

California Department of Justice
Office of the Attorney General



Legal Alert

Subject:

Guidance regarding students' free speech rights and schools' obligation to prevent discrimination and harassment

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In light of recent world events, numerous issues have arisen regarding students' rights of freedom of expression and their right to be free from discrimination and harassment in educational environments. This legal alert provides a general overview of how constitutional free speech rights, along with free speech protections under the California Education Code, apply to students' expressive conduct in California public K-12 schools and public colleges and universities. This alert also addresses schools' obligation to protect students from discrimination and harassment based on protected characteristics.

Constitutional Right to Free Speech

The First Amendment of the U.S. Constitution protects "freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." And Article 1, Section 1 of the California Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." These rights are subject to reasonable "time, place, and manner" restrictions.

Student Free Speech Rights in Public K-12 Schools

As the U.S. Supreme Court famously said, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹ Students generally may express their opinions in K-12 school settings, even on controversial subjects, unless their conduct will materially and substantially disrupt the work and discipline of the school or invade the rights of others. Schools generally cannot curtail students' speech just to avoid discomfort or inconvenience created by the airing of unpopular views or beliefs. Protected rights in school include not just verbal speech, but symbolic acts or expressive conduct (for example, wearing a patch on a backpack) and generally apply both in and out of the classroom. Conversely, bullying, harassment, and threats aimed at teachers or other students are forms of expression that schools generally may regulate, whether the expression occurs on or off campus.

California law generally provides students the right to exercise freedom of speech, and schools generally may not discipline students solely because they have engaged in speech that would be constitutionally protected off-campus. However, speech that is obscene, libelous, or slanderous; or that so incites students that it creates a clear and present danger of unlawful acts on school premises, violations of school regulations, or the substantial disruption of the orderly operation of the school, is prohibited. (See also sections below on "Unprotected Speech" and "Schools' obligation to prevent discrimination and harassment.")

Student Free Speech Rights in Public Colleges and Universities

California public college and university students generally enjoy the same constitutional free speech protections in their schools that they do as members of the community at large. Indeed, courts have recognized that vigilant protection of free speech interests is nowhere more vital than in the context of colleges and universities, which are uniquely the marketplace of ideas. The state Education Code also generally

¹ *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 509, 511, 513.

provides public college and university students with the same free speech rights on campus they have off campus. But that law expressly does not protect student speech that constitutes harassment, threats, or intimidation, nor does it prohibit campus rules designed to prevent hate violence.

Though colleges and universities may sometimes limit the topics that may be discussed in a particular setting, they generally may not restrict the particular opinions or beliefs expressed just because they oppose or disagree with them or find them abhorrent. Discrimination against speech because of its message (“viewpoint discrimination”) is presumed to be unconstitutional. Accordingly, public colleges and universities may not, for example, deny funding that the school generally provides to student organizations to particular student groups based on those groups’ viewpoint.

The scope of students’ free speech rights may vary depending on the particular place (or “forum”) where they seek to express themselves. Students’ rights are generally at their greatest in places which by long tradition have been open to the public for assembly and discussion (“traditional public forums”) or which have been designated by the school as generally open to all students for the purposes of communications and discussion (“designated public forums”). A school may also create “limited public forums” that are restricted to their intended purposes, as long as the restriction is reasonable and viewpoint neutral. Such forums may therefore be restricted to certain groups or topics. A college or university may impose reasonable, tailored restrictions on the time, place, and manner of students’ speech or other expressive conduct, including protests or demonstrations, provided the purpose is not to discriminate against particular viewpoints, opinions, or beliefs. And, generally, schools may not suppress speech based on a hostile audience’s reaction, or because of the disruption it may cause due to such reactions.

Unprotected Speech

Some speech is not protected because of the harm it causes or threatens. In addition to libel and slander (specific types of harmful false statements), such unprotected speech includes:

- Speech advocating for the use of force or the violation of law (or certain school regulations), where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action;
- “[T]rue threats of violence,” which are statements intended to communicate a serious expression of intent to commit unlawful violence against a particular individual or group of individuals;
- “[F]ighting words,” which are personally abusive epithets that are commonly known to be inherently likely to provoke violent reaction when addressed to a reasonable person; and
- As discussed below, harassing conduct based on protected characteristics that is so severe, pervasive or persistent that it interferes with or limits the ability of an individual to engage in the school’s services, activities or privileges.

Schools’ obligation to prevent discrimination and harassment

Schools have a responsibility to protect all students from threats and harassment, and to prevent discrimination due to a hostile learning environment. Under California law, all students have the right to participate fully in the education process, free from discrimination and harassment. Therefore, schools are not only prohibited from discriminating, but also have a responsibility to provide equal educational opportunity to all students and an affirmative duty to combat racism and other forms of bias. This duty includes countering or preventing a discriminatory hostile school environment where there is harassment based on an individual’s protected characteristic, such as their ethnicity or religion. Public colleges and universities also have the responsibility to ensure that campus programs and activities are free from discrimination and harassment.

In addition to State law protections, Title VI of the federal Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin by educational institutions that receive federal funding. This prohibits

discrimination against students of any religion, including those who are or are perceived to be Jewish, Muslim, Christian, Sikh, Hindu, or Buddhist, when the discrimination, for example, involves:

- Racial, ethnic, or ancestral epithets, slurs or stereotypes;
- How a student looks, including skin color, physical features, or style of dress that reflects ethnic, ancestral, and religious traditions;
- Potentially or allegedly inherited traits;
- Stereotypes about people who share certain ancestral or ethnic characteristics; and
- A foreign accent; a foreign name, including names commonly associated with particular shared ancestry or ethnic characteristics; or speaking a foreign language.

Schools may violate Title VI if they have created, encouraged, or failed to correct a hostile environment based on (among other characteristics) race, color, or national origin. A hostile environment occurs when there is harassing conduct (e.g., physical, verbal, graphic, or written) based on a protected characteristic that is so severe, pervasive or persistent that it interferes with or limits the ability of an individual to engage in the school's services, activities or privileges. This applies in all academic, athletic, and extracurricular contexts, and regardless of whether the harasser is a student, faculty member, other employee, or an outsider to the school. The federal Department of Education recently issued a ["Dear Colleague" letter](#) addressing Title VI requirements in light of recent events.

In the K-12 context, a complaint alleging violations of civil rights or other state laws can be made in the first instance to the local school under the Uniform Complaint Process, summarized [here](#). At the post-secondary level, each college and university has its own process of handling such complaints. (See [Cal. Community Colleges](#); [Cal. St. U.](#); [U. of Cal.](#)) Students at any level may [file](#) a complaint with the federal Department of Education's Office for Civil Rights.

Resources Available

Finally, the Attorney General is aware that many Californians have been dealing with significant stress, anxiety, and other adverse impacts from recent world events. If you or someone you know is in a mental health crisis, get help right away. Call 911 any time you think you or someone you know may need emergency mental health care. You can also: Call the Suicide and Crisis Lifeline at 988; call 1-800-273-TALK (1-800-273-8255); or text HOME to 741741 to access the Crisis Text Line. In addition, California's public colleges and universities provide mental health services to students, staff and faculty. (See [Cal. Community Colleges](#); [Cal. St. U.](#); [U. of Cal.](#)) On the K-12 level, in addition to services provided at [local schools](#), the California Department of Education maintains a [list](#) of mental health resources.

If you believe you have experienced a hate incident or hate crime, or know someone who has, please contact local law enforcement, document the details of the event, and seek medical attention if necessary. For non-urgent reports, you may also contact the California Civil Rights Department's "CA vs. Hate" Resource Line and Network, by: calling 833-8-NO-HATE, M-F 9 a.m.-6 p.m.; or submitting a report at [Stop Hate](#), which is available 24/7. Students who believe they have been subjected to discrimination, harassment, intimidation or bullying at school should immediately report these incidents to school officials. And as linked to above, students may submit complaints for harassment or discrimination using the Uniform Complaint Process, their college or university's complaint process, or through the federal Department of Education's Office for Civil Rights.