

## UTAH SYSTEM OF HIGHER EDUCATION INSTITUTIONAL NEUTRALITY AND SPEECH GUIDANCE<sup>1</sup>

“[T]he hallmark of higher education is its position as the marketplace of ideas, where community members may freely express all ideas and viewpoints...”<sup>2</sup> “Institutions have a solemn responsibility not only to promote the freedom to debate and scrutinize all ideas in appropriate forums but also to protect that freedom when others attempt to restrict it.”<sup>3</sup>

### I. Institutional Neutrality

#### A. What Is Institutional Neutrality?

“Institutional neutrality” means that an institution of higher education does not take positions on political, social, or cultural controversies, public debates, or flashpoint moments except when those issues impede the institution’s mission or functioning, its role as a discoverer and disseminator of knowledge, or its values of free expression and inquiry.<sup>4</sup>

The instrument of dissent and criticism is the individual faculty member or the individual student. The university is the home and sponsor of critics; it is not itself the critic. It is, to go back once again to the classic phrase, a community of scholars. To perform its mission in the society, a university must sustain an extraordinary environment of freedom of inquiry and maintain an independence from political fashions, passions, and pressures. A university, if it is to be true to its faith in intellectual inquiry, must embrace, be hospitable to, and encourage the widest diversity of views within its own community. It is a community but only for the limited, albeit great, purposes of teaching and research. It is not a club, it is not a trade association, it is not a lobby.<sup>5</sup>

As directed by the Utah Board of Higher Education (Board), institutions in the Utah System of Higher Education (USHE) must maintain institutional neutrality.

Institutions, as governmental entities, or employees acting in their official capacities as representatives of the institution must refrain from taking public positions on political, social, or unsettled issues that do not directly relate to the institution’s mission, role, or pedagogical objectives. This

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<sup>1</sup> This guidance document was developed at the Utah Board of Higher Education’s direction by the Board’s Free Expression Advisory Committee and was finalized on October 15, 2024.

<sup>2</sup> *Resolution of Freedom of Expression*, Utah Board of Higher Education (May 18, 2023), 1.

<sup>3</sup> *Resolution Establishing Expectations for Implementing Principles of Free Expression on Campuses*, Utah Board of Higher Education (Dec. 1, 2023), 2-3.

<sup>4</sup> This definition was inspired by the *Kalven Committee: Report on the University’s Role in Political and Social Action*, University of Chicago (1967).

<sup>5</sup> *Kalven Committee: Report on the University’s Role in Political and Social Action*, University of Chicago (Nov. 11, 1967), 1.

does not mean faculty, staff, or students must remain neutral; indeed, institutions should promote a culture that encourages and celebrates forums in which faculty, students, staff, and community members may express conflicting, controversial, or unpopular viewpoints. A fundamental mission of higher education is to promote the exchange of knowledge and ideas through teaching, research, critical evaluation, civil discourse, and debate. Neutrality as an entity allows the institution to protect this mission by supporting those who engage in open, rigorous debate without disaffecting segments of its faculty, staff, and students whose sincerely held beliefs conflict with others. The institution can thereby fulfill its responsibility to be an impartial steward of the marketplace of ideas in which sincerely held viewpoints are subject to rigorous scrutiny and must withstand the challenge of open debate and critical examination on their own merits, not the institution's endorsement.<sup>6</sup>

USHE institutions must refrain from taking positions on social and political issues to allow students, staff, and faculty members to speak out robustly and candidly, resulting in educational environments in which a large spectrum of thoughts, opinions, and ideas can be explored and flourish.

In keeping with institutional neutrality, an institution may:

- Provide forums for, and invite speakers to speak on, political or social issues if it does so in a reasonably neutral manner, providing opportunities for listeners to hear opposing speakers and/or other viewpoints. Institutions may determine which guest speakers to invite. While the institution should seek balance among viewpoints, institutional neutrality does not require there to be an exact balance between speakers of differing viewpoints.
- Host events or activities based on political or social issues. When guest speakers are invited by non-university entities, such speakers and participants may generally<sup>7</sup> present their views without censorship, in compliance with the institution's free speech policies. Institutions may determine which guest speakers to sponsor, but themselves must remain viewpoint neutral.
- Structure student clubs in various ways, such as formal administrative units of the institution or informally associated clubs that operate more independently. For example, student government is generally structured as an administrative unit of the institution, whereas a gardening club may be an informally associated club. Student organizations operating as formal administrative units are subject to institutional neutrality. Student clubs not formally designated or treated as administrative units are not considered to be acting on behalf of the institution

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<sup>6</sup> *Resolution Establishing Expectations for Implementing Principles of Free Expression on Campuses*, Utah Board of Higher Education (Dec. 1, 2023), 1.

<sup>7</sup> The First Amendment allows institutions to limit illegal speech including that which incites imminent lawless action, or is obscene, threatening, or defamatory.

and are excluded from institutional neutrality requirements. However, institutions are expected to offer recognition or benefits (if any) to informally associated clubs on a viewpoint neutral basis.

Except as outlined herein, an institution may not:

- Make statements taking a position on an issue, movement, candidate, or group that is political or social in nature;
- Expend public funds or use an institution email for a political purpose or to advocate for or against a ballot proposition or referendum under Utah Code sections [20A-11-1203](#) and [1205](#); or
- Post logos or symbols that support a particular political or social movement in any forums that the university has reserved for institutional expression, such as institution buildings (including outward facing windows, doors, walls, or fences), office common areas, publications, advertising, or websites, etc. Restrictions on private expression in nonpublic forums should be consistent and not selectively enforced based on a speaker's topic or viewpoint. This guidance does not require institutions to establish new non-public forums or prohibit institutions from opening a non-public forum to private expression.

## **B. What are the Limits of Institutional Neutrality?**

Institutional neutrality should not be interpreted to:

- Restrict curriculum or assigned student speech in curricular contexts (e.g., argumentative essays) that are reasonably related to legitimate pedagogical objectives<sup>8</sup>;
- Prohibit individual members of the institution community from posting logos or references to social or political groups or issues inside their assigned, non-public spaces;
- Prohibit approved posting in accordance with the institution's free expression policies;
- Prohibit institutions from encouraging in a neutral manner campus communities to vote or otherwise participate in democratic processes;
- Limit academic freedom<sup>9</sup>;
- Prohibit a faculty member from providing an expert opinion on an issue related to their discipline, or otherwise restrict their constitutional speech rights;

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<sup>8</sup> See *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).

<sup>9</sup> See Utah Board of Higher Education Policy R481-3.3.

- As pedagogically appropriate and consistent with policies governing academic freedom, prohibit a faculty member from expressing views on political or social issues in their teaching, research, or scholarship;
- Prevent an institution from flying an American, State of Utah, or institution flag; or
- Prohibit institutional speech on myriad matters that do not implicate political, social, or unsettled issues (e.g., messages cheering for sports teams or welcoming students back in the fall).

## II. Institutional Speech

### A. When Is an Institution Speaking?

Neither the Board’s Resolution nor [HB 261](#) abridge the First Amendment rights of individuals who are authorized to speak for the institution, to take, express, and assert personal opinions and positions in their *personal* capacities, consistent with First Amendment principles. However, such individuals, and any individual who, based on the circumstances, may be considered by a reasonable person to be speaking on behalf of the institution, should expressly differentiate personal expression from institutional speech, such as by including a statement that their views are not intended to reflect the views of the institution.<sup>10</sup> Institutional letterhead, email accounts, and social media platforms should not be used by employees when they are expressing their personal views.

An institution may regulate employee speech in accordance with First Amendment principles.<sup>1112</sup>

Institutional speech may be found not only when an institution’s leader or employee is speaking orally or in writing, but also when an institution engages in symbolic speech. An institution engages in nonverbal, symbolic expression when (1) the institution intends to convey a particularized message via conduct or symbol, and (2) there is a strong likelihood that the message will be understood by those who view it.<sup>13</sup> Symbolic expression can include actions such as flying flags, illuminating monuments with colors or patterns associated with a particular message, modifying logos, or participating in parades, marches, or sit-ins. The intended and perceived message will depend heavily on the circumstances of the symbolic act.

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<sup>10</sup> When deciding whether to include a disclaimer, subject matter experts should consider the context. For example, a department head writing a letter to the editor expressing personal views regarding a political or social issue should include a disclaimer but need not provide a disclaimer when speaking to a news outlet as a subject matter expert.

<sup>11</sup> See *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist.*, 391 U.S. 563 (1968).

<sup>12</sup> See *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>13</sup> *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

The guidelines stated below regarding authority to speak on behalf of an institution also apply to symbolic speech. An unsanctioned modification to an institution's graphic, for example, would not be imputed to an institution unless later endorsed or used by the institution.

### **1. Speech by Institution President**

An institution president is authorized to speak for their institution on all matters. Their messages on institutional matters, when made in a context reasonably understood as an official pronouncement of the institution, are presumed to be "institutional" expression absent an express disclaimer.

### **2. Speech by Other Institution Leaders**

Absent an express disclaimer, an institution employee is presumed to be speaking on behalf of the institution when they make a statement representing the institution or one of its constituent colleges, divisions, departments, programs, or a significant decision-making committee in a context reasonably understood as an official pronouncement for the portion of the institution within their authority.

### **3. Speech by Other Institution Employees**

An institution employee is engaging in institutional speech when making a statement as a designated spokesperson for an institution or one of its subunits in a context reasonably understood as an official pronouncement for the portion of the institution for which they have been authorized to speak. This may include content decision-makers for official institutional publications and social media accounts, or employees charged with media relations responsibilities for the institution.

The following circumstances indicate that an employee's statement may be institutional in nature. When making this determination, each condition should be considered in context, and a single condition standing alone may be insufficient to find that an employee is engaging in institutional speech.

- The employee has been granted authority to speak on behalf of the institution by the president, institution leadership, or by statute, ordinance, regulation, job description (examples of explicit grants of authority), custom, or usage (examples of implicit grants of authority);
- The employee is utilizing communication channels commonly or regularly used for institutional communication, e.g., an institution email;
- The message is closely controlled by institutional leadership;
- The employee is purporting to speak on behalf of the institution, or otherwise acting in a manner such that they would likely be perceived by the public as speaking on behalf of the institution; and/or

- With the exception of a professor who is speaking as part of their teaching responsibilities, the employee is speaking as part of their responsibilities for the institution.

Depending on the circumstances, communications, whether formal or informal, may be considered institutional, and a disclaimer may be warranted.

Individuals who serve as advisors to informally associated student clubs should be made volunteers acting in their personal capacity. Institution employees who serve as advisors to these clubs may not act on behalf of or speak for the institution and must make express disclaimers, as needed.

#### **4. Legislative Communications**

Absent an express disclaimer, the institution president, a senior vice president, legislative liaison, or another employee designated by the president speaking on legislative matters is presumed to be speaking on behalf of the institution under [Board Policy R250](#). Other employees will not be presumed to have the authority to speak for the institution on legislative matters.

#### **B. Institutional Speech Guidelines**

##### **1. When An Institution Cannot Speak**

In addition to remaining neutral on political and social issues, in accordance with [HB 261](#), an institution may not take, express, or assert a position or opinion on:

- Anti-racism;
- Bias;
- Critical race theory;
- Implicit bias;
- Intersectionality;
- Prohibited discriminatory practices;<sup>14</sup> or
- Racial privilege.

An institution may not speak in a way that would materially impair students' or employees' First Amendment freedoms as defined by law.

##### **2. When An Institution May Speak**

An institution may speak, even when related to social or political matters, on issues that directly, significantly, or specifically affect its mission, role, or pedagogical objectives, e.g., education, research, service, or academic freedom including:

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<sup>14</sup> “Prohibited discriminatory practice” is defined by [Utah Code section 53B-1-118\(1\)\(c\)](#). An institution also may not assign a third party to engage in prohibited discriminatory practices on the institution's behalf.

- The functioning of the institution;
- Campus safety;
- In recognition of holidays as provided in either the Utah Code or United States code;
- Commitment to the rule of law, including freedom of expression;
- Policy or legislation that affects one of its core missions, e.g., education, teaching, research, service, or academic freedom; and
- Addressing community members' expression that is not protected by the First Amendment.<sup>15</sup>

When events arise that do not directly, significantly, or specifically affect its mission, role, or pedagogical objectives, an institution may comment to reaffirm its mission and commitment to civility, nondiscrimination, and diversity of viewpoints, to reaffirm support and value for its students and employees, and to share resources when appropriate. For example, an institution may respond to the following circumstances:

- Events or expressive activities that make members of the institution's community fear for their physical safety;
- Events or activities that have a significant impact on the institution's community; or
- A troubling event that directly affects students, faculty, or staff, such as the death of a current or former student, faculty member, or staff member.

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<sup>15</sup> Speech that is not protected by the First Amendment may include but not be limited to speech that incites imminent lawless action, is obscene, threatening, defamatory, or appears to create a hostile environment based on sex or a protected class as defined by state or federal law.