

Is Political Speech Free Speech in the School Setting?

September 23, 2020

With a particularly contentious election season at fever pitch, many school administrators long for an educational atmosphere completely void of potentially controversial speech, but a quick glance at the First Amendment should quash dreams of being able to prohibit all political speech in the school setting. That said, some limitations can legally be imposed on political speech both within the school setting and externally.

Context: Public vs. Private School

The First Amendment prohibits governmental restrictions on free speech, which means that public schools, including charter schools that qualify as public, cannot infringe on teachers' or students' rights to freedom of expression. Private schools are not prohibited by the First Amendment from imposing limitations on the free speech of teachers or students.

As a public school teacher, the First Amendment protects the teacher's ability to speak as a private citizen on a matter of public concern. For instance, a teacher may post a lawn sign supporting a particular political candidate, or may attend a Black Lives Matter rally on personal time.

Capacity: As a Private Citizen, or in Professional Duties?

The First Amendment does not protect a teacher from all restrictions on speech made within the teacher's professional capacity as a teacher. A school district can prohibit any political speech, including nonverbal speech such as clothing, hats, accessories such as pins, and classroom decorations within the school setting if the speech veers from the approved curriculum. For instance, in *Mayer v. Monroe County Community School*, a 2007 U.S. Court of Appeals for the Seventh Circuit case from Indiana, an elementary teacher indicated during a classroom discussion on current events that she privately opposed the Iraq War, and she was subsequently terminated. The court held that, even though the speech was an issue of public importance and was germane to the classroom discussion, the school could limit that speech because it unduly disrupted the employer's business of education. Per the court, "This is so in part because the school system does not 'regulate' teachers' speech as much as it hires that speech."

Similarly, when a sixth-grade teacher cited an offensive racial epithet that was part of the lyrics in a song as part of a classroom discussion as to why such words should not be used, the Seventh Circuit in *Brown v. Chicago Board of Education* held in 2016 that the school's policy forbidding the use of such epithets could be enforced against him because his use of the term in his capacity as a teacher did not implicate his First Amendment rights, which only protect his speech as a private citizen.

Thus, a directive made in August, by the Washoe, Nevada County School District, to teachers not to support the Black Lives Matter movement in their capacities as teachers is an attempt to regulate political speech within a classroom setting, and may be found to be a legal exercise of the board's right to regulate classroom speech. On the other hand, other school districts have expressly voted to support Black Lives Matter, thereby allowing teachers to support the movement in their classrooms. If a teacher in one of those districts opposed Black Lives Matter in a classroom setting in contravention of the mandated curriculum of the school, the school may be able to discipline the teacher for such speech without violating the teacher's First Amendment rights.

As disruptive as it may be to a student/teacher relationship if a student is aware of a teacher's political opinions that may be offensive to the student, such as opposition to the Black Lives Matter movement to an African American student or anti-immigration posts to an immigrant student, the First Amendment generally does not apply to a teacher's expression of those views as long as the speech is made in the teacher's capacity as a private citizen. For instance, a teacher in Oregon 2019 wore a Make America Great Again hat to a racial diversity training for school employees, and later filed a complaint, on which he prevailed, because he believed that he was improperly disciplined for his constitutionally protected private speech.

Private vs. Public Speech: A Balancing Test

Private speech, such as private Facebook posts, can also be limited to the extent that the speech violates a school policy and does not address a matter of public concern, such as mocking a student's appearance or posting sexually offensive content. Similarly, private communications with students on nonschool matters such as political discussions can potentially be prohibited by school policies that require that all electronic student/teacher communications be limited to pedagogical matters. In a closed social media group that can be accessed only by students and their parents and the teacher, the communication is likely considered speech being made in the speaker's capacity as a teacher, and political speech can be prohibited.

Even public speech made in a teacher's capacity as a private citizen can be limited by a school if the employee's exercise of free speech impedes the teacher's proper performance of his daily duties or interferes with the regular operation of the school generally. A balancing test examines whether the employer's interest in promoting efficiency outweighs the teacher's rights. To find that public speech can be limited to promote efficiency, factors that can be considered include: whether the speech meaningfully interferes with the teacher's performance of his duties or the employer's general operations, undermines a legitimate goal or mission of the employer, creates disharmony among coworkers, undercuts a supervisor's discipline of the employee, or destroys the relationship of trust and loyalty among employees. These factors arise from the 1968 Supreme Court case of *Pickering v. Board of Education*, which found that the employer's interest in efficiency did not outweigh an employee's rights to write a public letter criticizing a school board for its handling of a bond issue and for budgeting funds in a way that he felt did not support academics over athletics. The employee's speech was protected even though many of his statements were factually incorrect, because the false statements were not knowingly or recklessly made by him. Thus, even though a school can adopt policies that limit private speech by teachers on matters of public importance in order to promote the school's efficient operation, such a policy will have to pass this stringent balancing test to be upheld.

States Statutes and Equal Enforcement

Other laws can also protect teachers from discipline for their political speech. For instance, if a school prohibits all political speech in the classroom, but only enforces that rule against teachers who wear Black Lives Matter clothing and not against teachers who wear Make America Great Again hats, a claim of racial discrimination against the school may be successful.

Several states, including California, New York and Louisiana, have statutes that protect even employees of private employers, such as private schools, from adverse employment action for their political affiliations because political affiliation is a protected class like gender, race or disability status. Louisiana's law even prohibits employers from adopting any rule that attempts to control or direct the political activities of employees and specifically forbids employers from threatening to fire workers if they become affiliated with any political faction or organization or participate in political activities of any nature.

Free Speech for Students

Students' rights to free political speech are more broadly protected by the First Amendment than teachers' rights per the 1968 Supreme Court decision of *Tinker v. Des Moines Independent Community School District*, which enabled students to wear peace symbol arm bands to class to indicate their opposition to the Vietnam War. However, even student speech can be restricted if the student speech is found to be inconsistent with their basic educational mission, such as when a school was permitted to remove certain articles on divorce and teen pregnancy from a student newspaper per *Hazelwood School District v. Kuhlmeier* in 1988, or when a student engages in offensively lewd and indecent speech in a school assembly per *Bethel School District No. 43 v. Fraser* in 1986.

Limitations on political speech by school employers will be enforceable, even in these narrow circumstances, only when a school policy is carefully crafted to promote efficiency and to disallow unwanted behavior that legitimately threatens that efficiency. Thus, school administrators who want some peace in the classroom during these adversarial times should carefully examine their policies to ensure maximum enforceability.

Reprinted with permission from the [September 23, 2020 issue of The Legal Intelligencer](#). © 2020 ALM Media Properties, LLC. Further duplication without permission is prohibited. All rights reserved.

Related people

Magdalen Blessey Bickford

Camille R. Bryant

Kathy Conklin