



State of West Virginia
Office of the Attorney General

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Dear West Virginia College and University Presidents:

America's colleges and universities are in trouble.

Since the horrific events in Israel on October 7, anti-Israel groups have raised an uproar over Israel's subsequent response. Too often, those voicing concerns have devolved from protesters into chaos agents on college campuses. At UCLA, police were forced to "quell[] the violence" among protesters.¹ At Columbia, students and others constructed encampments and eventually took over a campus building by force.² At Berkeley, protesters broke into a violent brawl.³ At DePaul, pro-Palestinian protesters threatened to spear a Jewish student with a flagpole and made violent gestures toward pro-Israel supporters.⁴ And on and on.

Altogether, protesters like these "have taken over dozens of college campuses nationwide."⁵ In response, "[m]ore than 2,500 people have been arrested or detained on campuses across the country."⁶

With some groups promising to expand their protests to other campuses, I write to provide guidance about how you can respond. Normally, I'd trust that West Virginians could avoid the problems that we've seen elsewhere. But unfortunately, many of these protesters aren't affiliated with the schools they are occupying. At some schools, these outsiders represented as many as 60% of the protesters.⁷ Some are even affiliated with foreign terrorist organizations.⁸ Given that reality, it's no longer enough to trust in the protesters' good faith. You need to be prepared.

To be clear, the First Amendment matters. The "freedom to think and speak" is an "inalienable human right[]." ⁹ Indeed, "[i]f there is any fixed star in our constitutional constellation, it is that

¹ *Violence breaks out at some pro-Palestinian campus protests*, CBS NEWS (May 1, 2024), <https://tinyurl.com/45t23axt>.

² *Id.*

³ *Fight at UC Berkeley pro-Palestinian encampment leaves several people injured*, CBS NEWS (May 2, 2024), <https://bit.ly/4btw7R0>.

⁴ @StopChiAntisems, TWITTER (May 5, 2024, 4:29 PM), <https://tinyurl.com/3be2zt34>.

⁵ Nick Robertson, *Brown University agrees to hold Israel divestment vote after pressure from student protesters*, THE HILL (April 30, 2024), <https://tinyurl.com/5hf4vkhx>.

⁶ *Where Protesters on U.S. Campuses Have Been Arrested or Detained*, N.Y. TIMES (May 6, 2024, 2:30 PM), <https://tinyurl.com/3p54ssw2>.

⁷ Shimon Prokupez, Mark Morales, and Celina Tebo, *Here's what we know about those arrested at NYC pro-Palestinian campus protests Tuesday night*, CNN (May 2, 2024, 8:50 PM), <https://tinyurl.com/mr4akmx5>.

⁸ Dan Diker, *Students for Justice in Palestine Unmasked*, JERUSALEM CENTER FOR PUBLIC AFFAIRS (2018), <https://tinyurl.com/y96xe5js>.

⁹ *303 Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023).

no official ... can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”¹⁰ “Freedom of thought and speech is indispensable to the discovery and spread of political truth.”¹¹

So the First Amendment is “hostil[e] to content-based regulation” of speech.¹² In other words, the “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹³ And “speech on matters of public concern ... is at the heart of the First Amendment’s protection.”¹⁴ These notions must always be kept top-of-mind when dealing with protest.

But these principles don’t immunize the kinds of behavior we’ve seen recently. The First Amendment does not protect “[t]rue threats of violence.”¹⁵ Nor does it shield statements “directed [at] producing imminent lawless action” and likely to do so.¹⁶ So you need not permit acts, threats, or incitements of violence, even if protesters and instigators commit them in the guise of free speech. What’s more, all expression—including protest in a public forum—“is subject to reasonable time, place, or manner restrictions.”¹⁷ To be permitted, restrictions like these need only be content-neutral, narrowly tailored, and leave open ample alternative channels.

Given all that, your institutions can and should do several things to prevent out-of-control protests from poisoning our campuses as they have in other places.

First, enforce your school’s existing code of conduct. Your schools’ codes of conduct already prohibit much of the troubling behavior we’ve seen on other campuses. Although many other schools seem reluctant to enforce their policies, West Virginia’s schools shouldn’t be. For instance, some of you have policies against “[r]ioutous behavior and hooliganism.”¹⁸ These policies prohibit actions that “threaten[], present[] a danger to, or terrorize[] the public” and would cover the dangerous behavior we’ve seen at other schools.¹⁹ Likewise, you should enforce policies that ban the “[i]ntentional disruption or obstruction of teaching, research, administration, disciplinary proceedings or other University activities” when protesters try to take over the campus.²⁰ And policies against “[i]ntimidation” should squarely prohibit the concede-or-else tactics that extremist protesters have used against school administrators at other institutions.²¹

Second, and relatedly, you must take your harassment policies seriously. We’ve seen rampant antisemitism from many of the protests at other schools, putting Jewish students in imminent

¹⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹¹ *303 Creative*, 600 U.S. at 584.

¹² *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980).

¹³ *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

¹⁴ *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (cleaned up).

¹⁵ *Counterman v. Colorado*, 600 U.S. 66, 72 (2023) (cleaned up).

¹⁶ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

¹⁷ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

¹⁸ W. VA. UNIV., *Student Conduct Code and Discipline Procedure for the Main Campus of West Virginia University* R. 6.2(e), <https://tinyurl.com/mkrwusc3>.

¹⁹ *Id.*

²⁰ MARSHALL UNIV., *Student Rights and Responsibilities* R. 5.2.2.9, <https://tinyurl.com/4u33eves>.

²¹ *Id.* R. 5.2.2.14.

danger.²² Harassment policies are critical, as they protect the safety (and even lives) of your students. If students are intimidated—or have their lives interfered with because of their beliefs, religious creed, or other protected status—you must act swiftly and certainly.²³ Suspensions or expulsions should be on the table. Students should be educated on how to obtain protective orders if need be. Remember that if you fail to act with appropriate haste, you could create difficulties for your institution under Title VI of the 1964 Civil Rights Act and similar non-discrimination laws.

Third, you can **implement new policies using content-neutral standards** if current ones aren't enough. These new policies might include creating specific areas (such as spots away from building doors) or times (such as during the daytime) designated for protesting. If you have not already adopted them, you should also consider whether to implement (1) noise limits, (2) constraints on erecting structures (including tents and other camping structures),²⁴ (3) prohibitions on the possession of dangerous articles (consistent with West Virginia campus carry laws), and (4) limits on the number of people who can gather in one place. All these actions advance non-discriminatory, content-neutral purposes like ensuring safety, minimizing disruption to academic activities, and preserving sanitary and habitable conditions for students. Similarly, to reduce the danger that anonymity can create, you could ban full-face masking on campus with certain exceptions.

Fourth, you should **consider working with local law enforcement to create response plans**. That way, if the worst happens and violence does occur, your campus will be better able to allow law enforcement to restore safety.

Fifth, you should be ready to **call on law enforcement to enforce relevant criminal law**. Some have insisted that criminal penalties are unjustified because protesters are purportedly acting with a public-minded purpose. But good intentions do not justify bad actions. And applying our laws with an even hand does not threaten peaceful protesters. Especially when outside, non-student agitators are coming onto campus and moving beyond speech, it is right for criminal authorities to respond. When things get out of hand, several parts of the West Virginia Code might be implicated:

- § 61-1-5: unlawful speeches, publications, and communications
- § 61-2-10b: assault on governmental representatives
- § 61-3-30: destruction of property
- § 61-3-48a: damage to trees and plants
- § 61-3B-4: trespass on student-facility premises of a higher-education institution
- § 61-5-17a: obstructing a law-enforcement officer
- § 61-6-1a: rioting; violation of a lawful order during an unlawful assemblage
- § 61-6-1b: disorderly conduct
- § 61-6-6: rioting and destroying college property during a riot
- § 61-6-14: disturbance of schools

²² See, e.g., *Jewish groups call for action from NYC council to address antisemitism amid protests*, ABC7NY (May 1, 2024), <https://tinyurl.com/nexjtk7> (noting antisemitic incidents more than doubled from the previous year following Hamas's October 7 attack on Israel).

²³ See, e.g., SHEPHERD UNIV., *Student Code of Conduct* Section 2500, <https://tinyurl.com/5an6w8sk> (harassment policy).

²⁴ See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 292, 294 (1984) (upholding a ban on "symbolic tents" against a First Amendment challenge).

- § 61-6-14a: loitering on school property
- § 61-6-21: violating others' civil rights
- § 61-6-22: wearing masks and face coverings
- § 61-6-24: terroristic threats

Although prosecuting attorneys always bear final responsibility for deciding what charges might be appropriate in each case, you should work with the authorities to support whatever charges they might wish to bring in response to unlawful and unjustified campus activities.

Sixth, and finally, I strongly urge you to **reject any policy of appeasement**. Conceding to protesters' demands, as some other schools have done, is not an option. For one thing, that sets a dangerous precedent—acceding to the wants of the most violent group will only invite more dangerous activities from those with an agenda. But we must make it clear that shutting down our State's schools to score political points won't be an option going forward.

For another thing, the demands themselves are unsupportable. Most often, protesters are insisting that universities "divest" from Israeli-related investments.²⁵ Yet the West Virginia Legislature has already declared that "[t]he State of Israel is one of the United States' closest allies and international trading partners," and "boycotts that attempt to isolate Israel within the international community have served as a vehicle for spreading anti-Semitism and advocating for the elimination of the Jewish State of Israel."²⁶ Agreeing to such a boycott would ignore that. And ultimately, West Virginia's colleges and universities should not be on the side of antisemitic, pro-Hamas bigotry. What happened on October 7 was a tragedy, and attempts to minimize it by appeasing agitators are unacceptable. Thus, while those who stand against Israel have a First Amendment right to voice that view (within limits), I encourage you to make your own voices heard in speaking out against it.

* * * *

As we reach the end of another academic year, now is a time for moral courage. Students should be finishing their studies for the year, celebrating graduations, and saying goodbye to friends; they should not be dealing with malcontents who aim to destroy our campus communities in these waning days. We need not stand idly by while those who want to sow discord and hate cloak themselves in a warped view of the First Amendment. By implementing some of the measures described above, you will ensure that First Amendment rights are respected while *also* guaranteeing that violent disruptions don't take hold. Our students deserve that.

Sincerely,



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Attorney General

²⁵ Chris Schulz, *WVU Students, Community Members March In Support Of Palestine*, WV PUBLIC BROADCASTING (Apr. 29, 2024, 11:19 am), <https://bit.ly/4btxoHM>.

²⁶ W. VA. CODE § 5A-3-63.