

Balancing Free Speech and Addressing Bias Issues on Campus

*Office of the General Counsel
Maricopa County Community College
District*

*Melissa Flores (480) 731-8418
Associate General Counsel, Sr.
Student/Academic Affairs
Regulatory Compliance*



- 1. Topic Introduction**
- 2. Bias Incidents and Responses: The Basics**
- 3. Current Legal Landscape**
- 4. Practical Considerations**
- 5. Strategies for Responding to a bias incident**



TRAINING AGENDA

INTRODUCTION TO TOPIC:

The problem of hate speech on campus

Campus has a legal duty to:

1. to protect campus community from a hostile environment and to ensure equal access to educational opportunities/activities, and
2. to protect First Amendment right and to allow free expression

Campus has a core value of:

1. a commitment to inclusion and to success of historically underrepresented minorities, and
2. providing a campus marketplace of ideas that champions debate, not censorship



Bias Incidents and Responses: The Basics

- A bias incident is conduct, speech or expression motivated, in whole or in part, by bias or prejudice.
- It differs from a hate crime in that no criminal activity is involved.
- Both hate crimes and bias incidents demand a unified and unflinching denouncement from school leaders.
- Schools must handle bias incidents through grievance procedures and educational programs.



How can bias incidents occur on campus?

Bias incidents can be:

- Student to student (outside of class)
- Controversial speakers on campus (both invited and not invited)
- Classroom incidents
- Recruiting on or near campus by racist groups
- Offensive or threatening graffiti or symbols



MARICOPA
COMMUNITY COLLEGES

BIAS RESPONSE TEAMS

- Bias Response Teams (BRT) are becoming increasingly common at colleges and universities.
- BRTs are controversial and have led to multiple litigation.
- The typical role of a BRT is to “investigate, assess, and intervene in reported bias incidents on campus.”
- Most commonly staffed by administrators from student conduct departments, law enforcement, faculty, and students.
- BRTs typically have no disciplinary power.

Criticisms of BRTs

- Simply having a BRT chills speech because of the threat that speech (verbal and non-verbal) will be reported.
- They have a loosely defined role and create additional layer of review (outside of student conduct process)
- They serve as a “speech code” by another name
- They chill protected speech by forcing a meeting with those who engage in uncomfortable speech
- They are targets for litigation



**The Office of General Counsel
advises you NOT create a Bias
Response Team (BRT) on your
campus**



MARICOPA
COMMUNITY COLLEGES



**Campus Administration must still
address bias incidents on their
campuses while respecting free
speech/free expression**



MARICOPA
COMMUNITY COLLEGES

Current Legal Landscape



- New Regulatory action (Free speech NPRM)
- Key legal issues

Notice of Proposed Rulemaking (NPRM)

Issued January 16, 2020 by Department of Education.
(condition certain federal grants on institutions' compliance—
not Title IV funding)

--Public institutions “must...comply with the First Amendment.”

--Private institutions “must comply with [their] stated
institutional policies regarding freedom of speech, including
academic freedom.”

--Institutions will be deemed noncompliant if there is “final,
non-default judgment by a state or federal court” finding a
violation of the First Amendment or institutional policies.

Unclear what conduct constitutes a violation.



MARICOPA
COMMUNITY COLLEGES

Free Speech NPRM Consequences

- The Department of Education will consider the grantee in violation of a material condition of the grant and may pursue available remedies for noncompliance, which includes suspension or termination of a federal award and potentially debarment (excludes Title IV federal student aid)
- Suspension or termination only if remedy is not possible
- DOE will consider the nature of the harm, the identity of the wrongdoer, role of the institution's principals, and historical practice.
- Significantly increases the stakes in First Amendment litigation
- *Examples: denial of promotion to a professor because of authored newspaper columns the college found offensive; viewpoint discrimination when a college refuses to allocate money to a pro-choice student organization.*

Key Legal Issues

1. The role of the college/university is to be a forum where all viewpoints can be vigorously expressed and debated → teach students how to engage in productive and respectful conversations.

**HAVING A RIGHT TO SAY SOMETHING
DOES NOT MEAN BEING UNAWARE OF
THE CONSEQUENCES OF THAT SPEECH**



MARICOPA
COMMUNITY COLLEGES

Legal Issues

2. Public v. private institutions.

3. State law: Arizona has a free expression statute (no free speech zones but time, place, and manner restrictions okay if reasonable)

4. The First Amendment and discrimination

5. Anti-Semitism Executive Order

Title VI does not cover religious discrimination and the Executive Order says that national origin discrimination exists notwithstanding dominant religion.

How will this be applied in practice?



MARICOPA
COMMUNITY COLLEGES

Practical Considerations

College as a marketplace of ideas

- Fits with the mission of higher education and role of criticism and debate as the engine of truth.

Meaning of the First Amendment

- Government cannot treat someone differently because of the viewpoints they hold or express
- Content and viewpoint neutrality is key



MARICOPA
COMMUNITY COLLEGES

Traditional approach to bad ideas in the marketplace

- Best remedy for bad ideas? More ideas
- Bad speech has benefits → Leads to good speech
- Exposure rather than censorship
- No institutional consequences for the student speaker (unless substantial disruption (*Tinker*), offensively lewd and indecent (*Bethel*), or poses a danger to their classmates or faculty (*Morse*))
- Focus on college/community value
- Promote counter-protests
- Encourage teaching and learning

CHALLENGES TO THE MARKETPLACE

- Competing legal duties with respect to harassing speech
- Student expectations about bullying and the role of “adults.”
- Moving from “diversity” towards “inclusion”
- Generational differences in how we view free speech

Pew research study (2015)

- 40% of millennials favor limits on racially offensive speech
- 27% of gen X’ers
- 24% of baby boomers
- 12% of persons aged 70-87

Knight Foundation Research

- 69% of college students believe colleges and universities should be allowed to create policies that restrict slurs and other intentionally offensive language



SO WHAT SHOULD WE DO?



Identifying Bias Incidents

1. Slurs and epithets are used.
2. Hate symbols -- or inflammatory symbols like nooses -- are used.
3. The perpetrator(s) admit their conduct was motivated by prejudice or that they selected the target(s) based on their race, ethnicity, religion, disability, sex, sexual orientation or other identity factors.
4. The target(s) believe the incident was motivated by bias.



MARICOPA
COMMUNITY COLLEGES

5. The target(s) openly engage in activities related to their race, ethnicity or other identity characteristics -- e.g., LGBTQ students trying to start a gay-straight alliance at school.

6. There's been prior news coverage of similar bias incidents

7. The acts are directed against members of groups whose presence in the community or school is opposed -- e.g., DACA students in a community where anti-immigrant groups are active.



8. Ongoing school or community conflicts may have initiated or contributed to the act -- e.g., a bias incident involving nooses ultimately gave rise to off-campus conflicts and violence.

9. Possible involvement by an organized hate group or its members -- e.g., students who are skinheads taunt Jewish peers.

10. A pattern of incidents in which the targets and perpetrators are of a different race, religion, national origin, gender or sexual orientation -- e.g. school records show a growing number of incidents involving conflicts between Latinx and black students.



MARICOPA
COMMUNITY COLLEGES

Responding to Bias Incidents

1. Triage, evaluation, and response
 - Core internal group
 - Flexibility to adapt to specific circumstance
 - Acknowledge harm, express empathy (even if no disciplinary action is taken)
2. Focus on safety
3. Denounce hateful acts and address fears.
4. Enforce appropriate consequences for perpetrators.
5. Work towards unity.



Additional Strategies

- Empowering students
- Empowering faculty

Things to consider w/ institutional response:

Extending the news cycle?

Who is the right audience?

What is the right voice?

When must the president respond?

Avoid a rush to judgment?



MARICOPA
COMMUNITY COLLEGES

Do you have
any
Questions?



MARICOPA
COMMUNITY COLLEGES



Chandler-Gilbert | Estrella Mountain | GateWay | Glendale | Mesa | Paradise Valley |
Phoenix | Rio Salado | Scottsdale | South Mountain



Chandler-Gilbert | Estrella Mountain | GateWay | Glendale | Mesa | Paradise Valley |
Phoenix | Rio Salado | Scottsdale | South Mountain

WHAT
QUESTIONS
DO YOU HAVE
FOR ME?



MARICOPA
COMMUNITY COLLEGES



MARICOPA
COMMUNITY COLLEGES