
Congressional Hearing Examines Free Speech and Tax Constraints on Campus Political Activity

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Campuses across the country are wrestling with how free speech, tolerance, diversity and politics mix in a higher education environment. Recently, the Oversight Subcommittee of the House Ways and Means Committee examined the intersection of an institution's 501(c)(3) status and campus policies that regulate partisan political activity. With the presidential election approaching and Congress soliciting reports of censorship on campuses, schools should consider reviewing their campus political activity policies.

Congressional Hearing

The subcommittee hearing was titled “Protecting the Free Exchange of Ideas on College Campuses.” The impetus for the hearing was the experience of a student at a leading national university who struggled to get approval for campus activities supporting the presidential campaign of Senator Bernie Sanders. The administrator dealing with the student withheld approval over concern that student use of campus resources for partisan political activity might jeopardize the university's 501(c)(3) status. The university later recognized that such concerns were unfounded and has taken steps that the student acknowledged to be “undeniably positive” to clarify its policies.

The student noted that his experience was “just one example of a much broader problem.” Other witnesses agreed. Catherine Sevcenko, director of litigation at the Foundation for Individual Rights in Education, provided several instances of colleges invoking their 501(c)(3) status to restrain political activity. At one Midwestern university, for example, administrators prohibited College Republicans from hosting former Massachusetts Senator Scott Brown on campus in light of his announced intention to run for office in New Hampshire.

Such measures are unnecessary, University of Miami School of Law Professor Frances Hill explained, because of IRS rules governing when conduct is “attributed” to an educational institution:

- *For students*—Professor Hill pointed to IRS guidance that “[t]he actions of students generally are not attributed to an educational institution unless they are undertaken at the direction of and with authorization from a school official.”¹ Thus, the use of university facilities or resources alone does not convert student partisan political activity into

university conduct.

- *For faculty and administrators*—Professor Hill explained that school employees can engage in political speech in their private capacities. However, the authority of certain employees to speak and act on behalf of the institution could raise issues. She noted the importance of having appropriate policies in place to govern employee partisan political activity.

The hearing also covered a broad range of other campus speech issues. Congress is actively engaged on campus speech issues, and the subcommittee created an email address (campus.speech@mail.house.gov) to receive reports of censorship on campus.

How Should Educational Institutions Respond?

With congressional attention rising and the presidential election season heating up, educational institutions should consider the following steps:

- Review policies governing political activity by students to verify that unfounded 501(c)(3) concerns are not driving the promulgation or application of restrictive policies. While there may be sound pedagogical reasons for regulating certain types of partisan political activity, any restrictions should be expressly grounded in bona fide educational considerations.
- Ensure that policies governing partisan political activity by faculty and employees are clear and provide appropriate safeguards for the institution's 501(c)(3) status.
- Train administrators who interact with students, faculty and staff on issues of free speech and political activity to recognize the complexity of these matters, and consult with legal counsel whenever necessary.

WilmerHale has substantial experience counseling educational institutions on the development and enforcement of policies with the purpose or effect of regulating speech, as well as anticipating and addressing federal oversight. We would be pleased to speak with you about how to evaluate and enhance your school's policies, as well as how to address current and potential free speech controversies on your campus.

¹ Kindell & Reilly, *Election Year Issues*, IRS Exempt Organizations Continuing Professional Education (CPE) Technical Instruction Program 365 (2002).

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