

HACU 2016 ANNUAL MEETING
October 8-10, 2016
San Antonio, TX
NACUA Panel: October 9, 10:30am-11:45am
Background Materials

**Campus Climate Issues Facing Higher Education Leaders:
Institutional Response Matters**

A special session by the National Association of College & University Attorneys on pressing issues facing higher education, such as campus unrest and unease, the Fisher case, and others of particular interest to senior administrators and CEOs.

Moderator: Kathleen Curry Santora
President & Chief Executive Officer
National Association of College & University Attorneys

Panelists: Joseph I. Castro
President
California State University, Fresno

Ajay Nair
Senior Vice President and Dean of Campus Life
Emory University

Jose Padilla
Vice President and General Counsel
DePaul University

I. CONTEXT

A number of articles in the *Chronicle of Higher Education* and *Inside Higher Ed* have recently brought to light some of the issues that are giving rise to unrest on college and university campuses. Issues of identity and equity have manifested themselves in protests regarding campus monuments that some members of the campus community suggest honor troublesome legacies, campus buildings named after historical figures that some view as controversial, faculty and student demographics that are argued as evidencing racial and ethnic imbalances, provocative chalkings, alleged microaggressions, and more. Some of the events that have recently made headlines are:

A. Political Chalkings

During the 2016 presidential primary season, some students have chalked “Trump,” in support of Republican Presidential Candidate Donald Trump, at various places around campus. While the political chalkings are protected by the First Amendment, some students are asking the administration to take action, alleging that these chalkings constitute discriminatory harassment insofar as the students deem the chalkings to be synonymous with “attacks on Muslims, Latin Americans, African-Americans, and other minority groups.”

See Sarah Brown, “Trump Chalkings Trigger a New Debate Over Speech and Sensitivity,” *Chronicle of Higher Education* (Apr. 6, 2016)

B. Campus Building Names

Many colleges and universities have buildings on campus that are named after former slave owners or other controversial historical figures. This has prompted a series of conversations at Yale, Georgetown, Princeton, and other institutions, with vocal participants offering a wide range of opinions. Some argue that institutions should preserve history. Others argue that institutions should eliminate all manifestations of what many view as hurtful legacies from college campuses. Still others argue that there might be ways to preserve history while confronting the troublesome past in meaningful and lasting ways. For example, in an effort to reconcile a tainted past of having sold 272 slaves to fund institutional growth, Georgetown University has renamed two campus buildings, offered preferential admissions treatment to descendants of slaves, create a campus memorial, and launched plans to establish an Institute for the Study of Slavery.

See Sarah Brown, “Students Vent Frustrations as Yale Leaves a Slavery Champion’s Name Intact,” *Chronicle of Higher Education* (Apr. 29, 2016).

See also Corinne Ruff, “Many Colleges Profited From Slavery. What Can They Do About it Now?” *The Chronicle of Higher Education* (Apr. 19, 2016)

See also Madeline Will, “When Building Names Honor Racists, Universities Must Tread Carefully,” *Chronicle of Higher Education* (Feb. 10, 2015)

See also Fernanda Zamudio-Suaréz, “Georgetown’s Plan Spurs Hopes for a Shift in How Universities Confront Ties to Slavery,” *Chronicle of Higher Education* (Sept. 2, 2016).

C. Campus Monuments Honoring Troublesome Legacies

Similar to the issues stemming from controversial building names, several colleges and universities have monuments on their campus that memorialize the legacies of controversial figures from history. Again, there is widespread debate about the extent to which historic preservation constitutes public endorsement of legacy.

See Christopher Phelps, “Removing Racist Symbols Isn’t a Denial of History,” *Chronicle of Higher Education*, (Jan. 8, 2016).

See also Corinne Ruff, “In Explaining Confederate Symbols, Colleges Struggle to Summarize History,” *Chronicle of Higher Education* (Mar. 23, 2016).

D. Faculty and Student Demographics

Students have turned a critical eye towards the racial and ethnic demographics of tenured faculty members. In some instances, students have demanded that the University award immediate tenure to various minority faculty members whom the students deem to be deserving of tenure. Universities in turn are not able to override their tenure policies and procedures for a number of reasons—some legal and others related to institutional mission and goals. Nonetheless, these student demands have prompted many institutions to look at their demographics, examine internal policies and procedures, and convene working groups tasked with recruiting and retaining a diverse faculty that is reflective of national racial demographics.

Student concerns about campus demographics are not limited to concerns about faculty. Student demands often include calls for increasing diversity among the student body. Some commentators speculate that *Fisher II* may catalyze another round of student protests.

See Sarah Brown and Katherine Mangan, “Faced with Extreme Demands From Defiant Protesters, What’s a President to Do?” *Chronicle of Higher Education* (Jan. 23, 2016).

See also Beth McMurtrie, “2 New Diversity Deans Take on Ivy League Challenges,” *Chronicle of Higher Education*, (Apr. 7, 2016).

See also Beth McMurtrie, “What it Will Take for Missouri to Meet Its Faculty-Diversity Goal,” *Chronicle of Higher Education*, (Sept. 16, 2016).

See also Peter Schmidt, “The Supreme Court Could Fuel Campus Unrest in Ruling on Race in Admissions,” *Chronicle of Higher Education* (Dec. 8, 2015).

E. Anonymous Speech on Social Media

Social media web sites such as Yik Yak provide students with a venue to anonymously post content, some of which may be highly offensive and even threatening. Colleges and universities do not administer these third-party social media sites but have been asked on some occasions to erect “geo-fences” to bar the university community from using the university’s server to access certain social media sites. Geo-fencing in and of itself raises serious First Amendment concerns and in fact, is not even necessarily a feasible alternative since students are able to use personal data plans to continue to access the site. Nonetheless, it is one of the many demands that students are bringing to college and university presidents as they strive to build more inclusive communities.

See Fernanda Zamudio-Suaréz, “Students Were Mad Their College Banned Yik Yak. So They Went on Yik Yak. The Chronicle of Higher Education,” (Apr. 11, 2016).

F. Curriculum, Microaggressions, Trigger Warnings, and Academic Freedom

Students have raised concerns that they are regularly subjected to microaggressions and that certain assigned texts necessitate trigger warnings or should not be assigned in the first place due to objectionable content. Some faculty and staff have endeavored to create “safe spaces” for students. Others have asserted a right to academic freedom and expressed vocal opposition to what they perceive to be overprotective coddling of students. This impasse has been a focus of many campus protests, and stakeholders seem to have trouble finding common ground. As Sarah Brown and Katherine Mangan, journalists for the *Chronicle of Higher Education*, framed the issue in their article, “What ‘Safe Spaces’ Really Look Like on College Campuses,” “Either safe spaces are essential sanctuaries for members of historically marginalized groups, or they reflect a troubling desire to escape the rigorous intellectual inquiry that college should be all about.”

A University of Chicago welcome letter to new students illustrates how this debate is playing out. The letter stated in part, “Our commitment to academic freedom means that we do not support so-called ‘trigger warnings,’ we do not cancel invited speakers because their topics might prove controversial, and we do not condone the creation of intellectual ‘safe spaces,’ where individuals can retreat from ideas and perspectives at odds with their own.” The letter, embraced by many, also provoked a backlash from students, staff, and community members. Others, such as Christina Paxson, President at Brown University, describe safe spaces as “a much-needed anchor in an unfamiliar environment.”

See Sarah Brown and Katherine Mangan, “What ‘Safe Spaces’ Really Look Like on College Campuses,” *Chronicle of Higher Education*, (Sept. 8, 2016).

See Beth McMurtrie, “U. of Chicago’s Free-Expression Letter Explodes Fault Lines on Campus,” *Chronicle of Higher Education* (Sept. 2, 2016).

See Christina Paxson, “Brown University President: A Safe Space for Freedom of Expression,” *Washington Post* (Sept. 5, 2016).

See Stephanie Saul, “Campuses Cautiously Train Freshmen Against Subtle Insults,” *New York Times* (Sept. 6, 2016).

See Peter Schmidt, “A Faculty’s Stand on Trigger Warnings Stirs Fears Among Students,” *The Chronicle of Higher Education*, (Oct. 6, 2015).

See also Peter Schmidt, “Occidental Faculty Weighs System for Reports of Microaggressions,” *Chronicle of Higher Education* (Nov. 24, 2015).

See also Peter Schmidt, “Campaigns Against Microaggressions Prompt Big Concerns About Free Speech,” *Chronicle of Higher Education* (July 9, 2015).

G. Other Issues

Other issues stem from student concerns about university policies, campus resources, institutional responses from the leadership, and training.

See American Council on Education Center for Policy Research & Strategy, “Summary of Student Demands,” (Dec. 14, 2015).

As these issues surface, context is important. Erwin Chemerinsky astutely notes in an April 3, 2016 *Chronicle* article that “[t]his is the first generation of students to be educated, from a young age, not to bully.” These anti-bullying campaigns have inculcated in a generation of students “a persistent instinct to protect others against the hateful discrimination of intolerant speech,” a message that resonates much more strongly with this generation who knows of the McCarthy Era and Vietnam war only as “abstractions.” Erwin Chemerinsky & Howard Gillman, “What Students Think About Free Speech,” *Chronicle of Higher Education* (Apr. 3, 2016).

II. LAW

Several of the issues outlined above implicate the First Amendment, Title VI and VII. As college and university administrators dialogue and negotiate with students about ways to make the campus more inclusive, they must be familiar with these laws. On a general level, campus counsel must be fluent in First Amendment principles, including recognized exceptions to the First Amendment and the overbreadth and vagueness doctrines. Private universities that are not subject to the First Amendment should be acquainted with their internal policies and procedures, which in most instances afford First Amendment-like protections to students and faculty and thus bind the institution contractually to adhere to those protections. Public and private universities that receive federal funds are subject to the protections afforded by Titles VI and VII of the Civil Rights Act and thus must tailor policies, procedures, and practices accordingly. Below is an overview of how these laws might interface with the various issues emerging through channels of campus unrest:

A. First Amendment

i. Public institutions --“Congress shall make no law ... abridging the freedom of speech...”

ii. Exceptions to First Amendment Protections

1. True Threats

1. Intimidation where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. *See Virginia v. Black*.

2. A statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person. *See Planned Parenthood v. American Coalition of Life Activists.*

2. Inciting or Producing an Imminent Lawless Action

1. Where the speaker intends to incite, uses words likely to produce such action, and openly encourages such incitement. *See Brandenburg v. Ohio.*

3. Fighting Words

1. Where the very utterance of words inflicts injury or tends to incite an immediate breach of the peace. *See Chaplinsky v. New Hampshire.*

4. Obscenity

1. Where a description or depiction of sexual conduct, taken as a whole by the average person, applying contemporary community standards, portrays sex in a patently offensive way, appeals to the prurient interest of individuals, and lacks serious literary, artistic, political, or scientific value. *See Miller v. California.*

5. Libel and Defamation

1. Oral or written falsehoods, which are not merely a statement of the speaker's opinion, that are communicated to a third party, or parties, and would harm another's reputation. *See New York Times v. Sullivan.*

6. Time/Place/Manner Restrictions

1. Institutions may be able to regulate speech by imposing reasonable time, place, and manner restrictions. The degree to which these restrictions must be content neutral or viewpoint neutral vary depending on the forum, although as a general matter, public universities will not be able to (and should not want to, given the collective mission to promote “robust exchanges” in the “marketplace of ideas”) regulate the content of the speech that is the subject of this outline. *See ACLU v. Mote.*

7. Discriminatory Harassment

1. Under Title VI and Title VII, a state actor can regulate unwelcomed speech that creates a “severe or pervasive” and hostile work environment or that otherwise denies a student the benefits of or subjects a student to discrimination in a federally-funded education program. This is a statutory exception to the First Amendment and not an exception carved from the common law, as those listed above. When a state actor punishes an individual solely for speech that it deems to have created a hostile environment, the First Amendment is implicated, and institutions should be mindful of these implications as they address Title VI and VII complaints.

iii. Overbreadth and Vagueness Doctrines

The overbreadth and vagueness doctrines demand that policies and laws are clearly drafted so as to convey to the public what behavior is permissible and what behavior is not, *and* to convey this message in a manner that does not unnecessarily regulate constitutionally-protected speech.

1. Overbreadth Doctrine

The government has enacted a law or policy that proscribes some constitutionally-protected speech.

2. Vagueness

The vagueness doctrine requires that individuals be put “on notice” of what behavior is permitted and what behavior is proscribed so that they are able to tailor their actions accordingly.

iv. Academic Freedom

Especially with respect to microaggressions and trigger warnings, faculty sometimes raise concerns about the extent to which real or perceived regulation of classroom content or curricular choices impede their academic freedom. Although academic freedom belongs to the institution and not the individual faculty member, this issue is nonetheless receiving more attention in the media, in part because of a recent [Report](#) issued by American Association of University Professors on trigger warnings.

B. Title VI

i. The Statute

“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

ii. Microaggression, Chalkings, and Yik Yak Postings:

It is at least arguable that microaggressions, chalkings, or Yik Yak postings (to a lesser degree because of the lack of university control) might be so severe or pervasive to create a hostile environment under Title VI.

iii. Campus Monuments and Buildings Names:

Does the very presence of campus monuments/buildings that honor troublesome legacies create a hostile environment? Probably not. But in one case, the students did not report a single instance of mistreatment but rather a collection of pervasive mistreatment over time. It is at least worth thinking about the extent to which student concerns about building names and monuments, when considered as one among many issues, may raise a Title VI concern.

C. Title VII

i. The Statute

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment into any way which adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.”

ii. Hostile Environment Claims

Title VII claims of harassment (whether harassment based on race, color, religion, sex, or national origin) are analyzed under the framework set forth in certain cases.

1. Elements

In short, the Plaintiff must prove that (1) he/she belongs to a protected class; (2) that he/she was subjected to unwelcomed harassment; (3) that the harassment complained of was based on plaintiff's protected status; (4) that the harassment was sufficiently severe or pervasive to alter the terms or conditions of plaintiff's employment and create a discriminatorily abusive or hostile working environment; and (5) that the defendant is responsible for the harassment under a theory of either direct or vicarious liability. *Weatherly et. al. v. Alabama State University*.

2. Affirmative Defense

Thereafter, the Defendant may offer evidence that (1) it exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities it provided, or otherwise to avoid harm.

3. Application

University employees (including student employees) who allege that they are being subjected to pervasive microaggressions or other discriminatory harassment in the work environment may have actionable claims under Title VII if the university knows about behavior that rises to the level of legal harassment and declines to take steps to remedy the behavior.

iii. Hiring a Diverse Faculty (Title VII Cont.)

Recent student demands have asked that colleges and universities increase racial and ethnic diversity among faculty and staff. These demands again implicate Title VII and the concomitant provisions regarding the laws governing raced-based considerations in employment.

III. Strategies for Addressing Campus Unrest in a Lawful and Meaningful Way

There is not yet a set of universally-accepted “best practices” for responding to campus unrest. Colleges and universities are still in a trial-and-error period, with some navigating the turmoil more successfully than others. The following strategies are derived from a review of all articles from the *Chronicle of Higher Education*, *Inside Higher Ed*, and other publications over a 6-month period that spoke positively about an institutional response to campus unrest.

A. Invite Dialogue

1. Engage students as partners in working towards a more welcoming and inclusive environment. Listen to the students. Seek to understand. “Let the students speak, and let them know that you hear them. Listen—really listen—to their concerns, fears and the hopes that reach to the core of their being.” Douglas A. Hicks and Suzy M. Nelson, [“Are You Ready to Work with Campus Protesters?”](#) *University Business* (March 2016).
2. *See also* Sarah Brown and Katherine Mangan, “Faced with Extreme Demands From Defiant Protesters, What’s a President to Do?” *Chronicle of Higher Education* (Jan. 23, 2016).

B. Know Your Role

1. “As an administrator, understand that you are an actor in the process. Instead of reacting only to what students do or say, proactively work with them to propose short-term and long-term solutions. Tap your own sources of professional and personal support.” Hicks & Nelson, *above*..
2. “Remember that you are the public face of the university. Be prepared for the demonstrators, other students and the public to make assumptions and false claims about you. Be open and empathetic. Avoid becoming defensive.” Hicks & Nelson, *above*..

C. Know Yourself

If there exists any tension between your public persona as a university administrator, and private inclinations to act in solidarity with the protestors (or any other values clash), talk with mentors and others to figure out how to navigate this tension.

D. Clarify the Agenda

1. “Clarify, with as much precision as possible, the students’ agenda.” Hicks & Nelson *supra*.
2. “[L]earn who is speaking on behalf of the students, and request that a small, consistent group be appointed to engage with you.” Hicks & Nelson, *above*.. This will allow you to clarify and understand the issues.

E. Convene Small Group Meetings

Once you understand the slate of issues, you may want to convene working groups of students, faculty, and staff to research, report on, and address each issue in a thoughtful and substantive way. See Corinne Ruff, “One University’s Response to Student Demands on Race: Radical Transparency,” *Chronicle of Higher Education* (Apr. 21, 2016).

F. Involve high-level senior leadership

1. Throughout the entire process, involve high-level senior leadership in a public way.
2. Public messages should be delivered by a high-level senior administrator.

G. Educate

1. Some student demands may not be viable. Don't forget that at the core, institutions of higher education serve an educational mission. This is a great opportunity to explain shared governance, academic freedom, and First Amendment protections in the context of higher education. *See, e.g.* University of Missouri Chancellor's Diversity Initiative, "[Creating a Better Mizzou Project: Learning the Facts as We Work Towards a More Inclusive Campus](#)," (offering community seminars on shared governance, the First Amendment, and system leadership).
2. Also as educators, we can help students find their voices and help them channel them productively to bring about change or improvement.

H. Follow Up

This movement calls for a culture shift that must be monitored over time. Follow up regularly with the protest leadership in the weeks, months, and years after the initial unrest.

[Adapted from materials prepared for NACUA by Holly Combe, Assistant Director of Legal Resources, National Association of College and University Attorneys]