



Association of
Title IX Administrators

Free Speech and Responding to Protests and Activism in Educational Settings

Training & Certification Course

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The content and discussion in this training will engage with protected characteristic-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

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Introduction



The primary focus of this course is to explore free expression and protest-related issues in public and private education environments.



Practitioners will review historical and legal context of the First Amendment and discuss the school/institution's role in addressing expression, protests, and activism on school/campus grounds.



Our goal is to provide a comprehensive framework for responding to public expression, protests, and activism in a legally sound manner that supports the educational mission of schools and institutions.

Introduction to Free Expression in Education Settings

First Amendment

“Congress shall make no law respecting an establishment of **religion** or prohibiting the free exercise thereof; or 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” (1791, U.S. Constitution, amend. I.)

- Protects individuals from government interference with individual liberties
 - There is no right to speak your mind, generally, only to be free from government (state) interference in speaking your mind



Application in Education

- Shapes the rights and responsibilities of students, educators, and administrators in both public and private (indirectly) schools/institutions
- **Principles of the First Amendment:**
 - Freedom of speech and expression
 - Freedom of the press
 - Freedom of religion
 - Peaceable assembly and protest
- Application of the principles differ in the K-12 and higher education setting

Public vs. Private

- First Amendment applies differently to public and private schools/institutions
 - Guaranteed protections are intended to limit government action
- **Public:** directly bound by the First Amendment
- **Private:** not bound by the First Amendment, except in certain circumstances
 - Not considered state actors
 - Freedom to set policies according to their mission/values and contractual obligations (e.g., student handbook)
 - First Amendment standards apply to private schools in California by state law
- Private schools/institutions accepting federal funds may be subject to civil rights laws (e.g., Title VI, Title IX, ADA, and Section 504)
 - Indirectly influence First Amendment-related issues

Key Differences: Public vs. Private

Aspect	Public Schools/Institutions	Private Schools/Institutions
First Amendment Coverage	Fully bound by the First Amendment as government actors	Not directly bound; policies are based on school/institutional mission
Speech and Expression	Protected unless it disrupts education or violates reasonable limits, or is one of the exceptions	May restrict expression based on institutional values or mission
Religious Neutrality	Must remain neutral; cannot endorse or inhibit religion	May promote or require religious practices if aligned with mission
Assembly Rights	Protected with reasonable time, place, and manner restrictions	May regulate or prohibit assemblies; context is critical
Federal Funding Impact	Must comply with constitution and civil rights laws	May impose civil rights obligations (e.g., Title VI, Title IX, ADA/504)

Legal Framework Governing Free Expression and Protests

Protected Expression

Protected Expression

- Includes: political speech, symbolic speech (e.g., clothing, armbands), and peaceful protests
 - Consider dress code restrictions
- Extends to controversial or unpopular speech, provided it does not violate recognized limitations
 - Example: student newspaper articles



Seminal Cases: Unprotected Expression

<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942)	FIGHTING WORDS
<i>Miller v. California</i> , 413 U.S. 15 (1973)	OBSCENITY
<i>Brandenburg v. Ohio</i> , 39 U.S. 444 (1969)	INCITEMENT*
<i>Virginia v. Black</i> , 538 U.S. 343 (2003) <i>Counterman v. Colorado</i> , 600 U.S. 66 (2023)	TRUE THREAT
<i>Milkovich v. Lorain Journal Co.</i> , 497 U.S. 1 (1993) <i>Hustler Magazine v. Falwell</i> , 485 U.S. 46 (1988)	DEFAMATION

Protected Expression Exceptions

Disruption to Educational Environment

- Schools can regulate speech that substantially disrupts or interferes with normal school operations (*Tinker v. Des Moines Independent Community School District*, 1969)
 - Example: Protest blocks hallways or prevents instruction
- Schools may have a legitimate interest in regulating off-campus speech in certain circumstances (*Mahanoy Area School District v. B.L.*, 2021)
 - Example: Students engage in bullying or harassment

Offensive or Vulgar Speech

- Lewd, obscene, or offensive to community standards can be applied in K-12 schools (*Bethel v. Fraser*, 1986 and *Miller v. California*, 1973)
 - Example: Student delivers a sexually explicit speech during a school assembly
 - Example: Student shares sexually explicit social media posting

Protected Expression Exceptions, Cont.

Promotion of Illegal Activities

- Schools can prohibit speech that encourages illegal activities (*Morse v. Frederick*, 2007)
 - Example: Banner with the phrase “Score a goal, get a bong hit!”

Harassment and Bullying

- Speech/Expression that constitutes harassment by creating a hostile environment based on race, gender, religion, or another protected characteristic **is not protected**
- Institutions must address harassment to comply with Title VI, Title IX, and other civil rights laws (*DeJohn v. Temple University*, 3rd Cir. 2008)

Incitement and Violence

- Speech that incites imminent lawless action or violence (*Brandenburg v. Ohio*, 1969)
 - Example: Making threats against specific groups or individuals

True Threat Analysis

In analyzing a true threat, one must assess:

Whether there is a specifically expressed intent to carry out the threat that places the targeted victim in danger

- 1 Directed toward a specific person or group and in what manner
- 2 Clearly expressed intent to harm
- 3 Capable of being carried out
- 4 Objectively threatening and subjectively reckless

True Threat Analysis, Cont.

In analyzing a true threat, one must assess:

Whether there is a specifically expressed intent to carry out the threat that places the targeted victim in danger

- 5 Reasonable person standard; would a reasonable person, similarly situated, consider it a threat?
- 6 Harm incurred if carried out
- 7 Explicit and unambiguous
- 8 Context of circumstances

Understanding Forum

Traditional Public Forum

- Public through streets
- Public sidewalks

Most limited restrictions on speech, must be compelling

Designated Public Forum

- Areas designated for “free speech”
- Ex: green space

Limitations similar to Traditional Public Forum

Limited Public Forum

- Auditoriums
- Meeting rooms
- Athletic facilities

Limitations must be reasonable based on nature of the space

Non-Public Forum

- Classrooms
- Offices

Broadest limitations permitted



Application of Time, Place, and Manner in the Various Forums

Traditional Public Forum & Designated Public Forum

- A **traditional public forum** allows for the fewest number of restrictions for any form of expression
- Any limitation to the speech, assembly, or other forms of expression **must serve a significant interest** of the school/institution, such as:
 - Not disrupting the delivery of education
 - Not posing a significant health or safety risk
(but one can't speculate on the risk—it must be imminent and specific)
 - Not blocking the ingress or egress of buildings, hallways, or offices
 - Placing a priority on the use of the space to support the school/institutional mission

Limited Public Forum

- When applying limitations on speech/expression, the school/institution is only required to meet a “**reasonableness**” standard
- An activity may be limited based on the location and type of activity, but not based on the message
 - Must be related to legitimate, clearly articulated standards based on location type
 - Cannot restrict more expression than is necessary
 - Schools/Institutions must be careful about “**prior restraints of speech;**” that is anything that would be overbroad and unnecessary to allow the communication, and may limit or chill protected expression

Non-Public Forum

- Any location that the school/institution has not been opened for public discourse (e.g., classrooms, offices)
- May limit the location (forum) to its intended purpose only
- May apply limitations on the subject matter being discussed and the speaker's identity, but not based on the speaker's message
 - Example: an institution may limit classroom discussion to the course subject matter, but not on a student or instructor's opinion about what is being discussed



Time, Place, and Manner Restrictions

- Schools/Institutions have the authority to impose **time, place, and manner restrictions (TPM)** on expression

TPM Restrictions:

- **Must meet a compelling government interest standard** when the expression occurs in a public or designated public forum
- **Must aim to balance individuals' First Amendment rights** and the need to maintain order, ensure safety, and fulfill the educational mission
- **Restrictions must be implemented fairly**
- **Need only be reasonable** in a limited public forum



TPM Restriction Examples

Schools/Universities may:



Require protests to take place during times that do not interfere with classes, exams, or operations



Designate free speech zones where protests and demonstrations can occur without disrupting other activities



Regulate the size, noise level, or logistical arrangements of protests to ensure safety

Restrictions must not be so restrictive as to effectively suppress speech

Three-Step Analysis for Expression

Step 1

Are there First Amendment implications in the activity or conduct?

- Does it include any components of “expression”?
- Does it involve a group activity on school/institutional property?
 - Demonstration, protest, walkout, rally, etc.

Step 2

Are there any clear exceptions to the First Amendment?
(unprotected speech)

- Each potential exception requires an analysis of the specific set of facts presented
- Exceptions must be applied with caution and without regard to the content of the expression

Step 3

Analyze the facts identified in Steps 1 and 2 in consideration of the forum (TPM)

- Schools/Institutions can apply a content-neutral TPM restrictions after careful considerations of the facts (offer alternatives)
- Document the decision with rationale

Challenges of Social Media

- **Texas State University**

- Tenured history professor was dismissed after social media posts in which he discussed “rebellion” that the administration characterized as “incitement of violence”
- Faculty member has filed lawsuit asserting First Amendment and due process violations

- **Emory University School of Medicine**

- Non-clinical faculty member was terminated following a controversial social media post
- University cited “community concern” as the rationale for the termination

- **Arizona State University**

- Faculty member was terminated after being accused of racism on social and student media

A Few More Challenges to Explore

- **University of California, San Francisco**

- Faculty member in the medical school was fired after colleagues accused her of routinely posting antisemitic content during the Gaza war

- **St. Joseph's University**

- Faculty member alleges his termination was directly related to his Twitter posts that were critical of racial reparations
- Faculty alleges students organized to have him fired

- **Sacramento City Unified School District**

- A high school teacher was placed under investigation for questioning a DEI training module in an email to administration, arguing that it was indoctrination

Neutrality and Compelled Speech

- **Content Neutrality:** not regulating speech based on its substantive content or the message it conveys
- **Viewpoint Neutrality:** not favoring one speaker's message over another's regarding the same topic
 - Viewpoint discrimination occurs when a school/institution denies a speaker access to a forum (or funding or recognition) solely based on the speaker's viewpoint on an otherwise allowable topic
- **Compelled Speech:** forcing individuals to express messages or adopt viewpoints with which they don't agree
 - Example: Apologies

Student Newspapers and Student Organizations

Student Newspapers

Challenging issue for schools and institutions:

- Courts tend to apply the U.S. Supreme Court opinion in *Hazelwood School District v. Kuhlmeier* (1988), a K-12 case, to higher education institutions as well (see *Hosty v. Carter*, 7th Cir. 2005)
- An institution's actions fall within the “safe zone” for institutional limitations when they serve a legitimate educational purpose
- Schools should apply the “forum analysis” to determine if school newspaper is a public or non-public forum
 - Determines the degree of control or limitations that can be applied
 - The school/institution has greater control if the student newspaper is subsidized by school/institutional funds

Student Organizations

- *Healy v. James* (1972) established the right for students to create organizations; subject to institutional standards
 - Students for a Democratic Society (SDS) was denied student organization recognition based on belief that the group's philosophy was "antithetical to the institution's policies"
 - U.S. Supreme Court held that public institutions are not immune from First Amendment protections
 - Student groups cannot be denied recognition for purely ideological reasons
 - Denial of recognition was a form of "prior restraint" of expression
- *Papish v. Board of Curators of University of Missouri* (1973) reaffirmed that public universities cannot punish students for indecent or offensive speech that does not disrupt campus order or interfere with the rights of others

Academic Freedom and the First Amendment

Academic Freedom Principles

- Courts recognize the relationship between Academic Freedom and the First Amendment
- **Academic Freedom:** the freedom to teach includes the right of faculty members to select the materials, determine the approach to the subject, make the assignments, and assess student academic performance in teaching activities for which they are individually responsible (AAUP)
 - **Applies:**
 - To public and private higher education institutions
 - Inside and outside the classroom
 - Extends rights within the educational context of teaching, learning, and research
 - Includes protections for the institution, faculty, and students

Faculty Speech

- Balancing test applied to the First Amendment rights of the instructor vs. the rights of the institution to maintain a non-disruptive environment
- Instructors may not create a hostile environment
- Instructors will likely be protected if:
 - Comments are relevant to course content
 - Speech is pedagogically appropriate to advancing the academic message
 - Language is not used to be gratuitously shocking
- Off-campus faculty speech/expression



Meriwether v. Hartop

992 F.3d 492 (6th Cir. 2021)

Facts

- In 2016, Shawnee State University (SSU) informed faculty “they had to refer to students by their ‘preferred pronouns’”
- Meriwether, a tenured faculty member, referred to a student (Doe) who presented as male as “sir” (he used formal pronouns for all students). Doe approached Meriwether and demanded to be referred to using female titles and pronouns.
- Meriwether said his religious beliefs prevented him from complying with the student’s demands
- Doe filed a complaint, SSU investigated, and found Meriwether responsible for creating a hostile environment
- Meriwether was given a formal documented warning that could lead to additional progressive discipline
- Meriwether argued that he couldn’t use female pronouns with Doe because of his religious convictions

Meriwether v. Hartop

992 F.3d 492 (6th Cir. 2021)

Decision

- Meriwether lost at the trial court level, the Court of Appeals overturned the decision and found in favor of Meriwether
- The Court held that under Supreme Court decisions and Sixth Circuit precedent, the First Amendment protects the academic speech of university professors
 - “The First Amendment protects the right to speak freely and right to refrain from speaking...and the government may not compel affirmance of a belief with which the speaker disagrees”
 - Citing to the *Tinker*¹ 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”

¹ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)

Non-Faculty Speech Rights

- Employers are generally free to create reasonable restrictions on employee speech/ expression while they are at work
- Courts balance the employee's right to free speech against the employer's interests in a disruption-free workplace
- To determine if expression is too disruptive, consider whether the expression:
 - Impacts close working relationships
 - Interferes with the employer's normal business operations
 - Impacts on-the-job discipline
- Important considerations for off-campus employee speech, set forth in:
 - *Pickering v. Board of Education*, U.S. Supreme Court, 1968
 - *Connick v. Meyers*, U.S. Supreme Court, 1983

Addressing Speech, Harassment, and Discrimination

School/Institutional Obligations

- Obligation to address discrimination under Title VI, Title VII, Title IX, and Section 504
- Includes speech/expression that constitutes harassment or creates a hostile environment based on protected characteristics
- First determine whether the speech/expression is protected
 - If not, respond **promptly** and **effectively** to stop, prevent, and remedy discrimination and harassment

1

STOP discriminatory conduct

2

PREVENT recurrence, on both individual and institutional levels

3

REMEDY the effects of discrimination, on both individual and school/institutional levels

Hostile Environment Standards

TITLE VI

Subjectively **and** objectively offensive; **and** so severe **or** pervasive; that it limits or denies a person's ability to participate in **or** benefit from the Recipient's education program or activity

TITLE IX

Objectively offensive; **and** severe **and** pervasive; interferes with an individual's access to education

TITLE VII

Subjectively **and** objectively offensive; **and** severe **or** pervasive; alters the terms or conditions of a person's employment

SECTION 504

Severe, pervasive, **or** persistent...

Addressing Harassment

Schools/Institutions should:

- **Promptly address harassment**
- **Evaluate the conduct** to ensure it is not protected speech/expression
- **Clearly communicate school/institutional policies** regarding free speech, unprotected speech, and harassment
- **Follow policies and procedures** for each speech-related harassment allegation; ensuring consistency, fairness, and transparency
- **Record incidents** and school/institutional responses to demonstrate compliance with federal and state laws
- **Know your Title** – Title VI, for example, does not make the distinctions between on-campus and off-campus conduct that other Titles (like IX) may

Case Study

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Student Display

A group of students hung up posters that had swastikas and iron cross on the walls in the school cafeteria/dining area of the student union. There are many other posters on the walls, most advertising upcoming events or concerts or advertising for local establishments.

The incident escalates when students who were offended begin chanting and recording videos for social media.

This causes heightened emotional distress, counter protesting, and widespread online discussions.

How should the school address posting in the cafeteria/student union?

Is the posting protected by the First Amendment?

Is the counter protest permissible? Should they be disciplined?



Addressing Off-Campus Speech

Mahanoy Area School District v. B.L.

594 US 180 (2021)

Facts

- B.L., a student, was suspended from the cheerleading team for one year for violating team and school rules by posting a picture of herself on Snapchat with the caption, “Fuck school fuck softball fuck cheer fuck everything” after she made the junior varsity rather than the varsity team
 - Snap was posted off-campus
- B.L. sued the school under 42 U.S.C. § 1983 alleging that (1) her suspension from the team violated the First Amendment; (2) the school and team rules were overbroad and viewpoint discriminatory; and (3) those rules were unconstitutionally vague

Mahanoy Area School District v. B.L.

594 US 180 (2021)

Decision

- Schools retain a special interest in regulating speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others,” but the interest is diminished for off-campus speech
- Schools may regulate student speech on campus and in school:
 - Indecent, lewd, or vulgar speech,
 - Speech promoting illicit drug use during a class trip, and
 - Speech that others may reasonably perceive as “bear[ing] the imprimatur of the school”

Mahanoy Area School District v. B.L.

594 US 180 (2021)

Takeaways

- The Court overruled aspects of the Third Circuit's majority opinion in *Tinker* determining that its stance on off-campus speech was overly broad. The ruling acknowledged that schools may have a legitimate interest in regulating off-campus speech in certain circumstances, particularly when it involves harassment or bullying.
- The Court stated, “the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory”
- In concurrence, Justice Alito noted that the opinion does not apply to **public colleges or universities, or private schools**

Chen v. Albany Unified School District

No. 20-16540 (9th Cir. 2022)

- High school student Kevin Chen created a private Instagram account where he posted offensive memes targeting classmates and teachers
- The posts were made off-campus, but some students felt harassed, leading to complaints
- The school disciplined Chen, arguing that the posts created a hostile environment for the school community
- Chen then sued on the grounds that his off-campus speech was protected by the First Amendment
- **The court ruled in favor of the school**, stating that speech that leads to harassment or a significant disruption to the school's climate, even if it occurs off-campus, can be regulated. Individuals should expect private posts could be made public.

Case Study

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Faculty Speech

A political science faculty member at a public university (or teacher at a public K-12 school) has posted to their Instagram and X accounts being critical of the institution's response to an on-campus/in-school protest and counter-protest related to U.S. involvement in the Israeli and Hamas conflict in the middle east.

The political science department chair/school principal requests a meeting with the faculty member to discuss their social media post and encourages the faculty member to refrain from additional posting as it could impact their tenure review/opportunities for promotion.

**Does this violate the faculty member/teacher's free speech rights?
Why or why not?**

Right to Assemble

Right to Assemble

- Fundamental component of the First Amendment
 - Guarantees individuals the freedom to gather peacefully for expressive purposes
 - In public schools/institutions this right is upheld but subject to certain limitations to balance educational objectives
 - Includes organizing meetings, forming groups, and participating in demonstrations or protests on school/institutional property
- **Limitations include:**
 - TPM restrictions
 - Disruption of educational activities
 - Credible threat to safety of students, employees, or property
- **Any restrictions imposed must be content neutral**

Heckler's Veto

A **Heckler's Veto** occurs when:

- A speech or event is canceled/censored by an institution as the result of the anticipated reaction of an audience or protesters, rather than the nature of the speech itself, **or**
- A representative of the public school/institution accepts limits or restrictions on speech that overrides another speaker
- The First Amendment protects speech from government suppression, including at public schools/institutions
 - Schools/Institutions cannot suppress speech solely because it provokes reaction
 - The decision to suppress speech should not be based on the fear of disruption, violence, or backlash, but rather on content-neutral principles

School/Institution Responsibilities

Monitor Demonstrations

- Remain vigilant about how protests may affect the learning environment
- Balance free speech rights while ensuring demonstrations do not create a hostile environment

Respond to Discrimination and Harassment Complaints

- Have clear procedures for reporting and addressing discrimination
- If protests escalate into harassment or threats, schools/institutions are required to investigate and take action
- **Provide safe spaces for expression and counter-speech**
 - Create policies that allow students to express their perspectives without fear of discrimination
 - Ensure counter-protests and discussions do not silence or intimidate specific groups

Responding to Protests and Activism



Responding to Protests and Activism: Establish Protocols

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Establish Protocols

- **Establish clear, neutral policies**
 - Publish, update, review with legal counsel, communicate to community
 - Adopt a response protocol
- **Build positive relationships**
 - Ensure open lines of communication with student groups and employees
 - Identify an individual to oversee or implement the dialogue between the administration and school community

Adapted from: IACLEA Guide for University Presidents to Handle Protests and Demonstrations



Establish Protocols, Cont.

- **Implement training and education**
 - Educate students and staff on the difference between free speech and harassment
 - Regular training for school resource officers (SRO)/public safety and staff on de-escalation techniques and respectful engagement
- **Create a crisis management plan**
 - Practice scenarios, drills, and tabletop exercises
- **Develop MOUs with law enforcement**

Adapted from: IACLEA Guide for University Presidents to Handle
Protests and Demonstrations





Responding to Protests and Activism: Essential Actions

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Essential Actions During an Event

- **Communicate**

- Maintain open, transparent communication with protest organizers
- Use social media to inform campus about ongoing events and safety measures

- **Supportive Presence**

- Ensure SRO/public safety is visible but not intimidating
- Role of SRO/public safety should be to facilitate protest, not inhibit it
- Provide necessary resources (e.g., first aid, water, restrooms)

- **Respect and Engagement**

- Approach protest with a respectful and empathetic attitude
- Consider meeting with protest leaders to listen to concerns

Adapted from: IACLEA Guide for University Presidents to Handle Protests and Demonstrations

Safety and Security

- Prioritize safety of all participants, bystanders and school/campus property
- Ensure law enforcement/security staff receive specific training on managing crowds and protests
- Be prepared to call in additional resources if situation escalates

Adapted from: IACLEA Guide for University Presidents to Handle
Protests and Demonstrations





Responding to Protests and Activism: Following an Event

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Incident Response

- Release an approved statement for inquiries to send to community and stakeholders (when appropriate)
- **Respond to complaints fairly and promptly**
 - Identify a trained administrator to conduct an immediate inquiry (if necessary)
 - Investigate all reports of discrimination or harassment
 - Take corrective action if a protest results in a hostile environment

Disciplinary Referrals

- Not all behavior will rise to the level of a policy violation
- Policy violations should be routed through student conduct/discipline or human resources with all due process rights intact; can be challenging in mass protest situations
- Behavior that does not substantiate a policy violation can still be addressed
 - Should be non-punitive and voluntary
 - Must not retaliate against any individual for exercising their First Amendment rights
 - May include referral to support services, behavioral intervention and threat assessment, etc.



Bias Response Team Considerations

Bias Response Team Considerations

If a school/institution maintains a Bias Response Team (BRT), it should:

- Clearly define the BRT mission and scope
 - Align with school/institution's values
 - BRT should not be the vehicle to refer, investigate, or adjudicate potential policy violations
 - Focus on community education and support outreach
- Develop and publish comprehensive BRT protocols
- Establish available resources and education tools/techniques

Speech First, Inc. v. Schlissel Takeaways

1

Policies & Practices

- Should not carry implied threats of discipline

2

Adverse Impact

- Institutions need to clearly define prohibited behaviors

3

Challenging Policy

- Campus chapters of national organizations may have associational standing to sue

4

Bias Response Teams

- Use BRTs as a resource and not the speech and behavior “police”



School/Institution Considerations

Community-Wide Impact Considerations

- Protests, demonstrations, and incidents involving expression issues can become catalysts for ongoing and wide-reaching school/institution impact

Supportive Measures

- Non-punitive, individualized supports
- Designed to restore or preserve access to the education environment, ensure safety, and prevent future harm
- Can be implemented without formal disciplinary action
- Temporary; should be timely and fair

Remedial Actions

- Designed to address the root causes of the incident, repair harm, and prevent recurrence
- Should always be considered, regardless of any policy violation(s)
- Demonstrate the school/institution's commitment to addressing potential harassment and supporting free expression

Questions

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