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Office of General Counsel

Politics and Speech on Campus

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MINNESOTA STATE

Next Month's Presentation October 8, 2020

International Students

- Presented by Assistant General Counsel Daniel McCabe

- For a complete listing of the Fall Second Thursday topics, please visit the Office of General Counsel's website at https://minnstate.edu/system/ogc/index.html

  - For more information call Amanda Bohnhoff, 651-201-1676

I. Hosting Political Candidates or Events on Campus

Promoting Democratic Values

One of the four objectives of Public Higher Education under state law is …

- *To promote democratic values and enhance Minnesota's quality of life by developing understanding and appreciation of a free and diverse society.*
  - Minn. Stat. § 135A.011

- One way to accomplish this is hosting political candidates or events on campus.

Tips for Hosting a Candidate Event

Do:

- Consistently apply policies regardless of political affiliation.
- Stay viewpoint neutral.
- Presidents are encouraged to introduce candidates on campus when possible. (A neutral introduction does not constitute an endorsement.)
- Make it clear that an appearance DOES NOT give endorsement from the campus or the president.
- Focus on the issues, NOT the candidate.

More Tips

Do:

- If candidates want to appear on campus for a town hall, fundraising, or event not sponsored by the institution, they should be allowed to rent space as any other group or organization would do.
- Same rules–noise restrictions, clean up, etc.–apply.
- Must give similar opportunity to all candidates and charge similar rates for similar events.
- Consider ways to engage student government in planning, hosting forums

Campus Sponsored Candidate Forum

Do:

- Invite all legally qualified candidates to participate in a campus forum.
- Provide similar opportunities for all legally qualified candidates. (If one candidate declines, you can still have the other candidate(s). Keep documentation of the declined invitation.)
- Student political groups may invite their candidate to appear at a forum as long as other student groups are similarly treated.

When Hosting a Candidate or Ballot Initiative Event

Do NOT:

- Use the college or university to endorse or oppose a candidate or party or ballot initiative.
- Use institution letterhead, emails, mailing lists or staff assistance for candidate/ballot initiative fundraising or support.
- Allow employees to use their title/position to endorse candidates/ballot initiatives.
- Use college or university listservs or other college or university resources to support a political party or candidate/ballot initiative.

College/University Legislative Initiatives

- Colleges and universities may actively support legislative proposals made by the system–e.g., bonding issues.
- Support of legislative proposals should be coordinated with system government relations.
- Promote in a bipartisan manner—talk to all area legislators about the proposal, not just one party.

Marketplace of Ideas

- Colleges and universities are recognized as places where robust discussion occurs, serve as a “marketplace of ideas.”
- Promote respectful, civil discourse on elections, ballot issues.
- Be clear about ground rules for speakers, audience.
- Responding to hecklers—use appropriate humor, calm explanation of rules.
- Coordinate with campus security as appropriate.
- Be attentive to local issues that may affect events.

Other Candidate Access

- Consult facilities use policy for questions about where/when public is allowed.
- Unscheduled candidate visits should be treated as visits from other members of the public.
  - Allow same access—e.g., presence in public access areas of campus, distribution of materials.
  - Provide “table” space in accordance with campus facilities use policy.
  - Treat all candidates consistently.

Inviting Public Officials as Speakers

- Alert System Office Government Relations
- Do not offer or agree to pay honoraria
- May pay documented expenses

Election Information

Candidate filings:

- Find out which candidates have filed for office here:

https://candidates.sos.state.mn.us/CandidateFilingSearch.aspx

Election dates:

- Find out the important election related dates:

https://www.sos.state.mn.us/election-administration-campaigns/elections-calendar/

Find your polling place:

- Polling place finder is here:

https://pollfinder.sos.state.mn.us/

II. Election Issues on Campus

Student Voter Registration

- Colleges, universities must provide registration forms as early as possible in fall semester.
- Must consult with student government regarding most effective way to register student voters before and on day of election.
- Forms must be forwarded at least 21 days before general election.
  - Minn. Stat. § 201.1611
- Federal law prohibits providing incentive of any kind for voter registration
  - 52 USC 10307(c)

Student Voting Rights

- Student's voter registration must be based on where student resides.
- Student may choose residence at either college/university address or parents'/other permanent address.
- Student may vote at only one address.

Dorm Access by Candidates

- Political candidates and campaign workers must be allowed access to campaign in on- or off-campus housing.
- Reasonable restrictions may be placed, including:
  - Denying admission to particular room, apartment;
  - Requiring reasonable, proper ID before entering;
  - Limits on number of people, hours of visit;
  - Requiring prior appointment to make visits.
    - Minn. Stat. § 211B.20

Election Day
Facilities Use for Elections

- College/university must make facilities available for caucuses, party conventions, and local and state elections.
- May charge for use, but not more than lowest amount charged to any other user.
- Facility use contract: specify that election official is responsible for enforcing election laws (posting, campaigning, etc.), in vicinity of polls.
  - Minn. Stat. § 202A.192, Minn. Stat. § 204B.16, Subd. 6

Election Day Scheduling Restrictions

- Classes may be held as usual.
- No college or university events—other than classes—may be scheduled between 6:00 pm and 8:00 pm
- Outside organizations are not prohibited from renting/using campus space between 6:00 and 8:00 p.m.
- Different rules apply to caucus days.

  https://mnscu.sharepoint.com/sites/connect/SitePages/topic.aspx?topicID=60&state=about

  - Minn. Stat. § 202A.19, subd. 3; § 204C.03, subd. 2

Get Out the Vote Efforts

- College and University Get Out the Vote activities must:
  - Be nonpartisan;
  - Not offer any reward, remuneration for voting a particular way or refraining from voting;
  - Made available regardless of party, candidate affiliation.

Election Day
Use of Campus Resources to Transport Students to Vote

- College/university is not required or expected to use campus resources to provide student transportation.
- Before using campus resources, college or university should consider whether:
  - The activity is mission-related
  - Students living on campus cannot get transportation to polling place.
  - College/university has sufficient resources to provide service.

General Use of Campus Technology

- May not use college/university/system computers, electronic resources for campaign/candidate-related activities.
- Okay to use to encourage employees, students—in nonpartisan way—to vote.
- Links to political/candidate websites from system/campus websites are prohibited.
- But employees may use to communicate with **elected** officials if use is incremental.
  - System Proc. 5.22.1, Minn Stat. § 10.60

General Posters and Banners

- Check your college/university facility use policy to determine whether there are public bulletin boards or other areas in which postings are allowed.
- If a bulletin board or other posting area is only for official use, mark it that way.
- Be consistent and content neutral in oversight of posting restrictions—whether violators re campaign related or nonpolitical messages.

General Student Organizations

- Student organizations not prohibited from having a political affiliation, identification.
- Student organization may not use student life funds to make contributions to candidate or party.
- Student organization may not use student life funds to support/oppose political campaign or ballot initiative, host political fundraiser, print campaign or candidate posters, materials, etc.

Employee Solicitation/Receipt of Funds

- Employees may not either directly or indirectly solicit or receive funds for political purposes during hours of employment.
  - Minn. Stat. § 43A.32, subd. 1

Employee
Improper Use of Position

- Employees may not use official authority or influence to:
  - Compel another person to apply for membership in or become a member of any political organization;
  - Pay or promise to pay any assessment, subscription, or contribution to a political organization or for any political activity;
  - Take part in any political activity.
    - Minn. Stat. § 43A.32, § 43A.38 , § 211.B.09

Employee Political Speech

- A college or university as an institution may not endorse candidates, parties, referenda or other ballot questions.
- All employees are encouraged to foster an environment of open discourse for students.
- When expressing political views, employee must be clear that view is not endorsement by the college/university.

Employee Political Speech—State Policy

- Political messages not prohibited in work space but should be kept out of areas of public access or visible to the public.
- Be respectful of other employees sharing workspace.
- Buttons or pins may be worn unless college/university regulates insignia worn during work.
  - See MMB HR/LR Policy #1401

Employee MSCF Bargaining Agreement

- "In the exercise of academic freedom, the faculty member may, without limitation, discuss his/her own subject in the classroom. The faculty member may not, however, claim as a right the privilege of persistently discussing in the classroom any matter that has no relation to the course subject. There is an obligation to respect the dignity of others, to acknowledge their right to express differing opinions to foster and defend intellectual honesty, freedom of inquiry and instruction…….
- "When a faculty member speaks, writes or endorses products or candidates as a citizen, s/he is **obligated to make certain that such endorsements or statements imply no endorsement by the college."**
  - MSCF Master Agreement 2019-21, Art. 23, Section 3 (emphasis added)

Employee
IFO Bargaining Agreement

- "It shall be the policy of MnSCU to maintain and encourage full freedom, within the law, of inquiry, teaching, and research. The Employer shall not discriminate against a faculty member for engaging in political activities or holding or voicing political views, **so long as the exercise of this right does not interfere with the faculty member's job responsibilities as a faculty member.**"
  - IFO Master Agreement, 2019-21, Article 4 (emphasis added)

III. Speech on Campus

The First Amendment

- “Congress shall make no law * * * abridging the freedom of speech * * *.” United States Constitution, Amend 1.
- Applies to public institutions
- Board Policy 3.1 Student Rights and Responsibilities

The First Amendment

- In thinking about speech issues, it is often helpful to think about:
  - Who is speaking?
    - A student?
    - A faculty member?
    - A third party?
  - Where?
    - In a classroom during class?
    - In an outside campus open area?
    - On a bulletin board?
- Different legal rubrics may apply depending on the answers to these questions

Public Institutions Are Subject to the First Amendment

- Campuses are “peculiarly marketplaces of ideas” -- merely offensive ideas may not be shut off in the name of “conventions” of decency. The First Amendment generally protects speech from government sanction but not speech that:
- Speech that is not protected by the First Amendment such as
  - “Fighting words” (“where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action”)
  - “True threats” (“a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another”)
  - Unlawful harassment/discrimination
  - Obscenity, defamation

Student Classroom Speech

- Conflict sometimes happens in the “marketplace of ideas.”
- Board Policy 3.1, part 2. Freedom of Expression.
  - Students shall be free to support causes by orderly means that do not substantially disrupt the regular and essential operation of the institution.
  - Students shall be free to take reasoned exception to the data or views offered in any course of student and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.
- Faculty may manage discussion with appropriate rules.
  - Reasonably related to pedagogical concerns.
  - Not pretext for viewpoint discrimination.

Forum Analysis

- Applies to Physical Space
  - Traditional (public streets, sidewalks)
  - Designated (bulletin boards, campus outdoor space, room rentals, etc.)
  - Nonpublic (classroom during class, offices)

Forum Analysis

- Traditional Public Forum
  - Public streets, sidewalks, parks
  - Restrictions must satisfy strict scrutiny (government must have compelling interest in regulation and regulations must be narrowly tailored to fit that interest)
  - No Content and Viewpoint discrimination
  - OK to have reasonable time, place, and manner restrictions like:
    - Hour restrictions (not at night)
    - Noise restrictions (no sound amplification)
    - Permits

Typical Campus Forums

- Outdoor space
- Space reservation and rental
  - Classrooms
  - Auditoriums
- Bulletin Boards
- Key – Look to campus policy and procedure around the forum
- Resource – “Free Speech and Forum Analysis Checklist”

Third Party Access to Campus Facilities

- Forum Analysis
  - If access, then access on a content and viewpoint neutral basis (this includes religious groups)
  - BUT time, place, and manner restrictions are OK
- Security
  - May alert campus security and/or local law enforcement

Counter-Protests

- Analyze context
  - Substantial disruption?
  - Forum?
- Security
  - May alert campus security and/or local law enforcement
  - Typically cannot charge one group for security if not charging all groups for security
  - So cost of security is an element of the forum analysis

Student Organizations: Recognition

Institutions may impose reasonable, content neutral criteria in exchange for the benefits of recognition. For example,

- Certain number of members.
- GPA.
- Advisor.
- Constitution.
- Apply/Renew on periodic basis.

Recognition, continued

- An institution may not refuse recognition because of the student organization's viewpoint BUT may require the organization to
  - Obey campus rules.
  - Refrain from disrupting classes.
  - Obey all applicable federal, state, and local laws.

    Healy v. James, 408 U.S. 169 (1972).

Student Organization Access to Campus Facilities

- If access, then access on a content and viewpoint neutral basis (this includes religious groups)
- BUT time, place and manner restrictions are OK

Student Life/Activity Fee

"Funding decisions shall be made in a viewpoint neutral manner." Board Policy 2.8 Student Life, Part 1; System Procedure 2.8.1.

Board of Regents v. Southworth, 529 U.S. 217 (2000).

Discrimination and the First Amendment

- July 28, 2003 OCR DCL on the First Amendment
- “OCR’s regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution.”
- “*** the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment.”
- “Harassment *** must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.”

Discrimination and the First Amendment

- Instead, “harassment must be sufficiently serious (i.e., severe, persistent or pervasive) as to limit or deny a student’s ability to participate in or benefit from an educational program.

  http://www2.ed.gov/print/about/offices/list/ocr/firstamend.html

Student Protests: Summary

- Follow your policies.
  - Time, place and manner restrictions.
    - Examples: Protestors must leave by close of business day, no sound amplification.
    - Sample Facility Use Policy available at
    - https://mnscu.sharepoint.com/:w:/r/sites/connect/_layouts/15/WopiFrame.aspx?sourcedoc={6fe32e5b-eb7d-4124-bfd1-4c405753d992}&action=default.

Think About Other Institutional Responses

- Address speech with more speech
- Letter to the campus community
- Host a forum on the issues
- Assessment of campus climate

IV. Bias Incidents

What is a Bias Incident?

- An **act** of **bigotry, harassment, or intimidation** that is motivated in whole or in part by bias based on an individual's or group's **actual or perceived** race, color, creed, religion, national origin, gender identity, gender expression, age, marital status, disability, public assistance status, veteran status, or sexual orientation.

And …

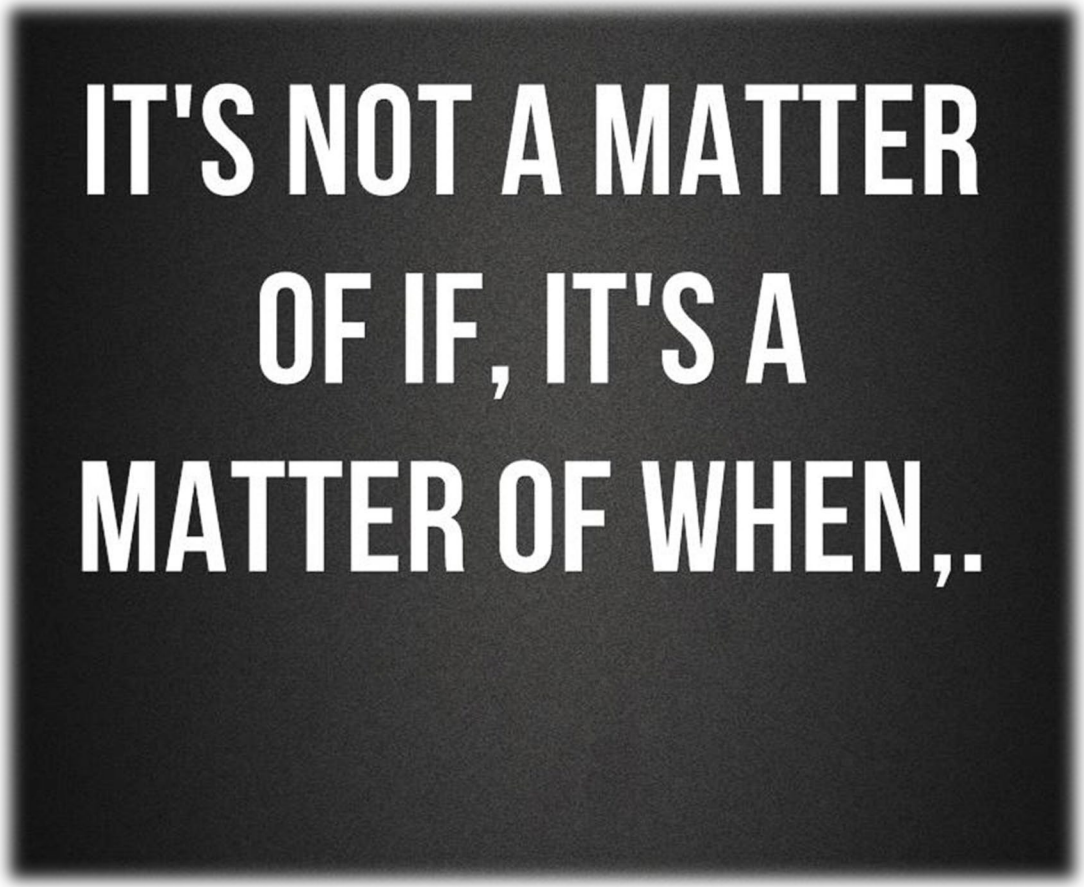
- They stem from fear, misunderstanding, hatred, and stereotypes and may be intentional or unintentional.

- They also bring attention to the needs of diversifying student bodies across the U.S. and an opportunity to shape campus life.

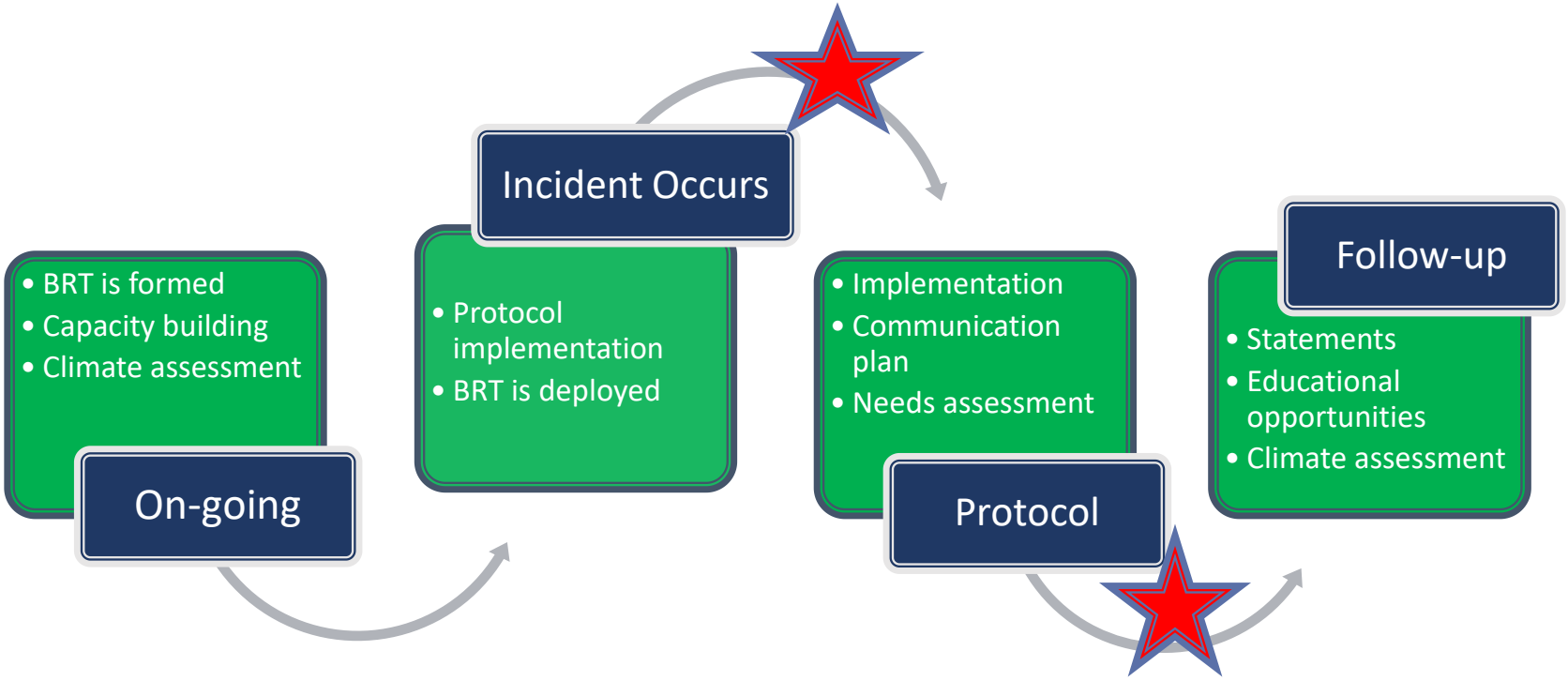
Ensuring Welcoming and Inclusive Campuses

- How to proactively create safe and productive opportunities for deepening discourse and understanding of controversial social, political, and philosophical issues.

- Major principles and strategies in planning for potential controversial/disruptive campus events.


IT'S NOT A MATTER
OF IF, IT'S A
MATTER OF WHEN,.

Intentional Planning



Ongoing
Communication preparation

- **Develop a communication plan and strategy**
  - The role of faculty, staff, students, and broader community.
  - Who communicates externally and internally?
  - What is the message?
  - What are the communication channels?
  - Use of social media, control and monitoring.

Incident Occurs

Bias Incident Advisory Team (already in place)

REMINDER: The Bias Incident Advisory Team doesn't have a role in determining whether campus policy has been violated and/or imposing disciplinary action.

Bias Incident Advisory Team

Composition

- Campus Diversity Officer
- VP of Student Affairs
- Dean of Students
- Director- Residential life
- Academic Deans (Provost can refer appropriate dean)
- Faculty committee member
- Campus Safety
- Sr. Student Conduct Officer
- Marketing and Communications
- Civil Rights Officer
- Title IX Coordinator
- Dir. Of Accessibility Services
- Two students

How the B.I.R.T. Can Respond

- Identifying needs
- Referring affected individuals
- Providing support, resources, consultation
- Considering IF incident had additional implications
  - Free speech, academic freedom, etc.
- Referring matter to law enforcement if warranted
- Updating campus community as appropriate
- EDUCATION

Ongoing learning opportunities, events, programming

Institutional Responses

- Encourage student activism
- Encourage those with power and privilege to communicate diversity and inclusion commitments and goals
- Review speech policies
- Engage faculty in hosting discussion forums and other events to dive deeper into issues
- Create opportunities for relationship building and engagement with students – Students need to be seen and heard!
- Engaging students in diversity and inclusion experiences – not just those intrinsically interested
- Continually assess campus climate and respond to feedback

Post Incident Debrief and Evaluation

- Two phases:
  - Immediate: event team gains clarity of what happened and determine next steps.
  - Conduct a thorough assessment by the administration, faculty, students, etc.
    - Communication
    - Discipline proceedings
    - Public safety
    - Policy review
    - Education offerings to wider campus community

Post Event Communication

- Communicate to reinforce values
- Communication about events that had widespread protest, arrests, etc. should be coordinated closely with Chancellor/Presidents.
- CDO role and statement to provide voice and perspectives of campus stakeholders who may have been targeted by protests or from marginalized communities or students.

Post Incident Communication

- Communicate with targeted groups or individuals if appropriate:
  - CDO
  - Determine whether any members of the group were physically harmed, threatened, or harassed (offer support, treatment, or advocacy)
  - Post incident town halls, inter-group dialogue, restorative justice or programs.

Post Incident Analysis

- Disciplinary proceedings
- Review and determine if need to modify campus policies, regulations, or procedures.
  - CDO should be active member of policy review process.

Questions & Answers

Please Chat in your questions to the host or the panelists.

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