Can coaches pray? Can teachers publicize grievances? A guide to the free speech rights of school employees

By the New York State Association of School Attorneys

School districts often are faced with the question of what speech can be regulated on their campuses. Can they prohibit a coach's act of praying on the field after a game? What about disciplining a teacher for making a complaint to the State Education Department or writing a critical letter to the editor of a newspaper? Does it matter if the complaint is done by way of a union grievance as opposed to outside the chain of command?

It is a balancing act to respect an employee's First Amendment rights while simultaneously ensuring that the exercise of those rights does not interfere with the pedagogical mission of the district. Fortunately, the courts have provided guiding principles to help school officials navigate this high-wire act.

The First Amendment and public employees

The First Amendment was specifically made applicable to the states – and by extension, school districts – in 1947, when the U.S. Supreme Court considered whether a New Jersey school district could continue to pay for transportation of children attending private religious schools. In *Everson v. Board of Education,* Justice Hugo Black said the practice was lawful but famously added that "a wall between church and state" must be kept "high and impregnable."

Just over 20 years later, in 1968, the Supreme Court issued a landmark decision in *Pickering v. Bd. of Ed. of Township High Sch. Dist. 205*, which concerned an Illinois teacher who was dismissed after writing a letter to a local newspaper in which he accused the superintendent of "totalitarianism" and said the school board spent too much money on athletics.

The court acknowledged a conflict "between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The court created a balancing test that involves a two-step inquiry:

- Did the employee's statements relate to a matter of public concern?
- Did the statements cause substantial disruption to or interference with the performance of the employee's duties or with the proper functioning of the employing public agency?

For the last 50 years, courts have used these two questions to determine whether a particular situation involves protected speech by an employee. School officials should ask themselves the same questions when considering any adverse action against an employee, including discipline, relating to forms of expression.

Three categories of speech

Applying the *Pickering* balancing test involves placing the subject speech into one of the three categories that have been identified by the courts:

1. Speech as an employee. Speech that is made "pursuant to" a public employee's job duties is not protected by the First Amendment. For example, in *Garcetti v. Ceballos,* (2006), the U.S. Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." In *Garcetti*, a deputy district attorney had prepared an internal memorandum that raised concerns about an investigative officer's arrest warrant. Despite bringing his concerns to his superiors, the prosecution continued. The defendant's lawyer subsequently called the deputy district attorney to testify at a hearing, where he again conveyed his concerns about the arrest warrant. The attorney claimed that after he testified he was subjected to adverse employment actions (reassignment to another courthouse, a missed promotion and less desirable work). The Supreme Court held that because the memorandum and testimony was part of his job duties, the speech was not protected by the First Amendment and, therefore, he could be disciplined for voicing his opinions.

2. Speech on matters that are not of public concern. Speech that is only of private interest and does not concern a matter of public concern is not protected by the First Amendment in the context of public employment, according to the U.S. Supreme Court's ruling in *Connick v. Myers* (1983). Protected speech, in contrast, involves a matter of public concern when it relates to a matter of political, social, or other community concern and is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication [see *San Diego v. Roe* (2004)].

3. Speech as a citizen on matters of public concern. Speech that a public employee makes as a private citizen on a matter of public concern is protected by the First Amendment, provided it did not cause substantial disruption to or interference with the performance of the employee's duties or with the proper functioning of the employing public agency.

How courts have ruled in school cases

Courts have applied the *Pickering* balancing test in cases involving schools many times. Below are some examples from New York and other states.

In *Weingarten v. Bd. of Educ. of the City Sch. Dist. of the City of New York* (2010), the U.S. District Court for the Southern District of New York upheld a school district's policy requiring all school personnel to maintain a posture of complete neutrality with respect to political candidates and not wear any buttons, pins, or other items advocating for a political candidate while on duty or in contact with students. The court found that the policy was done in good faith and had a reasonable pedagogical basis designed to prevent disruptions in the classroom. In other words, the political speech was being done as an employee, not as a private citizen, so it fell within the first category of cases and was properly regulated by the district.

Similarly, the Sixth Circuit U.S. Court of Appeals ruled that a school district could regulate the curriculum and pedagogical choices of teachers in the classroom without violating their First Amendment rights (*Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Village Sch. Dist.*, 2010).

In another case from 2010, *Weintraub v. Bd. of Educ. of the City Sch. Dist. of the City of New York*, the Second Circuit held that a teacher's filing of a grievance with his union to complain about his principal's failure to discipline a student in his classroom was not protected by the First Amendment. The teacher's grievance was pursuant to his official duties as a teacher and related to his private concerns, as such, it fell within the first and second categories and was not protected speech. See also *Cohn v. Dep't of Ed. Of City of N.Y.,* (2d Cir., 2017) (holding that a teacher's allegation that a fellow teacher had improperly assisted students prepare for a state-wide assessment test was not protected speech because the allegation was "part-and-parcel" of the teacher's job duties).

However, whistleblower speech can be protected. For instance, a New Mexico teacher complained to a state education department about a district's failure to comply with the Individuals with Disabilities Education Act. The Tenth Circuit deemed this to be protected speech because she went outside the "chain of command" and IDEA compliance was not part of her job duties, so the speech was made as a private citizen on a matter of public concern. (*Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ*., 2010)

What about coaches who pray? That was the issue in the Ninth Circuit's 2017 decision in *Kennedy v. Bremerton Sch. Dist*. The court was asked to address whether a school district in Washington State could discipline a football coach who would take a knee and silently pray at midfield after each game. The Circuit Court held that the coach's speech was that of a public employee, and not a private citizen, so it was not protected by the First Amendment, and the U.S. Supreme Court declined to review the decision.

The Ninth Circuit was careful to emphasize that the speech at issue took place immediately after the game, in full view of parents and students. The coach was engaging in the conduct at a school function, in the general presence of students, and he was doing so in a capacity one might reasonably view as official. Accordingly, pursuant to *Pickering*, he was acting in his official capacity, not as a private citizen. Moreover, the court noted that the coach could only pray at the 50 yard line because of his official position with the school – the general public was not permitted on the field following games. As such, the school had the right to regulate his speech.

A roadmap for compliance

School districts generally have the right to decide what is taught to their students and how those subjects are taught. If a district decides to limit a particular type of speech by its employees on its campus, it should ensure any limits imposed by the district:

- **Are content neutral.** It can be legally proper to ban all political speech or all religious speech, but it is unlawful to only ban expression of only certain opinions or beliefs.
- **Serve a legitimate pedagogical purpose.** For instance, it is lawful to prohibit speech if it would be disruptive to the learning environment.
- **Is related to the employee's job duties.** For instance, the U.S. District Court for the Eastern District of New York dismissed a superintendent's First Amendment claim that he was punished by a school board for speaking about corruption because the speech was done in his capacity as a superintendent (*Waronker v. Hempstead Union Free School District*, 2019).

In the event an employee proceeds to make statements that are not specifically prohibited by an existing policy, the analysis should revolve around three touchstone questions: (1) could a private citizen who was not affiliated with the district have made the same statement, (2) could a private citizen have made the statement in the same location, and (3) could the private citizen have made the statement at the same time? If the answer is yes to all three questions, the district should proceed cautiously with any discipline; if the answer is no to any of the three, then it is likely that it would be okay to proceed with the discipline.

For questions related to employee discipline or public use policies, consult your school attorney.


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