

FREE SPEECH IN THE TRUMP ERA

A Mixed-Methods Investigation of K-12 and University Faculty

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Abstract

This paper presents the findings from a mixed-methods study conducted in the spring of 2018 investigating “speech controversies” in K-12 schools and university campuses since 2015. Data were collected in an online survey and through follow-up interviews with volunteers. Participants reported an increase in oppressive speech acts in their institutions and backlash for trying to advocate for marginalized students who are being targeted by right-wing political groups and initiatives. Participants experienced a variety of backlash and supports as a result of the reported incidents. Issues related to advocating for LGBTQ rights, immigrants, and people of color were prevalent and themes of fear and silencing were discussed. Implications for professional development, activism, and practice in the current political climate will be discussed.

Objectives

The past two years have been challenging ones in terms of freedom of expression-- particularly on college campuses and in K-12 schools. Since the 2016 presidential campaign there has been a rise in extreme viewpoints represented in mass media, in public spaces, on college campuses, and K-12 schools (Rogers, 2017; Southern Poverty Law Center, 2016). President Trump’s campaign modeled such expression and empowered many individuals who align with far right, anti-gay, anti-immigrant, and White supremacist ideologies. The increased visibility of such viewpoints emboldened individuals and organizations to act out in individual and collective acts of expression that resulted in many people feeling threatened, scared, at risk, and unsafe. There have been renewed debates about what constitutes “hate speech” and what sorts of expression can legally and ethically be limited on college campuses and in K-12 classrooms.

Recent research indicates that pre-service teachers have an under-developed knowledge of the First Amendment and its application in K-12 settings (Call & O’Brien, 2011). There have also been calls for faculty on campuses to be more active in responding to “low value speech” by “embracing honest disagreements” (Waltman, 2018), promoting “safety” and “dignity” in campus dialogue (Callan, 2016), as well as the pedagogical uses of anger (Mayo, 2016). This study aims to understand educators’ experiences with speech controversies in their educational contexts since 2015 and make recommendations for practice.

Theoretical Framework

This study is grounded in social justice (North, 2008) and anti-oppressive theories of education (Kumashiro, 2002) which argue that educational institutions should be actively working to address social inequalities and challenge oppression. As a result, educators who align with this viewpoint are called to take proactive steps in their pedagogy and practice to ensure students in their school communities have equitable access to learning and are fully supported and integrated in the educational community. This study seeks to gain an understanding of how educators who are invested in improving diversity and equity issues in their institutions experience the tensions that emerge between legal, ethical, and pedagogical perspectives when controversial speech acts occur. This analysis is informed by legal (McCarthy & Eckes, 2009; Warnick, 2009) and philosophical (Callan, 2016; Mayo, 2016) analyses of free speech and First Amendment issues in educational contexts. While the design of the study was to understand how educators respond when oppressive speech acts occurred in their classrooms, the data told a different story. Several of the incidents were actually about educators and campuses being surveilled

and impacted by outside organizations (Liberty Council, Campus Reform, Fox News, Turning Point USA) and how progressive educators were scrutinized and required to defend their actions to their administration.

Methods & Data Sources

This paper draws from two primary data sources: an online survey and follow-up interviews with a sub-group of survey respondents. The survey invitation was distributed using email, Twitter, and Facebook. We also worked with Gay, Lesbian, and Straight Education Network and the American Association of University Professors to distribute the survey in their networks. The survey included 31 multiple-choice and open-ended questions and asked about a recent “controversy or challenging incident related to free speech at your institution” as well as educators’ experiences with this event and the context of their institution. Survey Data were collected between March 13, 2018 and May 30, 2018. As an exploratory survey, we were not seeking a large representative sample. We were using the survey to identify case studies of various incidents nationwide and recruit participants from diverse educational contexts to participate in the interview portion of the study.

The second data source includes interviews that were conducted with survey respondents who volunteered to complete a follow-up interview. 25 survey respondents agreed to be contacted and a total of 11 participants (3 K-12, 7 higher ed, 1 higher ed/K-12 hybrid) spoke with the research team about their experiences. We used a semi-structured interview protocol to learn more about the specific incidents, institutional contexts, and repercussions resulting from the incident. Interviews were conducted between May 1 and July 19, 2018 and were recorded and transcribed then read by two members of the research team to identify emerging themes and cases for deeper analysis.

Results

Results embargoed until presentation at the AERA annual meeting (April 4-9, 2019). Please contact the author if you’d like a copy of the paper after this date.

Significance

Social justice and anti-oppressive theories of education argue that for educators to be able to teach effectively, they must be able to take actions to promote educational equity and affirm the lives and experiences of all students in their curriculum. In our survey and interviews we found that K-12 teachers and university faculty were targeted for efforts they had made that aimed to support LGBTQ youth, immigrant youth, and students of color and design learning activities that teach and promote civic engagement. While most respondents reported that they had “some” or “strong” understanding of the First Amendment, they still reported experiencing fear and silencing as a result of these incidents. Our study indicates that K-12 teachers and university faculty are vulnerable to attacks from outside groups and they are often left on their own to navigate the repercussions of these incidents. School districts and universities need to do more to support educators teaching in these difficult times. Institutions can work with unions, community organizations (such as ACLU, GLSEN, AAUP) and other groups to ensure educators are informed of their First Amendment rights and responsibilities and should develop resources to support them when they come under attack for doing pedagogical work designed to support and strengthen democracy.

Works Cited

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FACT SHEET

Student Speech Rights in K-12 Public Schools

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The First Amendment and legal precedents established by the Supreme Court of the United States (SCOTUS) and lower district courts provide some guidance on what students and teachers can and can't express in public schools in the United States. Building administrators use discretion to interpret and apply what these mean in their local contexts. It is important for all stakeholders to understand the basic principles that need to be considered in these decisions. Here is a summary of guiding principles from case law.

Students may	Students may not
<ol style="list-style-type: none">1. Opt out of standing for the pledge of allegiance or national anthemⁱ2. Distribute materials about political or religious events and activities as long as you respect policies about "time, place, and manner"ⁱⁱ3. Wear clothes and symbols that represent your gender & cultural identitiesⁱⁱⁱ.4. Participate in walk-outs and silent protests^{iv}, but may be subject to discipline due to unexcused absence policies5. Express themselves freely on social media as long as they post using their own devices outside of school time and as long as it does not "substantially disrupt" the learning environment at school^v	<ol style="list-style-type: none">1. "Substantially disrupt"^{vi} the learning environment (<i>see Box A below</i>)2. Engage in vulgar, lewd, obscene, or plainly offensive speech^{vii} or make threats of physical violence3. Use school-sponsored activities^{viii} to express viewpoints that are not consistent with the pedagogical mission of the school (<i>see Box B below</i>)4. Wear clothing that has words or symbols that have a history of inciting violence locally^{ix} (racist, homophobic, anti-religious, etc.)5. Damage school property (vandalism, graffiti, etc.) and expect to be protected by the first amendment

A) What counts as a "material and substantial disruption"?

1. Interrupting class so that instruction or learning activities cannot continue
2. Threats of violence
3. Racially harassing conduct
4. Fights or violent behavior on school grounds
5. School must have evidence that a disruption will occur in order to limit speech. Prior events at the school and in the community may be sufficient (protests, targeted violence, etc.).

B) What counts as "school-sponsored speech"?

1. School-run publications (newspapers, yearbooks, literary journals, etc.)
2. School-funded performing arts activities (plays, concerts, etc.)
3. Activities occurring at athletics events
4. Content occurring at other competitions/practices of school clubs and organizations (band, chorus, cheerleading, debate, chess, math club, etc.)
5. Expression occurring during field trips

Suggested citation: Meyer, Elizabeth J. (2019) *Student and Staff Speech Rights in K-12 Schools [Fact Sheet]*. National Center for Free Speech and Civic Engagement: Irvine, CA.

Teachers & Administrators may	Teachers & Administrators may not
<ol style="list-style-type: none"> 1. Take immediate action if a student’s expression constitutes a “true threat.”^x 2. Take punitive action if student expression is causing a “material and substantial disruption”^{xi} 3. Make decisions over curriculum and course content (consistent with district policies and procedures)^{xii}. 4. Restrict the “time, place, and manner” of student expressive activities^{xiii} as long as the application of these policies is reasonable and nondiscriminatory. 5. Enforce anti-bullying and non-discrimination policies to ensure student safety at school. 6. Decorate your classroom, understanding that the school has a right to restrict certain displays if they are political or religious in nature^{xiv}. 7. Engage in political or religious activities as a private citizen on your own time^{xv}. 	<ol style="list-style-type: none"> 1. Discipline a student for creating/sharing expression that they disagree with or dislike^{xvi}. 2. Use class time or school activities to express personally held political or religious views (spoken, posted, on clothing, etc.)^{xvii}. 3. Refuse to teach required curricula that go against their personal beliefs^{xviii} (evolution, patriotic activities, LGBT-inclusion). 4. Make curricular decisions without following district policies and procedures^{xix}. 5. Lead prayers or other religious or political activities as part of their official duties at school. 6. Post on social media about students, school, work-related matters, or content that may impair their functioning as an educator^{xx}.

C) What counts as a “government speech”?

1. All curricular content: materials, lessons, classroom displays, including teacher expression during school day, at official school events, and on school grounds.
2. School mascots, logos, uniforms and other official publications that represent the policies, procedures, and views of the school and district.

Additional Resources^{xxi}

1. American Civil Liberties Union: Free Speech Rights in Public Schools
2. Anti-Defamation League: Unit plan - high school social studies
3. ASCD First Amendment Schools: FAQs
4. Bill of Rights Institute: Free speech lesson plans
5. National School Boards Association: “Coercion, Conscience, and the First Amendment”
6. National Center for Free Speech and Civic Engagement
7. Psychology Today: Gender and Schooling blog – “Free Speech vs. Hate Speech”

Suggested citation: Meyer, Elizabeth J. (2019) Student and Staff Speech Rights in K-12 Schools [Fact Sheet]. National Center for Free Speech and Civic Engagement: Irvine, CA.

Endnotes

- i *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943)
- ii *Hedges v. Wauconda Community Sch. Dist.*, 9 F.3d 1295 (7th Cir. 1993)
- iii *Arocha v. Needville ISD*, 2010
- iv “Tinker standard” from *Tinker v. Des Moines* (1969)
- v *J. S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. Cmwlth. 2000)
- vi Tinker standard”
- vii “Fraser standard” from *Bethel v. Fraser* (1986)
- viii “Hazelwood standard” from *Hazelwood v. Kuhlmeier* (1988)
- ix *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001) and *West v. Derby Unified School District No. 260*, 99-2039 (2000)
- x *Lavine v. Blaine School District*, 257 F.3d 981 (9th Cir. 2001) cert. denied, 122 S. Ct. 2663 (2002)
- xi *Tinker*
- xii *Settle v. Dickson County School Bd.*, 53 F.3d 152 (6th Cir. 1995), cert. denied, 516 U.S. 989 (1995)
- xiii *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).
- xiv *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 700 (4th Cir. 2007) and *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 n.12 (9th Cir. 2011)
- xv *Pickering v. Bd. of Education*, 391 U.S. 563 (1968)
- xvi *Boman v. Bluestem Unified Sch. Dist. No. 205*, 2000 U.S. Dist. LEXIS 5297, Case No. 00-1034-WEB, (Dist. Kan.) (Feb. 14, 2000)
- xvii *Miles v. Denver Public Schools*, 944 F.2d 773 (10th Cir. 1991)
- xviii *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F. 3rd 517 (9th Cir. 1994), cert. denied, 515 U.S. 1173 (1995), *LeVake v. Independent Sch. Dist. No. 656*, 625 N.W.2d 502 (Minn. App. 2001), cert. denied, 122 S. Ct. 814 (2002), *Palmer v. Board of Education*, 603 F.2d 1271 (7th Cir. 1979), cert. denied, 444 U.S. 1026 (1980).
- xix *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), cert. denied, 411 U.S. 972 (1973); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990) and *Kirkland v. Northside Independent Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989), cert. denied, 496 U.S. 926 (1990)
- xx *San Diego Unified Sch. Dist. V. Comm’n on Prof’l Competence*, 194 Cal. App. 4th 1454, 1458 (Cal. Ct. App. 2011), *Craig v. Rich Township High Sch. Dist.*, 736 F.3d 1110, 1113 (7th Cir. 2013), *Czaplinski v. Board of Educ. of Vineland*
- xxi Inclusion in this list is not an endorsement of these organizations’ viewpoints. They vary in their interpretation and motivations for protecting First Amendment issues. Please evaluate these materials carefully to determine if they are useful and relevant to the issues at your institution.

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FACT SHEET

Free Speech and Academic Freedom in Higher Education

By Elizabeth J. Meyer, Ph.D., University of Colorado Boulder, School of Education, Elizabeth.j.meyer@colorado.edu

The First Amendment and legal precedents established by the Supreme Court of the United States (SCOTUS) and lower district courts provide some guidance on how to balance the interests of Free Speech, Academic Freedom, and inclusive learning environments free from harassment and discrimination on college campuses. What follows is a summary of guiding principles from case lawⁱ. Most highly-publicized speech controversies emerge as a result of events (demonstrations, speakers, events, etc.) that happen on campus, but NOT in structured classroom settings. Private institutions are not held to the same standards as publicly-funded ones; therefore, this guidance applies primarily to public institutions.

Students may	Students may not
<ol style="list-style-type: none">1. Opt out of standing for the pledge of allegiance or national anthemⁱⁱ2. Distribute materials about political or religious events and activities as long as you respect policies about “time, place, and manner”ⁱⁱⁱ3. Wear clothes and symbols that represent your gender & cultural identities^{iv}.4. Participate in walk-outs and silent protests^v, but may be subject to discipline due to unexcused absence policies5. Express themselves freely on social media as long as they post using their own devices outside of school time and as long as it does not “substantially disrupt” the learning environment at school^{vi}	<ol style="list-style-type: none">1. “Substantially disrupt”^{vii} the learning environment (see Box A below)2. Engage in lewd and obscene speech, harassment, threats of physical violence, “fighting words” or incitements to lawless action^{viii}3. Wear clothing that has words or symbols that have a history of inciting violence locally^{ix} (racist, homophobic, anti-religious, etc.)4. Damage school property (vandalism, graffiti, etc.) and expect to be protected by the first amendment

A) What counts as a “material and substantial disruption”?

1. Interrupting class so that instruction or learning activities cannot continue
2. Threatening others
3. Harassment (see box C on hate speech)
4. Fights or violent behavior on campus property

B) Can professors restrict what is said in classes?

1. The classroom is not considered a “public forum” and faculty have more control over the content of what is shared as part of their curriculum.
2. Faculty have a responsibility to maintain order and meet the objectives of their curriculum and therefore they have broad latitude to make decisions in order to ensure study safety and learning are maximized.
3. Faculty may evaluate students based on their adherence to participation guidelines and expectations set out in the syllabus and in class presentations and interactions.
4. If a student is being disruptive, or poses a threat to others’ safety, faculty may implement campus policies for removing or addressing problematic student behaviors.

Suggested citation: Meyer, Elizabeth J. (2019) *Free Speech and Academic Freedom in Higher Education [Fact Sheet]*. National Center for Free Speech and Civic Engagement: Irvine, CA.

Faculty may	Faculty may not
<ol style="list-style-type: none"> 1. Take action if student expression is causing a “material and substantial disruption”^x 2. Make decisions over what to include in curriculum, class discussions, and assessment criteria consistent with university policies^{xi} 3. Restrict the “time, place, and manner” of student expressive activities^{xii} as long as the application of these policies is reasonable and nondiscriminatory. 4. Engage in political or religious activities as a private citizen on your own time^{xiii}. 	<ol style="list-style-type: none"> 1. Penalize a student for creating/sharing expression that they disagree with or dislike^{xiv}. 2. Use class time to lecture about personal views unless they are directly related to course content or their research expertise^{xv}. 3. Lead prayers or other religious or political activities as part of their official duties. 4. Post on social media about students, work-related matters, or content that may impair their functioning as a government employee^{xvi}.

C) What counts as a “hate speech”?

1. No agreed-upon legal definition currently exists.
2. Some consider it to fall under the definition of “fighting words” which, “by their very utterance inflict injury or tend to incite an immediate breach of peace.”^{xvii}
3. Government institutions/actors may not prohibit speech unless it will incite “imminent physical violence”^{xviii} even if it finds the ideas “offensive or disagreeable.”^{xix}
4. Harassment may fall in this category and is defined as behaviors targeted against a protected class^{xx} of persons that are “severe, pervasive, or objectively offensive” and that prohibit a student (or students) from accessing the full benefits of an education.^{xxi}

D) What about academic freedom?

1. Most universities place a high premium on academic freedom and provide their faculty wide latitude in this regard.
2. However, if a faculty is speaking as an employee or “pursuant to their official duties” courts may balance the employee’s interests against the employer’s interests.
3. Teaching and research by faculty are not explicitly protected by the First Amendment as noted in the Garcetti decision by Justice Kennedy, “there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence,” and therefore Garcetti does not “decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” Garcetti, 547 U.S. at 425
4. Courts generally provide “great respect for the faculty’s professional judgement” over decisions related to academics (research, teaching, and tenure decisions)^{xxii}.

Additional Resources^{xxiii}

1. American Association of University Professors – Academic Freedom
2. Bill of Rights Institute – Debating Free Speech on Campus
3. First Amendment Center - primers
4. Foundation of Individual Rights in Education – campus speech codes
5. National Center for Free Speech and Civic Engagement
6. Psychology Today: Gender and Schooling blog – “Free Speech vs. Hate Speech”

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Endnotes

- i I would like to thank Patrick O'Rourke, Counsel for the University of Colorado for sharing his memo that summarizes much of the legal decisions that are included here. O'Rourke, P. (2018). Memo to the Regents of the University of Colorado: Intersection of Articles 1, 5, and 7 of the Laws of the Regents and associated policies — Free Speech and Academic Freedom University of Colorado. Denver, CO.
- ii *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943)
- iii *Hedges v. Wauconda Community Sch. Dist.*, 9 F.3d 1295 (7th Cir. 1993)
- iv *Arocha v. Needville ISD*, 2010
- v "Tinker standard" from *Tinker v. Des Moines* (1969)
- vi *J. S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. Cmwlth. 2000)
- vii Tinker standard"
- viii *Cohen v California*, 403 U.S. 15, 21 (1971); *Watts v United States*, 394 U.S. 705, 708 (1969); *Chaplinsky v New Hampshire*, 315 U.S. 568, 570-71 (1942), *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999); *Planned Parenthood v Am. Coalition of Life Activists*, 290 F 3d 1058, 1070 (9th Cir. 2002).
- ix *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001) and *West v. Derby Unified School District No. 260*, 99-2039 (2000)
- x *Tinker*
- xi *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671-72 (7th Cir. 2006)
- xii *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).
- xiii *Pickering v. Bd. of Education*, 391 U.S. 563 (1968)
- xiv *Boman v. Bluestem Unified Sch. Dist. No. 205*, 2000 U.S. Dist. LEXIS 5297, Case No. 00-1034-WEB, (Dist. Kan.) (Feb. 14, 2000)
- xv *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671-72 (7th Cir. 2006)
- xvi *San Diego Unified Sch. Dist. V. Comm'n on Prof'l Competence*, 194 Cal. App. 4th 1454, 1458 (Cal. Ct. App. 2011), *Craig v. Rich Township High Sch. Dist.*, 736 F.3d 1110, 1113 (7th Cir. 2013), *Czaplinski v. Board of Educ. of Vineland*
- xvii *Chaplinsky v New Hampshire*, 315 U.S. 568, 570-71 (1942)
- xviii *Brandenburg v. Ohio*, 395 U.S. 444 (1969)
- xix *Snyder v. Phelps*, 562 U.S. 443 (2011)
- xx Protected classes vary by state, but federally include: race, color, religion, national origin, age, gender, disability, pregnancy, and veteran status. (Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act)
- xxi *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999)
- xxii *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).
- xxiii Inclusion in this list is not an endorsement of these organizations' viewpoints. They vary in their interpretation and motivations for protecting First Amendment issues on college and university campuses. Please evaluate these materials carefully to determine if they are useful and relevant to the issues at your institution.

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