

# From Walkouts to Social Media: First Amendment Rights of Staff and Students

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# Overview



## 1) Staff and Employees

- Federal Law
- State Law
- Sample Board Policies
- Hypotheticals

## 2) Students

- Federal Law
- Sample Board Policies
- Hypotheticals

# Things to keep in mind

- The First Amendment is a heavily litigated area of education law.
- People love to claim that their freedom of speech or expression was violated.
- You want to be sure that any decisions that the District is making are inline with the law and your District policies.
- If a First Amendment issue arises, call your Board Counsel.

# First Amendment Rights of Staff and Employees

“Teachers may not constitutionally be compelled to relinquish First Amendment rights, they would otherwise enjoy as citizens, to comment on matters of public interest in connection with the operation of public schools in which they work.”

*Pickering v. Board of Ed. Tp. High School High School Dist. 205, Will County, Illinois 391 U.S. 563 (1968)*



# Where Federal Case Law Begins

- There are two major U.S. Supreme Court cases that shape Public Employees' First Amendment Rights

## *1) Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County Illinois 391 U.S. 563 (1968)*

- A teacher wrote an Op-ed in the local newspaper that was critical of the School Board and handling of the financial resources of the District. The teacher advocated more funding was needed for academic activities instead of for athletics, which the Board was increasing funding too.
- The School Board terminated the teacher for the letter, and stated that several accusations made in the letter were false.
- The Supreme Court held that the dismissal was improper, because there was no proof of false accusations in the letter, and **(more importantly)** the matter of the financial well being of the District was a legitimate public concern. The teacher in expressing his opinion for legitimate public concern should be allowed to express himself publicly without fear of retaliatory termination.

# Where Federal Case Law Begins (Cont.)

## 2) *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

- A Deputy district attorney filed suit after he was denied promotion and was reassigned to another courthouse following his authoring of an interoffice memo in which he recommended dismissal of a case on the basis of purported governmental misconduct.
- The Supreme Court held that when public employees make statements pursuant to their official duties, they are not citizens for purposes of the First Amendment.
- Therefore, the Constitution does not insulate them from employer discipline for their statements made pursuant to those official duties.
- The Court asked a basic question:
  - 1) Did the employee speak as a citizen on a matter of public concern?
    - Since his opinion was given in the context of him doing his job, this was not free speech and not protected by the First Amendment.

# Garcetti/Pickering Factors

1. Did the public employee speak pursuant to their official duties?
  - Are they saying it as a teacher to students? To other faculty members?
2. If the employee spoke as a citizen, is the subject of the speech a matter of public concern?
  - What exactly are they saying? What is the context of their remarks/expression?
3. If the first two factors are met, does the employee's interest in commenting on the issue outweigh the interest of the employer?
4. Was the protected speech a substantial/motivating factor in any detrimental employment decision?
5. Can the employer demonstrate that they would have taken the same action against the employee even in the absence of the protected speech?

# What does this all mean?

- Due to the ruling in *Garcetti*, public employees' rights to free speech are limited to the confines of their employment.
- For teachers that means their rights to free speech, on school campus, are limited to the set curriculum, and to the **policies of the School District**.
- The good news is for the most part this is where the legal analysis for teachers stops
  - Most First Amendment issues concerning teachers/staff will occur inside the classroom and will be subject to the policies and procedures of the District.
  - However, if like in *Pickering*, the speech takes place outside the classroom, then all five factors previously listed must be discussed before any action is taken.

**This is a long way of saying, talk through the issue with your Board Counsel!!**



# State Law

- The State law granting school boards the ability to set educational policies and curriculum is NMSA 1978, §22-5-4:

“A local school board shall have the following powers or duties:

- A. Subject to the rules of the department, develop educational policies for the school district. . .
- K. Adopt rules pertaining to the administration of all powers or duties of the local school board ...”

# Example Board Policies

## Board Policy – G-1600 – Staff Participation in Political Activities

“The Board recognizes the right of its employees, as citizens, to engage in political activity. **However, school time may not be used for political purposes.** Staff members who intend to engage in political activities shall be guided by the following:”

## Board Policy – G-0761 – Staff Conduct

“No employee, while on or using school property, otherwise acting as an agent, or working in an official capacity for the District shall engage in:

- Use profane or abusive language, symbols or conduct
- Any conduct violating federal, state, or applicable municipal law or regulation
- A violation of District policies or procedures
- Any other conduct that may obstruct, disrupt, or interfere with teaching, research, service, administrative, or disciplinary functions of the District, or any other activity sponsored or approved by the Board.

# Hypotheticals

- 1) A new math teacher displays religious banners pertaining to his religious beliefs in his classroom. Can the District ask him to take them down?

Yes, the teacher is inserting his religious views into the math curriculum.

*Johnson v. Poway Unified Sch. Dist. Of San Diego County, 658 F.3d 954 (9<sup>th</sup> Cir. 2011).*

- 2) A World History teacher displays banners pertaining to several of the world's religions. Can the District ask him to take them down?

This is a harder question, is a study of the world's religions in the curriculum?

# Hypotheticals

- 1) The United States is involved in an armed conflict in another country, and a U.S. History teacher gets asked by a student in class what she thinks about the conflict. Is her speech protected by the First Amendment?

Not necessarily, Courts have held that the First Amendment does not entitle teachers to cover topics or advocate viewpoints that depart from the School Board's policies. *Mayer v. Monroe County Community School* 474 F.3d 477 (7<sup>th</sup> Cir. 2007).

- 2) A teacher posts on Social Media that her principal doesn't know what she's doing and is a bad educator. Can she be disciplined?

A) Look at your board policies first.

B) Courts may see this speech as “not in the public interest” therefore not protected by the First Amendment.

# Hypotheticals

- 1) A Government teacher tells her students that are able to vote, that they are foolish if they don't vote for a certain political candidate. Is her speech protected by the First Amendment?

Not necessarily, Courts have held that the First Amendment does not entitle teachers to cover topics or advocate viewpoints that depart from the School Board's policies. *Mayer v. Monroe County Community School* 474 F.3d 477 (7<sup>th</sup> Cir. 2007).

- 2) [https://www.youtube.com/watch?v=S\\_L6EB5ywWs](https://www.youtube.com/watch?v=S_L6EB5ywWs)

Like in *Pickering*, the subject of these teachers' out of classroom speech was about school funding and as such, will likely be considered a "matter of public concern."



# Students: First Amendment Rights



# First Amendment Rights of Students

“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of expression at the schoolhouse gate.”

*Tinker v. Des Moines Independent Community School District*, 399 U.S. 503 (1969).

# Federal Court Cases

## 1. *Tinker v. Des Moines Independent Community School District*, 399 U.S. 503 (1969).

- Students sought to wear black armbands to protest the Vietnam war, school administrators found out about the plan and adopted a policy prohibiting students from wearing the armbands
- The Court ruled against the administrators and held that student expression cannot be suppressed unless that expression “materially and substantially disrupt[s] the work and discipline of the school.”

## 2. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

- A student delivered a speech at a school assembly that used elaborate and graphic sexual innuendo
- The Court ruled that school districts can determine what manner of student speech in the classroom or school assembly is appropriate.
- Students do not have the same freedom in expressing themselves as adults do. This is due to their age, the public interest in protecting minors, and the school’s in educating them.

# Federal Court Cases

## 3. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

- Staff members of a high school student newspaper filed suit because the administration did not let the newspaper print two articles that dealt with pregnant students on campus.
- Educators can limit student's speech in school sponsored activities as long as their actions are reasonably related to legitimate educational concerns.

## 4. *Morse v. Frederick*, 551 U.S. 393 (2007).

- A student unfurled a banner that read "Bong Hits 4 Jesus" at a school-sponsored event . The principal of the school saw the banner, took it away from the student and suspended the student. The student filed a claim that the principal's actions were a violation of his First Amendment Rights.
- The Court held that the School could punish students whose speech promoted illicit drug use . The Court further held that the principal acted reasonably in the quick moment she had in which to make a decision.

# Federal Court Cases (Cont.)

Legal points to remember regarding student's freedom of speech

1. Does the student's speech or expression pose a substantial threat of disruption? (*Tinker*)
2. Is the speech or expression inappropriate? Is it obscene or vulgar? (*Bethel*)
3. Would the speech or expression, if at a school-sponsored activity be seen as contrary to the basic educational mission of the school. (*Kuhlmeier*)
4. Courts use a reasonableness standard to look at the reaction of school districts to student First Amendment claims. (*Morse and Kuhlmeier*).



# District Policies

- District Policies play a large role in how courts respond to student First Amendment claims.
- Student's actions may invoke other board policies besides student expression:
  - Ex: A student posts on social media threatening to injure or harm his classmates or to attack the school.
    - This circumstance not only involves student expression but also Board Policies regarding student safety, weapons on campus and student conduct.
    - The District may be able to take action against the student pursuant to multiple board policies.

## Example Board Policy Language – J2300

Students shall not engage in improper behavior, including but not limited to the following:

- Any conduct intended to obstruct, disrupt, or interfere with teaching, research, service, administrative, or disciplinary functions.
- Conduct or speech that violates commonly accepted standards of the District and that, under the circumstances, has no redeeming social value

# Hypotheticals

- Ripped from the headlines:
  - “Student Sues Teacher over Pledge of Allegiance Protest” – 10/8/2018 – Patch News
  - “High School Students Kicked Off Football Team After Protesting National Anthem” – 10/2/2018 – New York Times
  - “High School Student in Custody for online school threat”- 11/14/2018 – Austin American Statesman
  - “U.S. Students walk out again to protest gun violence” – 3/16/2018 – Reuters
  - “Student fights back after district banned MAGA hat on campus” – 2/19/2019 – WTHR News
  - “Christian Student loses court challenge to school history lesson on Islam” – 2/21/2019 – Bangor Daily News

# Questions/Discussion

- First Amendment Rights of Staff
  - Was the Speech/Expression a matter of public concern?
  - Was the Speech/Expression made pursuant to their official duties?
  - Was the Speech/Expression inline with board policy and the set curriculum?
- First Amendment Rights of Students
  - Was the Speech/Expression disruptive?
  - Was the Speech/Expression appropriate?
  - Did it take place at a school-sponsored event?
  - What was the immediate response by the District?

If you have any questions please don't  
hesitate to contact our office.



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