

Speech on Campus

A Discussion of Speech and Protest Activity on
Campus and Considerations from Student
Affairs and Mental Health Perspectives

© Copyright 2023 Saul Ewing LLP

SAUL EWING
LLP



Overview

- I. Free Speech and Protests on Campus:
Strategies to Protect Safety and Promote Civil Discourse
- II. The Student Affairs Perspective: When Speech & Misconduct
Collide
- III. The Campus Speech Wars and Mental Health
- IV. Questions?

SAUL EWING



2

Free Speech and Protests on Campus: Strategies to Protect Safety and Promote Civil Discourse

Alexander (Sandy) R. Bilus
Saul Ewing CYCLE
February 15, 2024

© Copyright 2023 Saul Ewing LLP

SAUL EWING



3

Topics

- What is campus unrest?
- What has campus unrest looked like over the course of history, and how does it compare today?
- The legal landscape: How free is “free speech”?
- What are some strategies to prepare for campus unrest?
- How should colleges and universities respond to campus unrest?

SAUL EWING



4

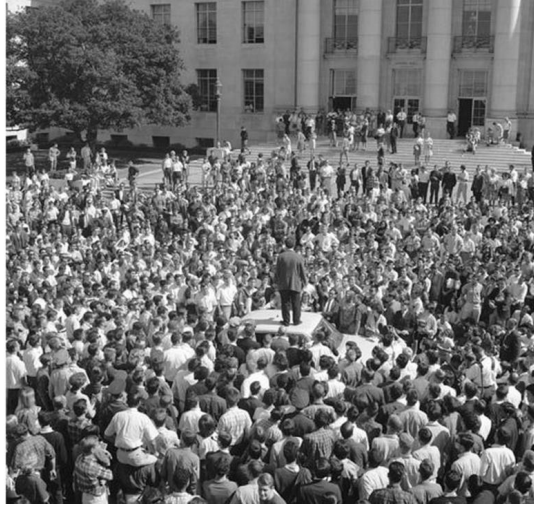
What is CAMPUS UNREST?

SAUL EWING



5

What Is Campus Unrest?



SAUL EWING



6

Peaceful and Orderly Protests



SAUL EWING



7

Disorderly Unrest



SAUL EWING



8

Campus Unrest In History



SAUL EWING



9

Campus Unrest In History



SAUL EWING



10

Campus Unrest In History



SAUL EWING



11

Campus Unrest Today



SAUL EWING



12

POLL

Has your campus dealt with protests, demonstrations, or other unrest in the past five years?

SAUL EWING



13

Campus Unrest Today

Protests erupt across US college campuses after Hamas attacks

US colleges become flashpoints for protests over Israel-Hamas war

October 27, 2023

Fear and Anger Spread on Campuses as Protesters' Rhetoric and Actions Escalate

Criticism and condemnation mount as colleges struggle to strike a balance between making fearful students feel safe and allowing protesters to express their free speech rights.

SAUL EWING



14

The Legal landscape: HOW FREE IS "FREE SPEECH"?

SAUL EWING



15

POLL

Are you a public or a private institution?

SAUL EWING



16

Categories of Unprotected Speech



SAUL EWING



17

SPEECH THAT SUBSTANTIALLY DISRUPTS CAMPUS OR INTERFERES WITH CAMPUS OPERATIONS

- Depending on a fact specific inquiry, an institution that “reasonably believes” certain speech will cause a substantial disruption on campus may regulate such speech.
- *Tinker v. Des Moines Indep. Cmty. Sch. District*



SAUL EWING



18

TRUE THREAT

In order to constitute a “true threat”, the speaker must: (1) intend to communicate (2) a serious expression of intent to commit an unlawful act of violence (3) to a particular individual or group of individuals.



SAUL EWING



19

INCITEMENT

- “The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to **inciting or producing imminent lawless action.**”
Brandenburg v. Ohio.



SAUL EWING



20

HARASSMENT

- (1) unwelcome;
- (2) discriminatory;
- (3) on the basis of a protected status, such as gender, race, disability, or age;
- (4) directed at an individual; and
- (5) “so severe, pervasive, and objectively offensive, . . . [that] so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”



SAUL EWING



21

Other Categories of Unprotected Speech

- Defamation
- Obscenity
- Fighting Words
- Intentional Infliction of Emotional Distress
- Speech that encourages crime
- Public employee speech

SAUL EWING



22

Preparing for campus unrest

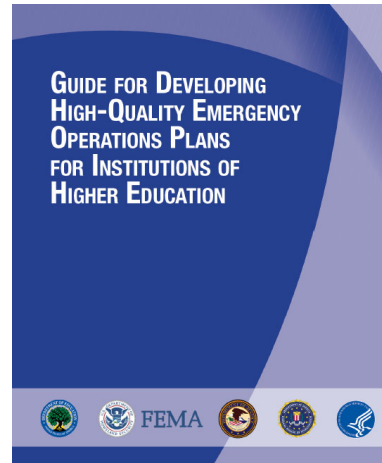
SAUL EWING



23

Preparing for Campus Unrest

- Organize a crisis response team.
- Address gaps in your emergency operations plan
 - Identify threats and hazards
 - Assess risk
 - Develop goals and objectives
 - Identify and select preferred courses of action
 - Training and implementation
- Examine the capabilities of your security or police force.
- Establish a good relationship with law enforcement.



SAUL EWING



24

Preparing for Campus Unrest

- Joint Contingency Plan:
 - Who will be the institution's liaison to law enforcement?
 - Who will be in command?
 - When will the institution call in the police?
 - What degree of force/weapons will be used?
 - How will you communicate?
- Crisis Communications Plan
 - Who will be your spokesperson?
 - How will you monitor and respond on social media?

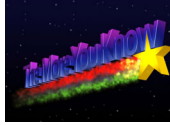
SAUL EWING



25

Preparing for Campus Unrest

- Create opportunities to teach the campus community about free speech.



- Consider taking a position on the presence of controversial speakers.
- What policies should you create/update?
- What should you consider when revising your policies?
 - Understand what speech is unprotected.
 - Understand the best methods to regulate speech.
 - Consider who you will allow to engage in expressive activity on campus – outsiders? Invited outsiders?
 - Beware creating “rights” through your policy language.
- Review your contracts with outside speakers/performers

SAUL EWING



26

Responding to campus unrest

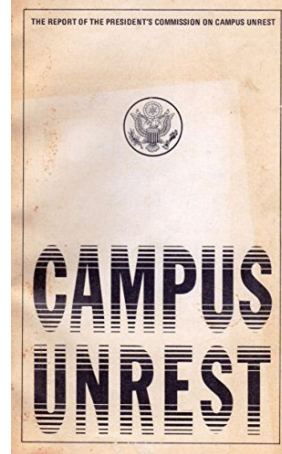
SAUL EWING



27

Responding to Campus Unrest

- Criminal violence: call law enforcement.
- Disruptive but nonviolent conduct, consult with law enforcement, gather intelligence, and consider your options:
 - Negotiate
 - Wait It Out
 - Get An Injunction
 - Disciplinary and Judicial Sanctions
 - Close the Institution



SAUL EWING



28

Responding to Campus Unrest

- Priority number 1: keep everyone safe
- Follow your joint contingency plan and your crisis communication plan
- After period of unrest subsides, consider next steps to address concerns—they're not going to vanish into thin air

SAUL EWING



29

Responding: a case study



SAUL EWING



30

The Student Affairs Perspective: When Speech & Misconduct Collide

Amy L. Piccola
Saul Ewing CYCLE
February 15, 2024

© Copyright 2023 Saul Ewing LLP

SAUL EWING



31

Overview

- I. Doxing
- II. Harassment
- III. Bias & Discrimination
- IV. Campus Supports

SAUL EWING



32

'Let's dox them one by one.' Rise in doxxing during Israel-Hamas war sparks alarm



Hannan Adely
NorthJersey.com

Jannine Masoud was looking at screenshots sent to her from a student group chat at Rutgers Law School when she spotted her own name and photo.

She froze.

The captions under students' photos read:

"Your employers have a right to know you support terrorist organizations."

"Maybe we sent [sic] this to some news outlet?"

"Let's dox them one by one."

The students were upset over a statement supporting Palestinians by the school's National Lawyers Guild chapter, and they debated posting members' personal information online. The incident deepened campus tensions and sparked a complaint to the administration.

Harvard Students Doxxed, Groups Withdraw Signatures Amid Continued Backlash to Israel Statement



A truck driving around Harvard campus warning people who signed onto a controversial letter supporting Palestinians in the wake of an attack by Hamas. AP Photo



Spreen King, Contributing Photographer

SAUL EWING



33

Doxing / Doxxing

- “To publicly identify or publish private information about (someone) especially as a form of punishment or revenge”
 • Derived from the phrase “dropping dox [documents]”
- Doxing may be conducted by researching public databases/sites, data brokers, or hacking
- Generally not illegal in and of itself
 - Harassment, stalking, or intimidation?
 - Use of illegally obtained documents?
- May violate the terms of service of websites

SAUL EWING



34

The Campus Response

- Resources
 - *Prevention & response*
- Assessment under codes of conduct
 - *Identifiable actor?*
 - *Violation of Computer/IT Use Policies?*
 - *Harassment?*

What promises are you making?

SAUL EWING



35

Harassment

- Where is the line between protected speech and prohibited harassment?
- What are the consequences for crossing that line?
- Is an identified victim necessary?

SAUL EWING



36

Bias & Discrimination

- November 7, 2023 OCR Dear Colleague Letter
 - “It is your legal obligation under Title VI to address prohibited discrimination against students and others on your campus—including those who are or are perceived to be Jewish, Israeli, Muslim, Arab, or Palestinian”
- NY Gov. Kathy Hochul: calls for genocide made on college campuses are a violation of New York State Human Rights Law and Title VI of the Civil Rights Act of 1964
- Student Title VI hostile environment lawsuits

SAUL EWING



37

Bias & Discrimination

- Are speech & conduct codes being applied evenly and fairly?
 - What is required to act?
- Are you addressing environmental factors, even if individual conduct is not actionable?
 - “It does not appear that the university determined whether the cumulative effects of these incidents created a hostile environment based on students’ shared ancestry (Jewish) or took action regarding the cumulative effects of the incidents until after the commencement of OCR’s investigation of this matter. . . .” Closure Letter, University of Vermont

SAUL EWING



38

Campus Supports

- Task Forces
- Expanded security
- Communicating reporting methods
- Improving mental health resources

SAUL EWING



39

The Campus Speech Wars and Mental Health

James A. Keller
Saul Ewing CYCLE
February 15, 2024

© Copyright 2023 Saul Ewing LLP

SAUL EWING
LLP



40

Overview

- I. CURRENT STATUS OF STUDENT MENTAL HEALTH ON CAMPUS
- II. MENTAL HEALTH, REMOTE LEARNING, & ENGAGING IN DIFFICULT DISCUSSIONS
- III. MENTAL HEALTH, TRIGGER WARNINGS, ACCOMMODATIONS, AND UNCOMFORTABLE SPEECH
- IV. MENTAL HEALTH, FREE SPEECH AND TRUE THREATS

SAUL EWING
LLP



41

National Alliance on Mental Illness Survey



SAUL EWING



42

Mental Health, the Pandemic, and Social Media – Isolation and the Challenges of Engaging in Difficult Discussions

- Isolation during COVID-19 pandemic aggravated mental health symptoms such as loneliness, anxiety, and depression; among other things, students who learned from the safety of being “behind a screen” are reporting that difficult discussions, in person, are making them feel “anxious or unsafe.”
 - -Campus Free Expression: A New Roadmap, by Academic Leaders Task Force on Campus Free Expression, November 2021 (p. 29).
- “Social media undermines the integrity of classroom experiences, as students wonder whether their comments may be shared on social media.”
 - -Campus Free Expression: A New Roadmap, by Academic Leaders Task Force on Campus Free Expression, November 2021 (p. 10).
- And not just classroom comments ...

SAUL EWING



43



SAUL EWING



44

Mental Health, Trigger Warnings, Accommodations, and Uncomfortable Speech

University Of Chicago Tells Freshmen It Does Not Support 'Trigger Warnings'

Why trigger warnings are really so controversial, explained

Why We Don't See A Need For Trigger Warnings

P.S., trigger warnings were not created for everyone.

How 3 Professors Use Trigger Warnings in Their Classrooms

The Trapdoor of Trigger Words Shut Up About Trigger Warnings...

What Is a Trigger Warning, Anyway?

What Americans Don't Understand About Trigger Warnings

A letter to incoming freshmen at the University of Chicago underscores how dysfunctional our public discussion of trauma and student safety has become.

SAUL EWING



45

Mental Health, Trigger Warnings, Accommodations, and Uncomfortable Speech

- "In essence, a trigger warning in academia is advance notice to students if assigned material contains information or subjects that might trigger difficult emotional responses for students with past trauma"
 - *Faculty and Employee Expression and Academic Freedom in a Time of Unrest*, NACUA Annual Conference 2018 (Rosenberg, Smolla, Urban), at p. 12.
- 2 TAs Provided Students Mental Health Resources on Gaza. They're Not TAs Anymore, Inside Higher Ed, December 20, 2023.

SAUL EWING



46

Mental Health, Trigger Warnings, Accommodations, and Uncomfortable Speech

POLL:

1. Does your institution ever recommend trigger warnings to faculty?
2. Have people asked the question re: current world conflicts that may be discussed in classroom (Israel/Hamas, Russia/Ukraine)?
3. Where is the line on "protecting" student mental health vs. allowing student free expression (whether public or private)?

SAUL EWING



47

Mental Health, Unrest, and Uncomfortable Speech Outside the Classroom

- Chalking and postings on campus.
 - Dorm vs. telephone pole
 - Public area vs. private space
- Controversial speakers (vs. *extremist* speakers?)
- Recent OCR Guidance re: Title VI

SAUL EWING



48

Final Note: Mental Health, Free Speech, and True Threats

- Expressing homicidal ideation about professors as part of clinical rotation.
 - Public college charged student with a conduct code violation, banned him from campus.
 - Student brought claims under ADA/Section 504, claiming he was disciplined for mental health disability, rather than offered/provided accommodations.
 - Student also brought 1st A. claim, alleging that his statements were just that – statements – and he was punished for his expression.
 - Court agreed with student, rejecting college's contention that ideation was a true threat. Summary judgment granted to student on 1st A. claim. *R.W. v. Columbia Basin College*, 2019 U.S. Dist. LEXIS 243578 (E.D. Wash., Oct. 4, 2019).
- True Threat vs. Speech, and impact on the mental health of students "targeted" by the speech – *Murakowski v. University of Delaware*, 575 F. Supp. 2d 571 (D. Del 2008)

SAUL EWING



49

Key Takeaways

1. Fraught time for both speech and mental health.
2. Limited and sometimes conflicting guidance in the case law and from OCR, etc.
3. Connect those working on your speech policies/conduct policies with your mental health experts on campus; their input will be valuable.

SAUL EWING



50

Any Questions?



SAUL EWING



51

Contacts



Patrick Nugent
patrick.nugent@saul.com
(215) 972-7134



Sandy Bilus
alexander.bilus@saul.com
(215) 972-7177



Amy Piccola
amy.piccola@saul.com
(215) 972-8405



Jim Keller
james.keller@saul.com
(215) 972-1964

© Copyright 2023 Saul Ewing LLP

SAUL EWING
LLP



52

<p>Baltimore Lockwood Place 500 East Pratt Street, Suite 900 Baltimore, MD 21202-3171 T: 410.332.8600 • F: 410.332.8862</p>	<p>Boston 131 Dartmouth Street Suite 501 Boston, MA 02116 T: 617.723.3300 • F: 617.723.4151</p>	<p>Chesterbrook 1200 Liberty Ridge Drive Suite 200 Wayne, PA 19087-5569 T: 610.251.5050 • F: 610.651.5930</p>	<p>Chicago 161 North Clark Suite 4200 Chicago, IL 60601 T: 312.876.7100 • F: 312.876.0288</p>
<p>Fort Lauderdale 200 E. Las Olas Blvd. Suite 1000 Fort Lauderdale, FL 33301 T: 954.713.7600 • F: 954.713.7700</p>	<p>Harrisburg Penn National Insurance Plaza 2 North Second Street, 7th Floor Harrisburg, PA 17101-1619 T: 717.257.7500 • F: 717.238.4622</p>	<p>Los Angeles 1888 Century Park East Suite 1500 Los Angeles, CA 90067 T: 210.255.6100 • F: 310.255.6200</p>	<p>Miami 701 Brickell Avenue 17th Floor Miami, FL 33131 T: 305.428.4500 • F: 305.374.4744</p>
<p>Minneapolis 33 South Sixth Street, Suite 4750 Minneapolis, MN 55402 T: 612.217.7130 • F: 612.677.3844</p>	<p>New York 1270 Avenue of the Americas, Suite 2005 New York, NY 10020 T: 212.980.7200 • F: 212.980.7209</p>	<p>Newark One Riverfront Plaza Newark, NJ 07102 T: 973.286.6700 • F: 973.286.6800</p>	<p>Orange County 5 Park Plaza Suite 650 Irvine, CA 92614 T: 949.252.2777 • F: 949.252.2776</p>
<p>Philadelphia Centre Square West 1500 Market Street, 38th Floor Philadelphia, PA 19102-2186 T: 215.972.7777 • F: 215.972.7725</p>	<p>Pittsburgh One PPG Place 30th Floor Pittsburgh, PA 15222 T: 412.209.2500 • F: 412.209.2570</p>	<p>Princeton 650 College Road East, Suite 4000 Princeton, NJ 08540-6603 T: 609.452.3100 • F: 609.452.3122</p>	<p>Washington 1919 Pennsylvania Avenue, N.W. Suite 550 Washington, DC 20006-3434 T: 202.333.8800 • F: 202.337.6065</p>
	<p>West Palm Beach 515 N. Flagler Drive Suite 1400 West Palm Beach, FL 33401 T: 561.833.9800 • F: 561.655.5551</p>	<p>Wilmington 1201 North Market Street Suite 2300 • P.O. Box 1266 Wilmington, DE 19899 T: 302.421.6800 • F: 302.421.6813</p>	

SAUL EWING
LLP



53