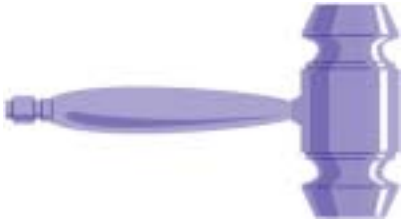
Legal Corner



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The First Amendment Has Its Limits

The First Amendment, part of the Bill of Rights of the United States Constitution, was adopted in 1791. More than 200 years later, the protections of the First Amendment continue to be a vitally important component of the fabric of American life. Five basic freedoms are typically associated with the First Amendment: Freedom of religion, freedom of speech, freedom of the press, freedom to peaceful assembly and freedom to petition the government for a redress of grievances. It is clear that American citizens maintain these freedoms in their everyday lives: they read newspapers which contain varied opinions, worship (or not) in the place of their choosing and freely criticize the government without fear of repercussion.

Yet, despite this august history, questions remain about the extent of First Amendment protections, particularly in an educational setting. It is clear that neither teachers nor students lose their First Amendment protections when they walk through the schoolhouse door — however, their rights while in that schoolhouse are curbed by the interest of the school in promoting both learning and an orderly environment. This article will focus upon the limits of First Amendment protections of teachers within the school setting, particularly their rights to religious freedom and freedom of speech. Principals need to have a working knowledge of where the line is drawn under the First Amendment between "protected" conduct and speech of teachers and unprotected conduct and speech that is subject to supervision, restriction or even prohibition.

Religious Freedom

Government neutrality towards religion is the hallmark of the free exercise clause of the First Amendment. Public schools, as an arm of the government, have the obligation to maintain such neutrality within their doors, and not promote or denigrate any particular religion, or religious practice. Teachers, like all other professionals, bring their faith along with them each day when they attend school. However, teachers are limited by the confines of their profession and the school's obligation of religious neutrality to how they may express their faith when they are in the workplace. School administrators must be aware of permissible and impermissible expressions of the religious beliefs of teachers in the workplace.

Teachers are, of course, permitted to hold whatever religious beliefs they may choose, and to participate in whatever faith community to which those beliefs lead them outside of the school day. During school hours, however, teachers may not engage in explicit demonstrations of their faith, as the active participation in a religious observance by a person in authority violates the establishment clause by blurring the distinctions between church and state. Praying with, or evangelizing to students is absolutely prohibited in school. For example, a school was permitted to terminate a teacher who persisted in offering an audible prayer and conducting a reading from the Bible each morning before lessons began despite being advised to stop doing so.[1] In another case, a school's dismissal of a teacher who required students to pray with him in the halls when they were disciplined, discussed his personal religious convictions including beliefs about the devil and demons with his classes, and told the superintendent of the schools that because of his Christian beliefs he would continue to evangelize, was upheld.[2] Groups of teachers may meet on school property for religious expression, and teachers may conduct silent, unobtrusive prayer such as a grace before eating a meal provided that these observances are in no way shared with students.[3]

The right of teachers to wear unobtrusive jewelry which indicates a religious belief, such as a small cross necklace, or religious headgear or dress required by a particular religion, such as a kippah[4] or head scarf, is currently in question in the state of Pennsylvania. A section of the Public School Code commonly referred to as the "garb law" authorizes public schools to prohibit any religious symbolism in the apparel of teachers in the public schools.[5] An

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identical law in Oregon has been upheld as constitutional, since it advanced a state interest in maintaining religious neutrality in the classroom.[6] However, the garb law may be implicated by a more recent Pennsylvania statute, called the Religious Freedom Protection Act,[7] which provides that no agency or political subdivision shall substantially burden the free exercise of religion, unless that burden is in furtherance of a compelling interest of the state and is the least restrictive means of furthering that interest. Furthermore, a federal court in Pennsylvania has raised questions concerning the constitutionality of the garb law. In a case where a teacher's aide was given a one-year suspension for wearing a small cross, a federal court has recently opined that the garb law violates the First Amendment, since it is a content-based distinction directed only at religious exercises.[8] The court found that while public employers may have more leeway than private employers in regulating the rights of their employees, they do not possess "carte blanche" to do so.[9] The court analogized the case to one where Muslim police officers challenged a departmental restriction against growing beards, and exceptions were made for medical reasons, but not for the exercise of religion. In that case, the Third Circuit held that the rules of the police department were not neutral towards religion, rather they opposed it, since exceptions were granted for other purposes. In the case of the teaching assistant, the court believed that since other instructors were permitted to wear jewelry, the forbidding of a necklace with a religious symbol could not withstand the heightened scrutiny required when an expression of religious belief is prohibited.[10] Quoting a U.S. Supreme Court case,[11] the court found that there was no more risk that students would misinterpret an endorsement of Christian beliefs from a teacher wearing a cross than a rejection of all religious belief if all such personal expression was banned.[12] This is likely to be a litigated issue in the next several years and bears attention by school administrators.

Study about world religion, religious beliefs and religious symbolism is crucial to an understanding of much of history, literature, art and contemporary life. Teachers are not prohibited by the First Amendment or any law from teaching about religion and religious beliefs when such instruction is within the confines of the school curriculum and state standards. Such classes are in fact growing in popularity within many public schools, as curriculum designers begin to understand the importance of a wide range of knowledge regarding religious beliefs. However, any teaching about religion must be objective and neutral — religion must be addressed strictly as an academic, not a devotional topic.[13] Teachers must not promote or denigrate any particular religions or religious beliefs during the academic discussion of religion and have no First Amendment right to do so.

Freedom of Speech

The right to free speech is another central element of the First Amendment. While speech is oftentimes protected, it has never been considered to be a right without limits. Teachers are subject to limits and prohibitions on their speech within the confines of the classroom. To determine whether government restrictions or prohibitions on the speech of its employees can survive a First Amendment challenge, the court must weigh the interests of the employee, as a citizen, in commenting upon matters of public concern against the interest of the government as an employer, in promoting the efficiency of the public services it performs through its employees.[14]

1. In-Class Speech

School districts are permitted to ensure that students' educational needs are met by developing a curriculum and instituting guidelines for classroom management. The creation of a curriculum inherently favors some viewpoints and disfavors others.[15] Teachers' First Amendment rights do not extend to choosing their own curriculums or managing their classrooms in contravention of district policies; and it is the school, not the teacher, who has the right to set that curriculum.[16] In one example, a teacher in Pittsburgh who was discharged for using a classroom management technique called "Learnball" after being told the district considered it pedagogically inappropriate did not have a claim for a violation of her First Amendment rights against the school district.[17] The court drew a distinction between the teacher's protected out-of-class advocacy for the "Learnball" method, as a member of a society that promoted the technique, and her in-class use of the method, which was not protected. The court stated that "[a]lthough a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is protected . . . her in-class conduct is not."[18]

In another case arising at the college level, a teacher at a public university argued that his First Amendment right to free speech and academic freedom required that he be permitted to set his curriculum, rather than using the curriculum adopted by the Department of Education at the university. The teacher also argued that it was an exercise of these rights to include adding religious content to classes on educational methods and choosing books deemed inappropriate by his department chair. The court held that the professor did not have the right to bring materials deemed inappropriate into his classroom, and that the university had the right to compel what was to be taught in its classrooms.[19]

Teacher's First Amendment rights do not extend to the use of profane, crude or degrading language directed towards students in the classroom. "It is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[20] For example, a teacher who called a 14-year-old student a "slut" and a "prostitute" was properly dismissed.[21] In a similar case, a physical education teacher who used

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profanity and belittling language was also properly dismissed for cruelty towards students.[22] Further, ethnically degrading remarks made by teachers are not subject to First Amendment protections. A teacher who told an African-American student that she was "sweating like a nigger at a Klu Klux Klan meeting" was rightfully dismissed for immorality and cruelty by her school district.[23]

I recently received an inquiry from a school district about a teacher who, on repeated occasions in his history class, expressed his opinion about the President, remarked about the President's intellect, and expressed his opinion about the war in Iraq. He would usually do this during a current events discussion. It is my opinion that the teacher has no right to express his personal opinions about such matters. A teacher's personal opinions have no pedagogical value. Moreover, when we reviewed the curriculum and applicable state standards, the teacher should not have been teaching "current events." Some may argue that teachers ought to teach students how to think critically about current events and form opinions on issues of the day. That is true if that is part of the curriculum and objectives of the class. But, good teachers do it without having to express their own opinions. Principals and school districts can prohibit teachers from the expression of their personal opinions in class, as long as it is done without regard to the viewpoint of the opinion expressed.

2. Out-of-Class, Work-Related Speech

Speech is protected only when it is a matter of public concern, i.e., it relates to any matter of political or social concern to the community. Speech which relates to a purely personal interest is not speech protected by the First Amendment. While speech by teachers which relates to the conditions of their employment will often be considered a public concern, as it may implicate the educational opportunities available to students; when the speech is strictly related to an individual grievance it will not be. Courts evaluate the "content, form and context of a given statement, as revealed by the whole record" in determining whether a particular topic is a matter of public concern.[24] Teachers may not be discharged or disciplined for speaking on matters of public concern, including the administration of the public schools, outside of the classroom unless it is disruptive to the educational process.

The key case on this issue is *Pickering v. Board of Education of Township High School.*[25] In this case, a teacher sent a letter to a local newspaper criticizing the district's allocation of funds between academic and athletic programs.The teacher was subsequently dismissed. The Supreme Court of the United States held that his dismissal was an impermissible violation of his rights under the First Amendment.

Speech that is "not motivated solely by employment concerns, but [is] a legitimate criticism of policies and administration, which affect the educational function of the school" is protected by the law.[26] For example, in one case, a teacher raised concerns to the administration and the public concerning a principal's administrative style, as she believed that he discouraged teacher input, inhibited use of teaching techniques and diminished teacher morale. The court held that the principal's abilities "touch in great measure upon . . . the function of public education."[27] In other examples, a teacher's speech at a board meeting regarding the removal of the book Huckleberry Finn from a required reading list because of the negative language which was used to portray African-Americans in the book was found to be protected speech under the First Amendment, because the cultural sensitivity exhibited by a school district was a matter of public concern.[28] In another Supreme Court case, a teacher was found to have been engaging in protected speech when he called a radio station with information regarding the institution of a teacher dress code.[29]

However, in many other cases, a teacher's speech is deemed to be purely a matter of private concern. For example, in one recent case, a teacher claimed that she was subjected to an unfair evaluation process to which other teachers in her district were not accountable.[30] When she complained about her treatment, she alleged that she was singled out for termination. The court held that the working conditions of this individual teacher was a purely private concern and was not protected by the First Amendment. The court held furthermore that the evaluation process would not deter a person of ordinary firmness from exercising their First Amendment rights so as to state a claim for retaliatory discharge. In another case, a teacher's article in a faculty newsletter regarding teacher morale at the high school was found to be strictly a matter of private concern and thus not subject to First Amendment protec-

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tion, since the article did not comment upon the school's discharge of its educational mission, the expenditure of funds, the violation of laws or any other matter of public concern.[31]

Untrue statements concerning work performance or other issues are not protected under the First Amendment. For example, a teacher who lied about her use of sick days may be properly dismissed. *Bethel Park Sch. Dist. v. Krall*, 44 A.2d 1377 (Pa. Commw. 1982).

3. Speech Unrelated to the Workplace

Schools have significantly less ability to restrict the speech activities of teachers when the speech has little or no relevance to the classroom performance of the teacher and does not involve the workplace. In one case,[32] the district court overturned a school board policy that prohibited off-duty teachers from working the polls at voting stations located on school grounds.[33] The board that instituted this policy was particularly concerned about teachers advocating for particular candidates for the school board. The court found that the teachers were engaging in speech on a matter of public concern when they advocated for candidates for office at the polls. Indeed, because of their position as public employees, their opinions could be of particular interest to concerned voters. The district argued that the teachers were supporting candidates for the board who promoted increased teacher salaries and benefits, and that since the teachers were speaking from a "selfish" perspective, their opinions were not a matter of public concern. The court disagreed with this perspective, finding that teachers had advocated for a wide range of candidates for the board, and no particular motivation could be seen for their decisions. In addition, even if the teachers were motivated solely by concerns about their working conditions, the court found that this concern was part of the interests that had to be balanced by any board that was elected under the democratic process. Furthermore, while the district claimed that the policy prevented an appearance of an official endorsement of a particular candidate, the court found that this was not a compelling interest to deny the teachers' First Amendment rights to participate in the political process as to justify this policy, particularly since all written materials were marked with their origin. In another case arising in a different state, a court held that a school could not dismiss a teacher who gave public interviews regarding his homosexuality, as he was speaking outside of the school day on a matter of public concern, and his doing so did not in any way disrupt the educational environment.[34]

First Amendment issues permeate the school environment. Everyday, administrators, teachers and students confront issues about what conduct is protected, and what is appropriate in an educational setting. *This article hopefully helped school administrators to understand some of the subtleties of the First Amendment, to better understand what must be tolerated and what can be supervised.*

Footnotes

[1] *Fink v. Board of Ed. of Warren County Sch. Dist., 442 A.2d 837 (Pa. Commw. 1982).*
[2] *Rhodes v. Laurel Highlands Sch. Dist., 544 A.2d 562 (Pa. Commw. 1988).*
[3] *See A Teacher's Guide to Religion in the Public Schools (First Amendment Center, 1999).*
[4] *Jewish head covering for men, also called a yarmeluke*
[5] *24 P.S. §11-1112.*
[6] *See Cooper v. Eugene School Dist., 723 P.2d 298 (1986).*
[7] *71 Pa. Stat. Ann. §2401 et seq.*
[8] *Nichol v. ARIN Intermediate Unit 28, 268 F.Supp. 2d 536 (W.D. Pa. 2003).*
[9] *Id. at 550.*
[10] *The court further stated that the "garb statute" was originally devised because of anti-Catholic animus in the state of Pennsylvania.*
[11] *Good News Club v. Milford Central Sch., 533 U.S. 98 (2001).*
[12] *See also United States v. Board of Educ. for the City of Philadelphia, 911 F.2d 822 (3d Cir. 1990). In this case, the court upheld the dismissal of a Muslim teacher who wore a head scarf to school under the garb law.*
[13] *See A Teacher's Guide to Religion in the Public Schools (First Amendment Center, 1999).*
[14] *Pickering v. Board of Ed., 391 U.S. 563 (1968).*
[15] *See, e.g., Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000).*
[16] *Edwards v. California University of Pennsylvania, 156 F.3d 488 (3d Cir. 1998), citing Boring v. Buncombe Cty. Bd. of Educ., 136 F.3d 364 (4th Cir. 1998).*
[17] *Bradley v. Pittsburgh Bd. of Public Ed., 910 F.2d 1172 (3d Cir. 1990).*
[18] *Id. at 1176.*
[19] *Edwards, 156 F.3d at 492.*
[20] *Bethel Sch. Dist. 403 v. Fraser, 106 S. Ct. 3159 (1986) (discussing student suspension for sexually suggestive speech).*
[21] *Bovino v. Board of Sch. Directors of Indiana Area Sch. Dist., 377 A.2d 1284 (Pa. Commw. 1977).*
[22] *Lenker v. East Pennsboro Sch. Dist., 32 SLIE 99 (1995).*
[23] *Sullenberger v. School District of the City of Monessen, 32 SLIE 56 (1995).*
[24] *See, e.g., Cox v. Dardanelle Public Sch. Dist., 790 F.2d 668 (8th Cir. 1986).*
[25] *Id., 88 S.Ct. 1731 (1968).*
[26] *Cox, 790 F.2d at 673.*
[27] *Id.*
[28] *Merkle v. Upper Dublin Sch. Dist., 211 F.3d 782 (3d Cir. 2000) (remanding for jury determination on whether protected speech was impetus for board decision to criminally prosecute teacher for donating useless art supplies to a shelter in violation of district policy despite resistance by police).*
[29] *Mount Healthy Sch. Dist. Bd. of Educ. v. Doyle, 97 S.Ct. 568 (1977) (remanding for further determination as to whether protected activity was the impetus for teacher's firing).*
[30] *Zugarek v. Southern Tioga Sch. Dist., 214 F.Supp.2d 468 (M.D. Pa. 2002).*
[31] *Sanguigni v. Pittsburgh Bd. of Public Ed., 968 F.2d 393 (3d Cir. 1992).*
[32] *Castle v. Colonial Sch. Dist., 933 F.Supp. 458 (E.D. Pa. 1996).*
[33] *Note that restrictions in the policy concerning political activity during working hours, and use of district equipment for such activity, remained unchallenged. Both policies would be constitutionally acceptable restrictions on speech.*
[34] *Acanfora v. Board of Ed. of Montgomery County, 491 F.2d 498 (4th Cir. 1974).*