June 18, 2012

Higher Education and the Public Fora

Recent decisions by two federal courts have signaled a warning flare for institutions of higher education to examine their campus free-speech policies.

On June 12, 2012, the United States District Court for the Southern District of Ohio granted an injunction prohibiting the University of Cincinnati from enforcing its prior notice and permit scheme, which restricted all "demonstrations, picketing, and rallies" to a "Free Speech Area" that comprised just 0.1% of the campus grounds and required advance notice ranging between five and fifteen days.[1] In that case, a student group wanted to circulate across the campus to gather signatures on petitions to place the Ohio Workplace Freedom Amendment on the November 2012 ballot. When the students were told that they must restrict their activities to the obviously very limited "Free Speech Area"—or be subject to arrest—they sought a preliminary injunction prohibiting the University from enforcing its policies. The court began its decision by quoting the Supreme Court: "It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."

The students challenged the University's policies on a number of fronts, alleging that the notification requirements were overly broad and facially unconstitutional and that the policies were vague and not narrowly tailored to achieve the University's regulatory interests. In response, the University argued that it "has an interest in regulating ALL expressive activity on campus" and is permitted to reasonably limit expressive activities. The University attempted to bolster its position—and avoid a higher level of scrutiny by the court—by arguing that its entire campus is a limited public forum rather than a traditional or designated public forum. The court rejected the University's forum argument, noting that "the property has traditionally been open for speech and debate by students, and because the University grants students access to the Free Speech Area as a matter of course, the University has made the Free Speech Area a designated public forum as to students." But the opinion did not stop there. Observing that there was no authority enabling a public university to "constitutionally designate its entire campus as a limited public forum as applied to students," the court further determined that the campus's streets, sidewalks, and open areas remain designated public fora as to students. As a result of these findings, the court examined the policies under the lens of strict scrutiny.

Turning to the notice requirements in the University's policies, the court found problematic the fact that they applied to all student speech and did not attempt to limit their application to large demonstrations, demonstrations using sound amplification, or any similar criteria. Nor did the policies define what constitutes "demonstrations, picketing, and rallies." These shortcomings were exacerbated by the fact that the notice periods governing campus speech activity were inconsistent, with some policies requiring five days, others requiring ten days, and still others requiring fifteen days. The court therefore determined that the students would likely prevail on their constitutional challenges and awarded the injunction they sought.

The Ohio decision relied in part on an earlier decision from the Sixth Circuit Court of Appeals, issued in April. In *McGlone v. Bell*, the Sixth Circuit addressed a situation in which a non-student Christian evangelist brought a challenge to a

university's policies requiring nonaffiliated individuals to submit a written application fourteen days before speaking on certain parts of the campus.[2] The policies also required individuals to divulge personal information about their identity and the content of the anticipated speech. The lower court had dismissed the complaint but, on appeal, the Sixth Circuit reversed the ruling, holding that the university's perimeter sidewalks were traditional public fora, the open areas were designated public fora, and that the university's policies requiring advance permission and the disclosure of the content of the speech were not narrowly tailored to any legitimate interest and, therefore, unconstitutional. In reaching its conclusion, the court cited to other decisions upholding much shorter notification periods, such as three or seven days.

In light of these decisions, it is recommended that educational institutions examine their free speech policies, paying careful attention to the length of any notification periods, the criteria used to determine whether notification is required, and the designated areas in which expressive activity may be conducted. For more information, contact your regular Butzel Long attorney or the author of this Client Alert.

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[1] *Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams*, No. 12-155 (S.D. Ohio June 12, 2012)
[2] *McGlone v. Bell*, Nos. 10-6055, 10-6169, 2012 WL 1403233 (6th Cir. Apr. 23, 2012)

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