Community College Services

Campus Expression and Facilities Use[1]

Individuals and groups regularly seek to speak, meet, or distribute literature or other materials on community college campuses. The parameters of permissible campus expression and facilities use are shaped by federal and state law, most significantly the First Amendment to the U.S. Constitution and Texas Education Code section 51.9315, and community college policies and procedures.

Campus expression and facilities use issues are addressed at TASB Policies DGC(LEGAL) and (LOCAL) for employees, FLA(LEGAL) and (LOCAL) for students, and GD(LEGAL) and (LOCAL) for the community.

For more information on the First Amendment, see *First Amendment Basics*, available on TASB College eLaw.

First Amendment

The First Amendment to the U.S. Constitution addresses five major rights: free speech, freedom of the press, freedom of religion, freedom of assembly, and right to petition. The application of these rights differ based on who is seeking to exercise that right.

1. What types of expression are protected by the Free Speech clause?

The free speech protections apply to pure speech. *Pure speech* is oral and written expression, including spoken commentary, pamphlets, and messages on signs. *Spence v. Washington*, 418 U.S. 405 (1974).

The protections also apply to expressive conduct and symbolic speech. *Expressive conduct and symbolic speech* are actions or conduct intended to convey a message, such as wearing a cross, flying a confederate flag, or participating in sit-ins. To be protected, the person engaging in expressive conduct and symbolic speech must intend to convey a particularized message, and there must be a great likelihood that the message will be understood by those observing it. *Spence v. Washington*, 418 U.S. 405 (1974).

[1] An electronic version of this document is available on TASB College eLaw at tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/cc-campus-expression-and-facilities-use.pdf.

A community college may not prohibit expression only because the college finds the speech offensive or disagreeable. However, the First Amendment protections do not extend to all speech, expressive conduct, or symbolic speech.

Lewd or obscene speech: Obscene speech is not protected by the First Amendment. Material is obscene if an average person would find the work appeals to a prurient interest based on contemporary community standards; the work describes or depicts in a patently offensive way sexual conduct as defined by state law; and the work lacks serious artistic, literary, political, or scientific value. *Miller v. California*, 413 U.S. 15 (1973).

Fighting words: Personal insults directed by one individual to another are not protected by the First Amendment if those insults are likely to result in immediate violence or retaliation. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942)

Defamation: The First Amendment does not protect false statements that damage a person's reputation. Note, the standard differs between public officials and private individuals. Public officials must show actual malice, that the speaker knew the statement was false or acted with reckless disregard for the truth when engaging in the expression. Private individuals do not. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Inciting imminent criminal activity: Speech intended to incite a person or persons to commit imminent illegal or unlawful activity is not protected by the First Amendment if it is likely to cause that action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Schenk v. U.S.*, 249 U.S. 47 (1919).

True threats: A statement intended to intimidate or scare a person or persons into believing they will be seriously harmed by the speaker or someone acting on behalf of the speaker is not protected by the First Amendment. *Virginia v. Black*, 538 U.S. 343 (2003); *Watts v. U.S.*, 394 U.S. 705 (1969).

Extortion: Statements intended to extort a thing of value from a person are not protected by the First Amendment. *U.S. v. Quinn*, 514 F.2d 1250 (5th Cir. 1975).

Plagiarism: Expression that violates the legally protected property rights of creators of certain works is not protected by the First Amendment. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

2. May a community college open the college campus for public use?

Under the First Amendment, a community college may open college grounds and facilities for public use. The extent of access depends on the forum created by the college through the policies, procedures, and practices of the college.

3. What is a forum?

A forum is either a place for communication, such as campus classrooms or a cafeteria, or a means of communication, such as a college newspaper or announcements over a public address system. Normally, community college facilities are operated for college purposes and therefore are not public. For example, if a campus maintains a bulletin board for official college announcements only, the bulletin board is not available for noncollege use. If, however, the campus permits noncollege-related announcements to be posted on a bulletin board, such as flyers for outside sports leagues, community events, or church activities, the bulletin board will become a type of public forum for noncollege use.

4. What are the types of forums and how may a community college regulate speech within each type of forum?

Courts have defined four different types of forums: traditional, designated, limited, and non-public. *Chiu v. Plano Indep. School Dist.*, 260 F.3d 330 (5th Cir. 2001). A *traditional public forum* includes locations, such as sidewalks and parks, where members of the public have historically been permitted to gather and speak on any topic. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985). Courts have generally concluded that community college property is not a traditional public forum, with the exception of sidewalks, streets, and parks that are indistinguishable from surrounding city property. *Widmar v. Vincent*, 454 U.S. 263 (1981); *see, e.g., Brister v. Faulkner*, 214 F.3d 675 (2000) (concluding that the sidewalk area between a university event center and city street was a traditional public forum because it was indistinguishable from city property).

Even in the rare situation where college property is deemed a traditional public forum under the First Amendment, the college may exclude particular content if the college can assert a compelling governmental interest that is narrowly tailored to address that interest, a standard referred to as the *strict scrutiny* standard. The college can also enforce viewpoint-neutral time, place, and manner restrictions to meet a compelling governmental interest if a sufficient number of alternative communication channels are available. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37 (1983).

A *designated public forum* is a forum that a community college intentionally opens to the general public to discuss matters of public concern. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985). Like in the case of a traditional public forum, once designated, a college may enforce reasonable time, place, and manner restrictions. *Widmar v. Vincent*, 454 U.S. 263 (1981). Any content limitations are subject to the strict scrutiny standard. *Chiu v. Plano Indep. School Dist.*, 260 F.3d 330 (5th Cir. 2001).

A *limited public forum* is a forum that a community college opens to a particular group of speakers or for discussion regarding a particular topic. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Within a limited public forum, limits on expression must be viewpoint-neutral and reasonable in light of the purpose of the forum. The government may impose reasonable time, place, and manner restrictions, as long as these restrictions do not relate to the content of the expression. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985).

To distinguish between a designated public forum and a limited public forum, courts consider two factors: (1) the intent of the community college regarding the forum, and (2) the forum's nature and compatibility with particular speech. The distinction is important because it decides whether the strict scrutiny or reasonableness standard is applied to a limitation on speech imposed by the college or university. *Chiu v. Plano Indep. School Dist.*, 260 F.3d 330 (5th Cir. 2001). Note, a college may establish a designated public forum with respect to some speakers and types of speech and a limited public forum for others. *Justice for All v. Faulkner*, 410 F.3d 760 (5th Cir. 2005).

If a community college has not opened a public forum, it remains a *nonpublic forum*. Although limits on expression must be reasonable and viewpoint neutral even within a nonpublic forum, a college will have greater discretion to control the content of speech within such a forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985).

Any regulation of expression by a community college must clearly state what speech is being regulated or face a claim that the regulation is vague. Similarly, the regulation must be written in a targeted way to avoid a claim that the regulation not only restricts unprotected speech but also substantially curtails protected speech and is therefore overbroad. *NAACP v. Alabama*, 377 U.S. 288 (1964); *Connally v. General Const. Co.*, 269 U.S. 385 (1926).

5. May a community college permit the distribution of noncollege materials?

Literature distribution, like other forms of expression, is subject to the rules regarding public forums. Once a community college has opened a forum for the distribution of noncollege literature, college decisions about what may be distributed must be viewpoint neutral. The college may not pick and choose among the views expressed in the materials. Unless the college can point to some other reason to stop a student or community member from distributing materials, such as a safety reason, the fact that materials are controversial or the college disagrees with the message will not suffice as a legal reason to stop the distribution.

6. What types of time, place, and manner restrictions may be placed on the distribution of noncollege literature?

Even if a community college opens a forum for the distribution of noncollege literature under the First Amendment, the college or individual campuses may impose time, place, and manner restrictions on the distribution. For all time, place, and manner restrictions, campus rules should be reasonable, clearly communicated to students, employees, and the community, and enforced evenly, regardless of the viewpoint expressed in the materials. What is reasonable will be considered in the context of the group to whom the restrictions apply, whether students, employees, or community members.

Limits on time: A community college may adopt a reasonable restriction that allows the distribution of noncollege materials at only certain times of day.

Limits on place: Similarly, the college may develop rules regarding locations for distribution. Designated locations may include entrances and exits, atriums, a handout table, or bulletin boards. In addition, a community college may determine that certain events are places that are not public forums for distribution. *E.g.*, *Sabatini v. Reinstein*, 222 F. Supp. 3d 444, 459 (E.D. Pa. 2016) (concluding a law school was reasonable and viewpoint neutral in preventing distribution of leaflets at the school's graduation ceremony).

Limits on manner: Community colleges may establish rules regarding the manner of any distribution. For example, a college may impose a manner restriction that requires all remaining materials to be picked up after a certain number of days.

7. May a community college open college facilities to the public for religious uses?

The public has no constitutional right to access community college facilities for religious purposes, even under the First Amendment Free Exercise Clause. But if the college opens a forum for expression, then the college must permit religious expression consistent with the purposes of the forum. The college does not violate the First Amendment Establishment Clause by permitting religious groups to use college facilities or engage in religious expression on the same terms as other groups. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (concluding a school district violated the First Amendment by permitting secular groups, but not religious groups, to show films on campus); *Fairfax Covenant Church v. Fairfax Cnty. Sch. Bd.*, 17 F.3d 703 (4th Cir. 1994) (concluding that a school district violated the First Amendment by enacting a policy requiring higher fees from religious groups than from other community

groups); *Moore v. City of Van*, 238 F. Supp. 2d 837 (E.D. Tex. 2003) (mem.) (concluding that a city violated First Amendment by excluding religious uses from open forum for facility use). *But see Pratt v. Arizona Bd. of Regents*, 520 P.2d 514 (Ariz. 1974) (noting that permitting religious services on a permanent basis or for less than a fair market rental fee would be unconstitutional).

Religion is considered a viewpoint, not a subject. Once college facilities are open for community use, colleges may not prohibit the expression of religious viewpoints on otherwise permissible subjects. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

8. May a community college open college facilities to the public for political uses?

Like in the examples above, once a community college opens a public forum for community use, the college may not discriminate based on a political viewpoint promoted by a group seeking access. *See Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Bd.*, 578 F.2d 1122 (5th Cir. 1978) (issuing a temporary injunction against school district's selective denial of access to designated public forum based on group's racially discriminatory views). However, the college may deny access to a public forum for legitimate reasons unrelated to the speaker's viewpoint. *See, e.g., Forysth County v. Nationalist Movement*, 505 U.S. 123 (1992) (invalidating ordinance that permitted county to vary fee for use based on estimated cost of maintaining order); *Nationalist Movement v. City of Cumming*, 913 F.2d 885 (11th Cir. 1990) (school could refuse use of its parking lot out of concern that assembly in parking lot would disrupt previously scheduled basketball tournament).

Use of a community college building as a polling place does not constitute opening a forum for all election-related communications. Texas law provides that college campuses may be used as election polling places. Tex. Elec. Code §§ 43.001-.034. Designation of a college campus as a polling place does not, standing alone, create a public forum for electioneering. *Embry v. Lewis*, 215 F.3d 884 (8th Cir. 2000); *United Food & Commercial Workers v. City of Sidney*, 174 F. Supp. 2d 682 (S.D. Ohio 2001). Generally, electioneering, defined as the posting, use, or distribution of political signs or literature, is prohibited within 100 feet of the entrance to a polling site. Tex. Elec. Code § 61.003. A community college may not prohibit electioneering beyond the 100-feet marker, but it may adopt reasonable time, place, and manner regulations for the period of time the campus is being used as a polling site. Tex. Elec. Code § 61.003(a-1).

9. May a college regulate student speech to the same degree as members of the public?

Historically, student speech has been perceived as having broad protections under the First Amendment consistent with the concept that a higher education campus is a "marketplace of ideas". *Healy v. James*, 408 U.S. 169, 180 (1972). Students therefore have greater access to express themselves on campus than members of the public and any regulations on student speech should be appropriately narrow. For example, students should be permitted to gather and speak to each other informally across campus with limited restrictions, such as restrictions on disrupting educational activities.

An emerging area of litigation relates to the application of professional standards of conduct to restrict the speech of students. Many community colleges require students enrolled in professional programs, such as nursing, to comply with the recognized standards of the profession or face discipline up to and including expulsion from the program. Courts have concluded that the colleges have discretion to require compliance with the standards if the application of the standards is reasonably related to legitimate pedagogical concerns, even if the alleged violation relates to off-campus speech. *E.g.*, *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016) (concluding that the expulsion of a nursing student for Facebook posts found to be in violation of the nursing code of ethics did not infringe on the student's free speech rights); *Tatro v. Univ. of Minn.*, 816 N.W.2d (Minn. 2012) (concluding a university did not violate the free speech rights of a mortuary student when sanctioning the student for Facebook posts found to be in violation of professional standards).

10. May a community college permit employees to use college facilities?

Community college employees do not have a special right of access to college facilities under the First Amendment. However, the college may want to grant priority access to employees and groups of employees during the employees' free time. If so, the college should address this special access in policy and associated regulations.

11. May community college employees discuss political and other issues during free time at work?

Community college employees have First Amendment rights while at work. Colleges must permit employees to talk about political and other matters during their free time. *See*, *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175 (10th Cir. 2010) (denying qualified immunity to charter school principal who directed teachers not to discuss school matters).

12. May a community college grant affiliated support groups be given priority access to college facilities?

A community college may grant priority access to college-affiliated support groups in policy. These groups can serve as important partners in promoting the college's interests; therefore, the college may choose to grant them priority access to assist them in their efforts and to facilitate coordination between the organizations and the college. Because the broader grant of access is based on the nature of the groups and the college's need to coordinate with the groups, not the groups' viewpoints, the broader access does not conflict with the First Amendment.

Texas Education Code Section 51.9315

The 86th Texas Legislature adopted Texas Education Code section 51.9315 in Senate Bill 18. The practical effect of the law is to incorporate existing First Amendment protections and to impose additional requirements on institutions in upholding these protections. Tex. Educ. Code § 51.9315.

1. What are expressive activities?

Section 51.9315 addresses *expressive activities*, speech and expressive conduct protected by the First Amendment and Texas Constitution article I, section 8, such as speeches, assemblies, protests, literature distribution, carrying signs, and circulating petitions. The term does not include commercial speech. Tex. Educ. Code § 51.9315(a)(2).

2. May a community college regulate speech in a common outdoor area?

Section 51.9315 requires community college to designate common outdoor areas as traditional public forums. As described above, a *traditional public forum* includes locations, such as sidewalks and parks, where members of the public have historically been permitted to gather and speak on any topic. Tex. Educ. Code § 51.9315(c); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985).

Under Section 51.9315, a community college must allow individuals to freely engage in expressive activities in common outdoor areas if their conduct is lawful and does not materially and substantially disrupt college functions. That said, the state law permits a college to impose reasonable time, place, and manner restrictions if the restrictions are narrowly tailored to serve a significant college interest, employ clear, published, viewpoint- and content-neutral criteria, and provide for ample alternative means of expression. This standard for accessing the

restrictions is similar to the strict scrutiny standard applied to restrictions on speech in a traditional public forum set out in First Amendment jurisprudence. Tex. Educ. Code § 51.9315(d); *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37 (1983).

3. May an institution impose approval or permit requirements on expression in common outdoor areas?

No. Section 51.9315 prohibits a community college from requiring a member of the college community to obtain permission from the college to assemble or distribute written materials in a common outdoor area. Tex. Educ. Code § 51.9315(d).

4. Is a community college required to adopt a campus expression policy?

Section 51.9315 requires each community college to develop a policy, approved by the majority of the college's board of trustees, that addresses student rights and responsibilities regarding expressive activities. The policy must allow any person to engage in campus expression and respond to others' expressive activities, subject to the limitations on expression adopted under Section 51.9315(d). It must allow student organizations and faculty to invite speakers on campus, subject to the approval guidelines described below. The policy must address the discipline of students, student organizations, and faculty who unduly interfere with an individual's expressive activities on campus. The policy must also include procedures for addressing complaints of violations of the policy. Tex. Educ. Code § 51.9315(f).

The policies adopted under Section 51.9315 must be posted on the college's website, included in the student and employee handbooks, and provided to freshman and transfer students during orientation. Section 51.9315 requires each college to develop procedures, programs, and materials to guarantee employees who educate or discipline students understand the requirements of the section and all related policies. Tex. Educ. Code § 51.9315(f), (i)-(j).

5. May a community college punish a student organization based on the organization's viewpoint or expressive activities?

The bill prohibits institutions from taking action against, or denying a generally available benefit to, a student organization based on the organization's academic, political, religious, ideological, or philosophical views or the organization's expressive activities. Tex. Educ. Code § 51.9315(g).

6. What criteria may a community college consider when approving a speaker or assessing a fee for the use of college facilities?

When determining whether to approve a speaker or the fee to be assessed for the use of college facilities for expressive activities, a community college may only consider content- and viewpoint-neutral criteria, such as the proposed venue and expected audience size, any campus security needs, any necessary accommodations, and the relevant compliance history of the requesting faculty member or student organization. The college may not consider any anticipated controversy surrounding the event. Tex. Educ. Code § 51.9315(h).

7. Must a community college report on its implementation of the Section 51.9315 requirements?

Yes. By December 1, 2020, community colleges must submit to the governor and the legislature a report on its implementation of the requirements of Section 51.9315. This report must also be posted on the institution's website. Tex. Educ. Code § 51.9315(k).

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