pro-Life Cougars v. Univ. of Hous.*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003).
[41] *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. Bd. of Regents, N. Ky. Univ.*, No. 96-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 22, 1998); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).
[42] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).
[43] *See McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001); *Dambrot*, 55 F.3d at 1185.
[44] *Maislin v. Tenn. State Univ.*, 665 F. Supp. 2d 922, 927–28 (M.D. Tenn. 2009) (racial harassment); *M.J. v. Marion Indep. Sch. Dist.*, No. SA-10-CV-00978, 2013 WL 1882330, at *6 (W.D. Tex. May 3, 2013) (disability harassment).
[45] *See, e.g., Harrell v. S. Oregon Univ.*, No. 08-3037-CL, 2009 WL 3562732, at *1 (D. Or. Oct. 30, 2009) (holding university was justified in punishing student for making ad hominem attacks on classmates).
[46] Tex. Educ. Code § 51.9366.

quid pro quo harassment between faculty and students.[47] The bottom line is that if student speech policies target speech based on content or viewpoint, contain vague or overbroad words, or limit speech that the Constitution deems protected, then they expose the college to potential liability.

FREQUENTLY ASKED QUESTIONS

Questions Concerning the Use of Campus Facilities

Q. Where may students distribute flyers, carry signs, and engage in oral speech on campus?

A. Generally, students may hold signs, distribute flyers, leaflets, and handouts anywhere outside on campus, as long as they are not substantially disrupting classes, forcing people to take material, or obstructing passageways. When they are distributing flyers on public sidewalks or in park-like areas—what courts deem traditional public fora—students' rights are the strongest.[48] Students can even speak anonymously to each other, but can be required to identify themselves to university administrators.[49]

Q. May a college require students to apply for permission to distribute flyers?

A. A public college may require students to inform administrators if they are going to distribute flyers, but may not disable the spontaneity of the speech. This means that if you require pre-registration, then you should approve the activity as soon as possible, subject to the limitations of not substantially disrupting classes, forcing people to take material, or obstructing passageways.

Q. May a college create "free speech zones?"

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[47] 20 U.S.C. § 1681; *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011).

[48] *Cornelius*, 473 U.S. at 802; *see also OSU Student All. v. Ray*, 699 F.3d 1053, 1062–63 (9th Cir. 2012) (holding Oregon State University campus is designated public forum for students); *Flint v. Dennison*, 488 F.3d 816, 831 (9th Cir. 2007) (noting campus is a public forum); *Bowman v. White*, 444 F.3d 967, 979 (8th Cir. 2006) (finding outdoor areas of University of Arkansas are designated public fora); *Justice for All*, 410 F.3d at 768–69 (finding portions of the University of Texas at Austin campus a designated public fora for students); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, 2012 WL 3636932, at *1 (S.D. Ohio Aug. 22, 2012) (finding outdoor areas of University of Cincinnati are designated public fora); *Roberts*, 346 F. Supp. 2d at 861 (holding park areas, sidewalks, streets, and common areas of Texas Tech University are traditional public fora for students); *Pro-Life Cougars*, 259 F. Supp. 2d at 582 (finding campus is a public forum for students); *Khademi v. S. Orange Cnty. Cmty. Coll. Dist.*, 194 F. Supp. 2d 1011, 1024 (C.D. Cal. 2002) (finding the generally available areas of a community college campus are public fora because they are open to the public); *Burbridge v. Sampson*, 74 F. Supp. 2d 940 (C.D. Cal. 1999) (finding a community college campus is a public forum because it is open to the public); *but see Students for Life v. Waldrop*, 162 F. Supp. 3d 1216 (S.D. Ala. 2016) (finding redeveloped perimeter area of campus is a limited public forum).

[49] *Justice for All*, 410 F.3d at 771–72.

A. Yes, but a college cannot restrict student speech to only those zones, unless the restrictions are to accommodate speech that is substantially disruptive to the campus environment.[50] Students may engage in spontaneous speech on public sidewalks and lawns on campus. While free speech zones provide scheduling benefits and help regulate speakers who are not part of the university community, they unconstitutionally limit student speech and often do not provide adequate space for competing speakers. When students want to reserve campus space for planned activities, college policies can encourage them to use the free speech zones, but cannot limit them from requesting other available, unreserved outdoor fora that will not create a substantial disruption of campus.

Q. Where may a student group hold an outside event on campus?
A. Like flyer distribution, student groups may hold spontaneous events anywhere in the public forum areas of campus, so long as they are not substantially disruptive. For pre-planned events, colleges may direct student groups to work with administrators to select the best location, keeping in mind, however, that they may not restrict student speech to an area of campus where it is ineffective (*i.e.*, a remote part of campus).

Q. May a college regulate the sound volume of student group events?
A. Yes. A college has a substantial interest in limiting sound volume on campus to preserve the educational mission of the institution. In outdoor areas, where this issue arises most often, a college may adopt content-neutral and reasonable time, place, and manner restrictions on sound volume, whether amplified or not.[51]

Questions About Student Organizations

Q. May a college require a student group to have a certain number of members for official recognition?
A. Depending on the number of students enrolled at a college, it may require students to identify a minimum number of members to receive official recognition. Keep in mind, however, that students often have trouble attracting interest and members to new organizations and the college must avoid discriminating against unpopular views and topics (and certainly wants to avoid any appearance of doing so). Thus, if a college chooses to set a minimum, it should err on the low side (*e.g.*, 5–10 students).

Q. May a college require a recognized student group to have a faculty advisor?
A. Yes. Faculty advisors often help maintain stability in student groups from one year to the next. If a student group, however, cannot find a faculty advisor, then the college should provide an interim advisor from an appropriate administrative office so that the students may maintain their group. Failure to do so could cause a student group

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[50] *See, e.g.*, *Roberts*, 346 F. Supp. 2d at 861 (finding university policy that limited unrestricted student expression to designated free speech zones on campus unconstitutional under First Amendment).
[51] *Ward*, 491 U.S. at 799–801.

to allege that the college is discriminating against unpopular speech. Student group advisors must also comply with specific training requirements in Texas law.[52] A college may also choose to allow a recognized student group to operate without a faculty advisor.

Q. May a college require recognized student groups to include a statement in their constitutions/bylaws that they will not discriminate based on various protected characteristics when establishing criteria for leaders and members of the group?
A. It depends. Requiring a student group to adopt a non-discrimination policy that prohibits discrimination based on race, color, national origin, sex, religion, veteran status, among other things, may violate the student group's rights under the U.S. Constitution and Texas law.[53] A policy that requires student groups to accept all students as members and leaders of the group—a so-called "all comers" policy—has been upheld by the Supreme Court,[54] but often results in groups losing their individual character, purpose, and mission.

Q. May a college restrict which recognized student groups get access to student fee funding?
A. Generally, no. If a college decides to allow student groups access to facilities or student fees, then it must distribute those fees on a viewpoint neutral basis to all such student groups regardless of the group's views. Even religious student groups must receive equal access to these fees.[55]

Q. May recognized student groups invite guest speakers to campus?
A. Yes. Student groups may invite guest speakers to their events, whether indoors or outside. Colleges may require student groups to provide advanced notice of planned guest speakers they intend to invite to campus. Criteria related to approval of the event must be content-neutral and viewpoint-neutral, but can require sufficient detail to allow the college to assess the needs of the event, including venue size, campus security, and other accommodations.[56]

Q. May students co-sponsor an event on campus with an off-campus organization?

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[52] *See* Tex. Educ. Code § 51.9361.
[53] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 708–09 (2012) (holding church school had First Amendment exemption from complying with federal anti-discrimination statute); *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006) (university violated First Amendment when it conditioned access to a forum on Christian student organization's willingness to abandon its faith-based membership and leadership restrictions).
[54] *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010).
[55] *Rosenberger*, 515 U.S. 819; *Widmar*, 454 U.S. 263; *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010).
[56] *Gay Students Org. of Univ. of N.H. v. Bonner*, 367 F. Supp. 1088, 1095 (D.N.H. 1974) (recognizing the right of a student group to invite guest speakers to campus).

A. Yes. At least one college policy prohibiting co-sponsorship of student group events with off-campus organizations was declared unconstitutional because it was not narrowly tailored to the college's interest in regulating the use of outdoor fora.[57]

Q. May a college require a recognized student group to pay for security for an event?
A. No, if the college uses the content or viewpoint of the speech planned for the event to justify the security costs. Policies requiring student groups to pay additional security fees for an event they plan on campus risks subjecting the university to allegations of content or viewpoint discrimination. An event involving "controversial" speech may indeed dictate the need for additional security because of the associated controversy or anticipated counter protests, but the college may not pass those additional costs (based upon the controversy of the speech itself) onto the student or student organization. If a college charges a security fee on a case-by-case basis, it should focus on the expected size of the event, the location, past compliance with campus policies, and other content-neutral criteria that limit an administrator's discretion to require security fees.[58] Alternatively, a college could charge a nominal security fee for all student group events, but it should not charge so much that smaller student groups with less popular views cannot afford the fee.

Q. May a college express disagreement with a recognized student organization's event or message?
A. A public college must be careful when responding directly to a student organization's event. To be sure, the government, including a public college, may express its views,[59] provided that the college does not censor or discriminate against student speakers. Thus, by ensuring student organizations may fully express their opinions within the lawful boundaries of the First Amendment, colleges may then express a counter-message. The key is to protect and encourage vigorous debate in the "marketplace of ideas."

Questions About the Content of Student Speech

Q. May a public college prohibit biased or offensive speech?
A. No. Aside from the fact that "biased" and "offensive" are vague terms that also capture protected expression,[60] a prohibition on such speech could constitute

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[57] *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610, 634–37 (N.D. Tex. 2010).
[58] *Forsyth Cty.*, 505 U.S. 123; *Coll. Republicans of Univ. of Wash.*, 2018 WL 804497 (W.D. Wash. Feb. 9, 2018) (striking down university security fee policy); *see also* Erica Goldberg, *Must Universities "Subsidize" Controversial Ideas?: Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 GEORGE MASON UNIV. CIV. RIGHTS L.J. 349 (2011).
[59] *See, e.g., Walker*, 135 S. Ct. 2239 (discussing "government speech" doctrine).
[60] *Papish*, 410 U.S. at 670 ("[M]ere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); *DeJohn*, 537 F.3d at 314 ("'Harassing' or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections."); *Dambrot*, 55 F.3d at 1185; *Roberts*, 346 F. Supp. 2d at 872.

viewpoint discrimination[61] and require the college to inquire into listeners' reactions to speech, both of which are unconstitutional.[62]

Q. May a college publish a statement of community values for students?
A. Yes, so long as the statement is aspirational and does not punish students based on viewpoints being expressed. For example, one university had a student policy that required students to "be civil" on campus. A court struck it down as unconstitutional because a lot of speech protected by the First Amendment could be considered "uncivil."[63] In other words, the policy could be applied to capture expressive conduct that the First Amendment protects. Another court, when examining a similar policy at another university, held that a "community values" statement was constitutional because it was aspirational only.[64]

Q. May administrators or professors publish "trigger warnings" about speakers on campus or educational materials?
A. Yes. Because public colleges are government institutions that may express a government message and professors have free speech rights, they may state that the content or speech students are about to encounter may cause discomfort.[65] However, colleges and professors may not require students to post trigger warnings about their own speech; doing so would restrict the speech based on viewpoint, which is unconstitutional.

Q. What forms of student-on-student harassment may a college ban on campus?
A. Only student-on-student harassment that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities" loses its protection under the First Amendment and may be prohibited by a college.[66] Student-on-student harassment, thus, is not the same as harassment between employees or the same as an employee harassing a student. Thus, standards applicable to employees should not be imposed on students, unless the situation involves a student employee.

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[61] *See Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (holding in the context of federal trademark law that a prohibition on disparaging trademarks was facially invalid under the First Amendment, and noting "[g]iving offense is a viewpoint"); *see also Johnson*, 491 U.S. at 414 ("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.").
[62] *Forsyth Cty.*, 505 U.S. at 135.
[63] *Coll. Republicans at S.F. State Univ.*, 523 F. Supp. 2d at 1021.
[64] *Bair*, 280 F. Supp. 2d at 370.
[65] *See Matal*, 137 S. Ct. at 1757 ("The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others, but imposing a requirement of viewpoint-neutrality on government speech would be paralyzing." (quotation marks and citations omitted)).
[66] *Davis*, 526 U.S. at 651.