



Association of
Title IX Administrators

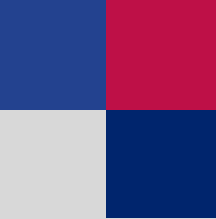
ACADEMIC FREEDOM AND FACULTY RIGHTS

Vassar College
February 25, 2025

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“Today’s institution of higher education is not a microcosm of society. It is both more and less than that. It must be better than the rest of society – more tolerant, more open to all ideas, less willing to explain away its problems. If the institution suppresses rather than takes on bigoted speech, it betrays our faith in the efficacy of education.”

U.S. Rep. Eleanor Holmes Norton



ACADEMIC FREEDOM, FIRST AMENDMENT AND FACULTY RIGHTS

INTERNAL SOURCES OF PROTECTION

- Internal Sources
 - Institutional rules and regulations
 - Letters of appointment
 - Faculty Handbooks (Generally Academic Freedom Rights are explicitly incorporated into this document)
- Academic Freedom is also protected as a part of “Academic Custom”

ROLE OF THE AAUP AND ACADEMIC FREEDOM

Academic Freedom of Professors in the U.S. was initially defined in the AAUP “Declaration of Principles” in 1915. This stated:

- “Academic Freedom has traditionally had two applications – to the freedom of the teacher and to that of the student.”
- “Academic freedom of the teacher compromises three elements:
 - Freedom of inquiry and research,
 - Freedom of teaching within the university or college; and
 - Freedom of extramural utterance and action.

(AAUP, 2001, p. 292)

AAUP AND ACADEMIC FREEDOM 1940

In 1940 the AAUP refined the earlier definition in their “*Statement of Principles on Academic Freedom and Tenure*” to include:

- Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of other academic duties; but research for pecuniary return should be based on an understanding with the authorities of the institution
- Teachers are entitled to freedom in the classroom in discussing their subject [matter], but they should be careful not to introduce into their teaching controversial matter which has no other relation to their subject.

AAUP AND ACADEMIC FREEDOM (CON'T)

- When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the college community imposes special obligations.
- As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances.
- Hence, they should at all times be accurate, should exercise appropriate restraint, show respect for the opinion of others and should make every effort they are not speaking for the institution.

(AAUP, 2001 pp. 3-4)

- The 1940 definition is retained today by the AAUP

ACADEMIC FREEDOM AND THE SUPREME COURT

- The U.S. Supreme Ct. has never fully accepted the term academic freedom as defined by the AAUP as a legal right.
- The concept of Academic Freedom can be of particular concern when a faculty member is disciplined for inappropriate behavior and claims protection for that behavior under the concept of Academic Freedom.
- The issue becomes:
 - What is protected speech? How much and to what extent?
 - What is protected behavior?

SWEETZY v. NEW HAMPSHIRE

In a U.S. Supreme Court case, *Sweetzy v. New Hampshire* (354 U.S. 263, 1957) the Court recognized the 1st amendment right of institutional academic freedom.

“It is the business of an institution of higher education to provide an atmosphere which is most conducive to speculation, experiment and creation... There prevails Four Essential Freedoms”

1. Who may teach
2. What may be taught
3. How shall it be taught
4. Who may be admitted to study

ACADEMIC FREEDOM & FREE SPEECH

- There may be a balancing test applied utilizing the First Amendment rights of the professor v. the rights of the institution to maintain a non-disruptive learning environment.
- The professor may not create a hostile environment.
- Individual academic freedom remains an important protection for faculty in the performance of their role:
 - Statements made by a faculty member that create a hostile learning environment may thwart the academic process and are less likely to be protected.
 - If a faculty member can show that their comments are germane to the course content and advance an academic message and are not merely gratuitous use of shocking language the professor will likely be protected from disciplinary action.

STUDENT ACADEMIC FREEDOM

- Historically academic freedom guidelines were used to protect students from disciplinary measures for campus activism
- The *Sweezy* case linked student academic freedom to student free expression rights
 - The Court placed students' rights to academic freedom over the institution's rights and stressed students' freedom to learn as well as students' right to speak
 - Yet, students' free speech is also limited in the classroom to content that is consistent with the course being taught
- Students may express their own opinion on a subject being discussed
- Students, like faculty, can be disciplined for expression that is not consistent with the subject matter being discussed

EXPRESSION IN THE CLASSROOM

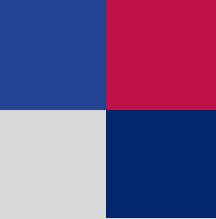
- A faculty member may limit student speech in the classroom if it interferes with the rights of other students to their education, or if it is threatening or intimidating, vulgar or obscene
- Important to recognize the distinction between student rights at a public institution and a private one like Vassar
 - Private institutions are not subject to the Constitution
 - Are subject to federal non-discrimination laws
 - Are subject to institutional policy statements

AND THE CHALLENGE CONTINUES...

- Since the early 1970's the concept of faculty or academic freedom has continued to be fraught with challenge.
- Who sets the standards?
- Is Academic Freedom a First Amendment right of absolute autonomy?
- Is Academic Freedom a right of the institution? The faculty? The students?
- What represents the boundaries?

A BALANCING TEST

There may be a balancing test applied utilizing 1st amendment rights of the professor v. the rights of the college to maintain a non-disruptive learning environment



EXAMPLES OF LEGAL CHALLENGES

Meriweather v. Hartop

U.S. CT. OF APPEALS, 6TH CIR. (2021)

- Faculty member (Meriweather), tenured – 25 years at SSU
- SSU informed faculty (2016) they had to refer to students by their preferred pronoun. If not, they were subject to discipline
- In the first class of the term Meriweather referred to a student who presented as male as “Sir” (he used formal pronouns for all students).
- Following class, the student approached him and requested to be referred to using female titles and pronouns.
- Meriweather said his religious beliefs prevented him from communicating about gender identity that he believes to be false and therefore couldn’t comply.

Meriweather v. Hartop

- The institution found Meriweather responsible for creating a hostile environment. Given a formal warning.
- Meriweather argued that he couldn't use the female pronoun with Doe because of his religious convictions.
- Meriweather filed a First Amendment lawsuit, based on free expression under academic freedom, and protection of religious beliefs
- The 6th Cir. court upheld Meriweather's First Amendment claims and held that under Supreme Ct. decisions & 6th Cir. Precedent, the First Amendment protects the academic speech of university professors.

Important Messages from this Case

- Citing to *Keyshian v. Bd of Regents* (1967) the court said the First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom.”
- Ct. said, “The First Amendment protects the right to speak freely and right to refrain from speaking
- Citing to the Tinker case the court said, “Government officials violate the First Amendment whenever they try to prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.”

How might this be different at a private institution?

OBERLIN COLLEGE

- Professor Joy Karega posted anti-Jewish messages on her Facebook page. She posed various anti-Jewish conspiracy theories, including that Israel shot down the Malaysia Airlines flight.
- After there was a huge outcry from the Oberlin community the President sent out a memo stating that “Oberlin College respects the rights of its faculty, students, staff and alumni to express their personal views. Acknowledgement of this right does not signal institutional support for, or endorsement of, any specific position”
- Jewish students, alumni and parents were appalled by what appeared to be a brush-off by the President.

OBERLIN COLLEGE (con't)

- President Krislov then issued a personal statement but did not specifically condemn the blatant expression of racism
- At their spring meeting, the Board of Trustees issued a statement that took a firm position on Karega's posts, calling them "anti-Semitic and abhorrent."
- The Board Chair announced that there should be disciplinary action against Karega.
- She refused to retract her statements or to apologize. Many of her friends and political allies rallied around her.

OBERLIN COLLEGE (con't)

- Oberlin announced that Karega would be suspended with pay and not allowed to teach in the fall semester pending a faculty governance review of her “professional fitness” in spite of the fact that she had been teaching for two years since posting the anti-Jewish comments.
- The College subsequently terminated Karega, citing a failure to meet academic standards and demonstrate intellectual honesty.
- She filed legal action against the College in 2018 and settled with the College in 2020.

KEEPING AN EYE ON

Kestenbaum v. Harvard

- Many on-campus protests since the October 7, 2023, Hamas attacks and Israel's response
- Jewish students sued Harvard for violating Title VI
- Suit alleges anti-Israel protesters restrained and assaulted Jewish students, and,
 - Harvard should have restricted peaceful protests, outdoor displays, online posts and other expression
- Ongoing arguments allege “chilling speech”
- Discipline requires speech to be severe, pervasive and objectively offensive that it effectively deprives other students of an education
- Important to sort true threats and violence from protected expression

THOUGHTS FOR DISCUSSION

- There are multiple and sometimes conflicting standards that establish acceptable in-classroom and out of classroom expression. These include:
 - AAUP Guidelines
 - Academic Freedom generally – what does that mean?
 - Vassar’s Statement on Academic Responsibility and Respect for Persons, and Vassar’s Policy Against Discrimination, Harassment and Sexual Misconduct
 - OCR Guidance and standards for Title IX and Title VI

CONSIDERATIONS

- If a student or parent makes a complaint or the institution seeks to have control over the actions of faculty in terms of behavior in the classroom and curriculum the College should look at:
 - Does the behavior undermine the legitimate goal or mission of the college?
 - Does the behavior conflict with college policies and standards for professional conduct?
 - Does the behavior interfere with the professor's performance of his/her duties?

GUIDELINES FOR FACULTY

- Ensure assignments have relevance to the course material.
- Controversial expression in the classroom is generally protected as long as there is a nexus to the course being taught.
- Do not use grading authority to coerce beliefs.
- All grades must reflect an honest, professional assessment of the student's work.
- Be able to demonstrate why protecting your Academic Freedom is important for the public good by upholding professional and ethical responsibilities of the profession.

FINAL THOUGHTS

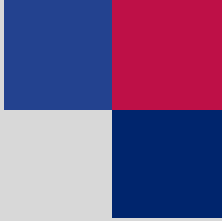
The Supreme Court has said that the nature and principal function under our system of government is to invite dispute, and that it may indeed serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger. The freedoms of speech and of press are fundamental personal rights and liberties, the exercise of which lies at the foundation of a free government by free people.

Justice William Douglas in Terminiello v. City of Chicago, 337 U.S. 1 (1948)



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Questions?



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