

Free Speech FAQs

Many are understandably troubled by the incident of a student who was not enrolled in a class distributing literature addressed to the content of that class and they have questions about why this is permitted. Our first priority is always the safety of students and ensuring an inclusive learning environment. Below are some of the most frequently asked questions that have arisen in the past few weeks.

Free Speech

1. Why can't a public university ban what is perceived to be hate speech?

Hate speech for one group could be free speech for another group. For instance, when 37 states adopted marriage equality laws, an opposing view considered such laws as an assault on religious freedom because adopted laws squarely conflicted with their religious beliefs. A person's expression presents their values, interests, and perspectives, and there are always others who will, often reasonably, consider that speech to be "hateful." Given these realistic problems, the law does not prohibit hate speech *per se*.

As a state university, we are subject to the First Amendment via the Fourteenth Amendment. The First Amendment states in part: "Congress shall make no law ... abridging the 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." The Fourteenth Amendment extended the Bill of Rights, which are captured among the first ten constitutional amendments to all public entities, including state governments. In other words, that includes the University of Louisville, a public research university within the Commonwealth of Kentucky.

2. Why does it appear that some speech is given more deference or public agencies tend to leave those expressions alone?

As the discussion above suggests, "free" speech comes at a cost, so it's not as free as we think. The law also places a special shield over certain types of speech. "As a default rule, courts have ruled that political, social, scientific, artistic, and religious expressions are typically protected akin to having a special legal shield because they represent the kind of speech that the law clearly intended to protect." (Sun, 2020).

3. What kinds of speech are prohibited?

The courts have identified the following categories of expressions that cross into impermissible behaviors and the First Amendment does not protect:

- obscenity, which amounts to an expression that an average community member considers as appealing to prurient interest, is classified as patently offensive, and lacks social, political, and scientific value;
- "true" threats, which occur when a speaker communicates a serious expression of intent to commit an act of unlawful violence to a particular individual or a clearly identifiable group of individuals;
- defamation, which reflects false and defamatory expressions about another without any privilege to make such expressions;

- disruptive expressions, which are associated with conduct that actually or is reasonably forecasted to lead to material disruption or substantial disorder, but must be more than mere offensive speech such as hecklers who prevent featured speakers from addressing an audience;
- harassment, which is unwelcome and objectively sufficiently severe, pervasive, or persistent experiences (e.g., harassment based on sex, race, national origin) creating a hostile environment that interferes with or limits the ability of the education program such as learning.

4. Why can't the university prohibit the disruption of classes?

The university can (and does) prohibit the disruption of classes.

There are certain spaces (or "forums") where the law does not recognize the place as an acceptable forum to exercise one's free speech. The classroom is one of those spaces (except for students enrolled in the course, of course). Unless otherwise authorized, no one is permitted to enter a classroom during a class session who is not enrolled in that class, and certainly, no one is authorized to disrupt the class. This is not what happened in this situation.

5. Why can't the university prohibit the distribution of literature in a particular classroom building?

The university could prohibit the distribution of literature or posting of flyers from persons beyond your instructors, who may distribute content that is germane to your classes. The university does not adopt such a restrictive policy, but if it did, it would have to do so in a content-neutral manner and it would most certainly have to ensure a viewpoint-neutral approach. In other words, to execute such a policy, all literature or flyers would be prohibited, not just literature with offensive or potentially offensive content. This restriction would have to include flyers (e.g., interest meetings about a new policy), notices (e.g., notification of scholarships), affirmations (e.g., congratulatory announcements), etc.

Like most public universities, the University of Louisville adopts a policy that furthers the free exchange of ideas and maximizes the messages to which you may be exposed. It is often the reason why certain groups in the community perceive the university as a progressive and open source to percolate new or emerging ideas in society.

6. Why doesn't the University risk curbing free speech in instances like this if it takes seriously its commitment to diversity and inclusivity for all?

We do take our commitment to diversity and inclusivity extremely seriously, as it is the foundation of all that we do, but we are a public university, which means we are technically a government agency. As a government agency, rather than a private business that can impose and enforce stricter and more specific restrictions on speech, we must follow government standards. As an institution of higher

education, our definition of diversity must be truly expansive and include diversity of thought. For us, inclusion means creating and maintaining an environment where even the most oppositional stances can coexist peacefully. That does not mean that we agree with or endorse everything that is said by every individual in our campus community. The University can and does articulate its values and what it stands for, but we must make room for the fact that individuals in our community have opinions that diverge from the institutional position or from our own. Restricting First Amendment rights would not only invite legal challenges but would also invite the involvement of legislative bodies which might lead to laws that have undesirable consequences for the University. The Commonwealth of Kentucky, through House Bill 254 passed in the last legislative session, has stressed the importance of free speech on college and university campuses.

Student Code of Conduct

1. Why doesn't the distribution of literature violate the Code of Conduct prohibition of the disruption of classes (10d)?

It would if the class were disrupted. But when the distribution occurs in the classroom between class meetings, it is not prohibited, because this would not disrupt class.

2. Why doesn't returning to attempt to engage with the teacher to distribute literature violate the prohibition against harassment? ["[C]onduct that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the person(s) educational experience or work environment, that the person(s) are effectively denied equal access to an institution's resources and opportunities" (10ii)]

The student distributed literature in the classroom before class and waited to speak with students after class. He returned to the class when it next met to attempt to talk with the professor. Such actions do not rise to the legal definition being 'severe,' nor are two instances considered to be 'pervasive.'

3. Why doesn't twice returning to the classroom "[detract] from the person(s) educational experience or work environment, that the person(s) are effectively denied equal access to an institution's resources and opportunities (10ii)?"

Since the situation does not legally qualify as "severe, pervasive, and objectively offensive," it cannot be considered to have undermined or detracted from the educational experiences and opportunities of the students in the class. This is consistent with Title IX of the Educational Amendments and Title VI of the Higher Ed Act.

4. Why doesn't waiting in the hallway violate the Code of Conduct prohibition against "threatening or endangering the health, well-being, property, or safety of any person(s)(10t)?"

Two instances of waiting to talk to students or the instructor in a class does not rise

to the level of threatening or endangering behavior. Further, the Dean of Students' office interviewed the student and conducted a threat assessment. So too did an officer from the University of Louisville Police Department. These offices evaluate campus situations on a regular basis and neither identified a threat to the safety of the class or its students.

5. Why doesn't the waiting in the hallway violate the Code of Conduct prohibition against stalking(10gg)?

For an action to be considered an instance of stalking requires some combination of: "intentionally or recklessly directing behavior at a specific person(s) involving repeated (two or more occasions) of visual or physical proximity, non-consensual communication expressed or implied threats of death or bodily harm." While a particular class received this unwanted speech, it is not considered stalking when the individual leaves voluntarily when asked to do so and does not follow or confront the students in the class.