

# YOUR RIGHTS

## Classroom Speech: Not Exactly Free

Everyone familiar with the First Amendment raise your hand. Yes, the much heralded rights to free assembly, right to protest the government, to free exercise of religion, to freedom of the press, and to freedom of speech are all protected by the First Amendment. Without question, the First Amendment has long provided the freedoms that we hold dear and that citizens of other countries envy.

A frequent question often arises regarding the limits of free speech. As we all have heard, freedom of speech does mean that we can say whatever we want, whenever we want. The most widely recognized example is that the First Amendment does not protect a person that shouts "Fire" in a crowded theater. The question for this article is: What protections does the First Amendment offer to teachers for speech in the classroom?

To fully answer this question, we must first take a brief look at how limits on speech are defined in the school setting. Speech includes both written and oral communication and includes all forms of expression (i.e., armbands, clothing, etc.) The United States Supreme Court has examined teachers' rights under the First Amendment on numerous occasions. The Court looks to two important concepts when examining whether a particular form of expression is protected. The Court looks to the 'forum' where the speech occurred and whether the speech is a matter of "public concern."<sup>1</sup>

### A. Forum of the Speech

The Supreme Court recognizes three different types of forums when analyzing freedom of speech related to schools and teachers: public forum, limited public forum, and private forum.<sup>2</sup> Public forums include areas such as sidewalks, common areas, and areas specifically designated free speech areas. Limited public forums include school grounds when opened for expression on a range of views, such as open meetings on public school grounds. Speech in either of these forums may not be restricted except in the most limited circumstances. Particularly, expression may not be suppressed based on the content or the view point.

This brings us to the private forum and the classroom. The classroom is a private forum and as such, speech in the classroom can be limited in numerous ways. The test for limiting speech in the classroom is whether the limits have a "reasonable pedagogical purpose."

### Application

The legal tests and classifications are well and good, but what does a "reasonable pedagogical purpose" mean to a teacher in New Mexico? Although I am sure that everyone reading this article knows the precise definition of pedagogical, I must admit that I had to look it up. Pedagogical comes from the root word pedagogy and means: 1. the art or profession of teaching; 2. preparatory training or instruction.<sup>3</sup> Given this definition of pedagogy, classroom speech may be restricted when the limitation is reasonably related to the curriculum and to teaching students.

Basically, school administrations are allowed to restrict speech in the classroom based on a desire to present a unified message for the students. The rationale is that a teacher appears to speak on behalf of the administration when he or she teaches. Unlike other areas of speech, classroom speech can be limited to a certain viewpoint. An example involved a recent case in which a school board decided to

promote Gay and Lesbian Awareness Month. One teacher made a bulletin board in his classroom that did not promote the message of tolerance and diversity. The bulletin board was found to conflict with the message presented by the administration. The court held that the teacher did not have a right to freedom of speech and had to remove the bulletin board. The First Amendment does not constrain a school's desire to present a unified message.<sup>4</sup>

School administrations are allowed to limit speech in furtherance of school curriculum. If that is not a gray enough test, then I am sure we could fuzz it up a little more. Suffice it to say that when confronted with a district-imposed restriction on speech, ask yourself whether the limitation has a reasonable relationship to a teaching purpose. The area that is more difficult is: when can a school district limit speech to a single viewpoint? For example, if a school district allows pro-war lesson plans, can it limit anti-war lesson plans? As the above case demonstrates, the answer depends on whether the limit is reasonably based on a purpose related to teaching.

### B. A Matter of Public Concern

Once again, I am sure that you have all heard the phrase "a matter of public concern." The real question is: what does this phrase mean and how does it affect classroom speech? This topic arises most often when an employee has been disciplined and he or she believes the discipline was because of speaking out on an issue. Public concern has been defined as involving "an issue of social, political, or other interest to a community."<sup>5</sup> The general test for determining whether a matter is of public concern is a balancing of the individual's right to free expression and the school's interest in promoting the services it performs.

As with many legal tests, the test for whether a matter is a public concern is rather ubiquitous and does not help in the practicalities of teaching.

The inner workings of a school and administrative decision making relating to individual teachers are basically not matters of public concern. The best question is to ask whether the matter relates more to an individual person or to the community at large. If the matter is personal, then the First Amendment will not insulate the speaker.

### Conclusion

The First Amendment provides broad protection for many forms of expression. Based on this article, one might think that the broad protection simply does not extend to teachers. Unfortunately, teachers do not gain the full protection of the First Amendment for speech in the classroom or for speech that is related to personnel matters within the school. However, the First Amendment still provides vast protection against issue-based prohibition on speech and against prohibition of speech in public forums. Although all speech is not free, the cost of refusing to speak may even be greater.

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<sup>1</sup> *Education Law*, Law Journal Press, Russo and Mawdsley (2005), provided much needed insight for this article.

<sup>2</sup> *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983).

<sup>3</sup> www.dictionary.com

<sup>4</sup> *Downs v. L.A. Unified School Dist.*, 228 F.3d 1003 (9th Cir. 2000).

<sup>5</sup> *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).