

## **ABSTRACT**

### **“Free Speech vs. Student Support and Advocacy: The Balancing Act”**

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This presentation provides foundational information regarding ways in which experienced staff navigate upholding protected speech while also assisting students and other staff members who feel negatively impacted by what is being said. The panelists will share their insight and techniques which they have successfully utilized to address these challenging situations within higher education.

Learning outcomes:

- Participants will gain a better understanding of prohibited speech categories relevant to higher education,
- Participants will gain a better understanding of forum analysis which dictates whether and how time, place and manner restrictions may be applied,
- Participants will be provided an overview of First Amendment cases involving the Internet and social media
- Participants will be provided general tips for responding to First Amendment crises on campus

# First Amendment Quick Reference Guide: Unprotected Speech Categories and Forum Analysis

**Lee Bird, Ph.D.**

CONCERN	TESTS	KEY RESOURCE
Sexual Harassment	<p>Unwelcome speech or conduct of a sexual nature that is so serious (i.e., severe, persistent, or pervasive) as to deny or limit a student's ability to participate in or benefit from the educational program. This conduct must be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances, including the alleged victim's age.</p> <p>Analysis of the totality of the circumstances</p>	<p><i>Revised Sexual Harassment Guidance</i> (2001)</p> <p>Title IX case law</p> <p><i>Gebser v. Lago Vista Independent School District</i> 52 &amp; US 274 (1998)</p> <p><i>Davis v. Monroe County Board of Education</i> (119 S.CT. 1661)</p>
Racial Harassment	<p>Unwelcome speech or conduct based on a person's race, color, or national origin that is so serious (i.e., severe, persistent, pervasive) as to deny or limit a student's ability to participate in or benefit from the educational program. This conduct must be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances, including the alleged victim's age and race.</p>	<p>OCR Guidelines</p> <p>Title VI</p>
Obscenity	<p>Miller Test</p> <ol style="list-style-type: none"> <li>a. Whether the average person applying contemporary community standards would find the work, taken as a whole, appeals to prurient interests</li> <li>b. Whether the work depicts or describes sexual conduct, as outlined in state law, in a patently offensive way</li> <li>c. Whether the work as a whole lacks serious literary, artistic, political, or scientific value</li> </ol>	<p>Justice Berger from <i>Miller v. California</i> , 413 US 15, 93 S. CT. 2607</p>
Fighting Words	<p>Chaplinsky Test</p> <p>Use of insulting "fighting words," which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace.</p>	<p><i>Chaplinsky v. New Hampshire</i>, 315 US 568 (1942)</p>

	At present, the “fighting words” doctrine is probably limited to provocative, face-to-face encounters that might also be treated as physical threats or intimidation. (Pavela, 2004)	
Incitement of Imminent Lawless Action (such as burning a classroom building)	<p>Brandenburg Test:</p> <p>In order for the government to intervene, the speaker must</p> <ol style="list-style-type: none"> <li>a. Subjectively intend incitement (imminent evil)</li> <li>b. Use words which are likely to produce action (imminent action)</li> <li>c. Openly encourage or urge incitement</li> </ol>	<i>Brandenburg v. Ohio</i> , 395 US 444 (1969)
True Threat	<p>Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. The intent in this language is to protect a victim from the fear of violence and does not rely on the speaker’s plan to carry out the threat.</p> <p>A statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person.</p>	<p><i>Virginia v. Black</i>, 538 US 343 (2003)</p> <p><i>Planned Parenthood v. American Coalition of Life Activists</i> (2002)</p>
Defamation (Libel)	<p><i>New York Times</i> Test:</p> <ol style="list-style-type: none"> <li>a. Requires that actual malice be present</li> <li>b. That there be some presumed damage to reputation, profession, business, charge of an indictable offense</li> <li>c. Tendency to bring an individual into public contempt</li> </ol> <p>Hustler Test (satire of public officials or figures) Public officials and public figures in general must prove actual malice or intentional infliction of emotional distress, even when no damage is done to reputation. The test is whether a parody, cartoon, or something clearly for entertainment purposes is outrageous in its intent.</p>	<p><i>New York Times v. Sullivan</i>, 376 U.S. 254 (1964)</p> <p><i>Hustler Magazine v. Falwell</i>, 485 US 46 (1988)</p>

## Forum Analysis Chart

TYPE OF FORUM	DEFINITION	COMMON CAMPUS EXAMPLES	DEGREE OF REGULATION POSSIBLE
Traditional Public Forum	Places which by long tradition or by governmental default have been devoted to assembly or debate	Campus mall, public streets through campus, public sidewalks	Content-neutral time, place, and manner limitations may be placed on expression, however, the limitation is subject to a strict scrutiny standard. Therefore, any limitation must serve a compelling government interest; be narrowly tailored so the limitation does not burden more expression than necessary to meet the compelling interest; and leave open ample alternative channels of communication.
Designated Public Forum	Areas on campus specifically assigned by the institution to serve as public forum location	Designated “free speech” zones such as gazebos, green space, campus mall areas, main walkways through campus	Content-neutral time, place, and manner limitations may be placed on expression; however, the limitation is subject to a strict scrutiny standard. Therefore, any limitation must serve a compelling government interest; be narrowly tailored so the limitation does not burden more expression than necessary to meet the compelling interest; and leave open ample alternative channels of communication.
Limited Public Forum	Locations that the institution has opened for expressive activity with a content-neutral limited purpose	Auditoriums, meeting rooms that may be made available at times to non-college groups, athletic	Limitations must be governed by a written-use policy that includes the stated purpose of the location and any limitations, and the limitations must be enforced consistently.

		facilities during events	<p>Regulations must only be reasonable and viewpoint-neutral.</p> <p>Policies limiting expression must be narrowly tailored and must not restrict more expression than is necessary to achieve the interest.</p> <p>Institutions may give priority for space to college groups over non-college groups.</p>
Nonpublic Forum	Locations that have not, by tradition or designation, been open to the general public	Classrooms, campus offices, residence hall rooms	<p>If the expression in question is incompatible with the purpose of the location, that expression may be limited.</p> <p>Expression may not be limited simply because of the content or viewpoint expressed. Regulation takes into account the purpose and nature of the location as well as the circumstances.</p>