

Insights

CAMPUS FREE SPEECH LEGISLATION: IMPLICATIONS FOR PUBLIC COLLEGES AND UNIVERSITIES

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SUMMARY

In recent years, a growing number of states have enacted campus free expression laws that impose more strenuous requirements on public higher education institutions than mandated by the First Amendment. Many of these laws are only a year or two old, and more such legislation is in the pipeline. For public institutions subject to such state laws that have not already done so, it is definitely time to revisit their existing free expression policies, and develop the additional materials, programs and procedures that many such laws also require.

States that have enacted such laws include Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Iowa, Kentucky, Louisiana, Missouri, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Virginia. These new laws apply to a wide variety of expressive activities, including protests, speeches and guest speakers, marches, vigils, distribution of literature, carrying signs, and circulating petitions.

Many of these laws have emerged from legislative concern that controversial speakers and others engaging in protected expression, including expression that some might consider offensive, were not being permitted to express those views on campus.

As “state actors,” public colleges and universities are already bound by the First Amendment’s limitations on whether and how they can restrict expressive activities. The new state campus free expression laws take it a step further, by imposing greater limitations on higher education institutions’ ability to restrict expressive activities than the First Amendment alone would require, as well as requiring these institutions to take a variety of additional actions to protect free expression.

While the new campus free expression laws differ, some of the most common provisions include:

- Expressly prohibiting “free speech zones” or other specific outdoor areas of campus designated for certain expressive activities, while restricting those activities in other outdoor

areas.

- Designating outdoor areas of campus as “public forums,” a First Amendment term of art that means expressive activities are generally permitted subject only to content and viewpoint-neutral time, place and manner restrictions.
- Protection for students and faculty to invite controversial guest speakers to campus.
- Requiring the adoption of written free expression policies, sometimes containing specific provisions, and requiring that those policies be made available on the institution’s web site, student and faculty handbooks, and in student orientation materials.
- Mandating that universities develop materials, programs and procedures to ensure that faculty and staff understand the institution’s free expression policies.
- Requiring periodic reports to state government on such matters as compliance with the state’s campus free expression law, as well as reports of any lawsuits alleging violations of the right to free expression.
- Requiring that free expression policies be part of student orientation programs.

Several states’ statutes provide a civil cause of action for violations, with remedies including recovery of compensatory and statutory damages as well as recovery of costs and attorneys’ fees, and injunctive relief.

Public colleges and universities that are located in a state with a campus free expression law should carefully review their current written (and unwritten) policies regulating speech and other expressive activities on campus to ensure those policies conform to both the First Amendment **and** the applicable state statute. In many instances, existing policies may comply with the First Amendment but not with the state campus free expression law, and will need to be revised.

For example, some higher education institutions’ policies designate what are commonly referred to as “campus free speech zones” in certain outdoor areas of campus, requiring those who want to engage in protests, demonstration and certain other expressive activities to do so only within those specific zones, and restricting expressive activities in those areas of campus that are not so designated. However, several state campus free expression laws **prohibit** restricting expressive activities only to certain outdoor areas of campus, and state that all outdoor areas of campus are deemed to be public forums. The “public forum” designation, in turn, means that colleges and universities must permit expressive activities, subject only to content and viewpoint-neutral time, place and manner restrictions. Any such time, place and manner restrictions must be narrowly tailored, and justified by a significant institutional interest. Several of the campus free expression laws require these time, place and manner restrictions to be in writing and publicly available.

Those institutions facing such a situation must revise their policies to ensure compliance with both the First Amendment and state law. In addition, they should ensure that any restrictions on outdoor speech are “narrowly tailored” – that is, that they do not go further than what is necessary to protect institutional interests (e.g., ensuring public safety, coordinating the use of limited space by multiple persons and entities).

In addition, depending on the particular campus free expression law, additional programs, materials and procedures may need to be created. In those states where the law provides a cause of action for violations, failure to take these steps may subject the institution to damages, attorneys’ fees, and/or an injunction – along with attendant publicity and reputational harm.

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