First Amendment Issues in the Education Sector

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What We Plan to Cover Today:

- First Amendment rights of public sector employees
- Equal Access Act
- First Amendment “Potpourri”:
  - First Amendment in the student library
  - First Amendment rights of students
  - First Amendment issues regarding speakers at board meetings
  - First Amendment rights of other Board members

Overview of First Amendment Employee Issues:

- When a citizen enters governmental service, the citizen by necessity must accept certain limits on their freedom.
- However, public employees do not surrender all of their First Amendment rights by reason of their employment.
- The First Amendment protects a public employee's right, in certain circumstances, to speak on matters of public concern.
- The government has an interest as an employer in regulating the speech of its public sector employees.

Criteria for Evaluating Constitutional Protections for Public Employee Speech:

- Analyzing the Constitutionality of public employee speech is a two-part inquiry.

- The first step is to determine whether an employee spoke as a citizen on a matter of public importance (referred to sometimes interchangeably as a matter of public concern) or, alternatively, whether they spoke pursuant to their official duties.

- If the employee either spoke pursuant to his/her official duties or spoke as a citizen but the speech is not of public importance, the public sector employee has no First Amendment protection for the statement.

Why an Employee Must Speak as a "Citizen" to be Covered by the First Amendment:

- Government offices could not function if every employment decision became a Constitutional matter.
- Government employers, like private employers, need a significant degree of control over their employee's words and actions; without it, there would be little chance of the provision of governmental services.
- Limiting protections for public sector employees to just matters spoken as a citizen on a matter of public concern prevents courts from having to provide constant oversight and intervention regarding workplace speech.

Step 1: Speech as a Citizen or Pursuant to Official Duties?

- The evaluation of whether a public sector employee spoke as a "citizen" or "pursuant to his official duties" is a *practical* one and involves analysis of what duties the employee is expected to perform.
- Formal job descriptions do not control because they may bear little resemblance to the duties an employee actually is expected to perform.
- Otherwise, employers could craft overly broad policies in order to restrict the First Amendment rights of public employees.
- Speech which closely relates to employee's job functions may be considered speech made pursuant to official duties, even if the speech is not formally required.

Step 1: Speech as a Citizen or Pursuant to Official Duties?

- When considering whether an employee spoke as a citizen, the fact that the public sector employee spoke inside his/her workplace, rather than publicly, is not dispositive.
- The fact that the speech concerns the subject matter of his/her employment is not dispositive.
- However, when public sector employees make statements about their official duties, the employees are not speaking as citizens for First Amendment purposes and the Constitution does not insulate the communications from employer discipline.
- The fact that speech is also concerning a matter of public concern is insufficient to garner First Amendment protection if the speech is made pursuant to his/her official duties.

Step 1: Criteria for Evaluating Whether Speech is a "Matter of Public Concern":

- The decision regarding whether speech is a matter of public concern requires an evaluation of the context, form, and content of a given statement.

- The inappropriate or controversial nature of speech is irrelevant to the question of whether the speech is a matter of public concern.

Examples of Unprotected Speech:

- Statement made by a public sector high school principal in connection with his efforts to convert school to charter school were pursuant to his official duties and thus lacked First Amendment Protections. (D'Angelo v. School Board of Polk County, 497 F.3d 1203 (11th Cir. 2007))
- Teacher and school psychologist complaining about lack of sufficient education and instructional resources and appropriateness of counseling curriculum were deemed pursuant to official duties. (Dorcely v. Wyandanch Union Free School District, 665 F. Supp. 2d 178 (E.D. N.Y. 2009))

Examples of Unprotected Speech:

- Public school teacher's failure to address transgendered students by their preferred pronouns in class was speech that was pursuant to the teacher's official duties. Additionally, the speech in question was not a matter of public concern. As a result, it was not protected First Amendment speech. (Kluge v. Brownsburg Community School Corporation, 432 F.Supp. 3d. 823 (S.D. Indiana 2020))
- Spirited disagreement by a teacher in discussions at school with her principal about the race-based content contained within the lesson plans she taught her class were statements made pursuant to the teacher's official duties and thus not entitled to First Amendment protection. (Lee-Walker v. N.Y.C. Dept. of Education, 220 F. Supp. 3d 484 (S.D. N.Y. 2016))

Examples of Unprotected Speech:

- In-class comments by a teacher about the origin of Christmas deriving from pagan traditions during class study of major world religions were deemed "curricular" in nature and as a result were not considered protected citizen speech on a matter of public concern. (Johnson v. Pitt County Board of Education, 2017WL2304211 (E.D. N.C. 2017))
- Religious and missionary materials of positive figures and positive moral values designed to impart knowledge to students posted on classroom bulletin board by teacher were "curricular" in nature even though they were not specifically related to the class's course. As a result, this speech was deemed not to involve a matter of public concern. (Lee v. York County School Div., 484 F. 3d 687 (4th Cir. 2007))

Examples of Unprotected Speech:

- Use of the "N-Word" by teacher in violation of school policies during impromptu lesson on racial epithets and why they are hurtful in class to sixth graders was deemed speech made pursuant to the teacher's official duties and thus was not entitled to First Amendment protections. (Brown v. Chicago Board of Education, 824 F.3d. 713 (7th Cir. 2016))

Step 2: A Balancing of Interests:

- If the employee spoke as a citizen and the speech in question implicated a matter of public concern, the second step of the analysis requires a balancing of interests to determine whether First Amendment protections accompany the speech.

- The second step of the analysis requires weighing:

  - The employee's First Amendment interests

  against

  - The governmental employer's interest in regulating speech in furtherance of its interest of promoting the efficiency of the public services it performs through its employees.

Step 2 Factors:

- Striking this balance requires consideration of:
  - Whether the speech at issue impedes the government's ability to perform its duties efficiently,
  - The manner, time, and place of the speech, and
  - The context within which the speech was made.

Step 2: The Balancing of Interests:

- The government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.
- This includes the ability to regulate employees whose conduct hinders efficient operations.
- Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of the office.
- Government has a compelling and legitimate governmental interest maintaining the public's confidence in carrying out their mission.

Step 2: The Balancing of Interests:

- A government's legitimate interest in avoiding disruption does not require actual disruption.
- A reasonable possibility of adverse harm is all that is required.
- It is not necessary for an employer to allow events to unfold to the extent that disruption of the office or destruction of working relationships is manifest before taking action.

Step 2: The Balancing of Interests:

- Expression on public issues enjoys the highest place in the hierarchy of First Amendment protections.
- However, when protected speech is vulgar and caustic, the speaker's protections are weakened.
- When an employee serves in a sensitive capacity that requires extensive public contact, the employee's otherwise protected speech may be deemed unprotected because it may pose a substantial danger to the governmental entity's successful functioning.

Court Opinions Addressing this Balancing of Interests:

- Employee – who had some but not significant public contact in his employment - of clerk of court's office's off-duty speech consisting of Facebook public comments on another post that were critical of decision by state attorney to not seek the death penalty in a criminal matter and called for her to instead receive the death penalty; that were considered vulgar, insulting, and defiant; and that generated immediate and overwhelming outcry constituted speech that was not protected by the First Amendment.
- The Facebook comments were deemed speech made by a private citizen on a matter of public concern.
- However, because the comments were not particularly well-informed, the clerk of court had an interest in censuring the employee's comments, the comments caused workplace disruption, and the comments damaged the integrity of the office, the Court found that the government's interest in regulating the employee's speech in furtherance of the efficient execution of its duties outweighed the employee's interests in the speech.
- McCullars v. Maloy, 369 F. Supp. 3d 1230 (M.D. Fla, Orlando Div., 2019))

Court Opinions Addressing the Balancing of Interest:

- Repeated racially insensitive, vulgar, and insulting comments, some of which were made on-duty, made by police officer publicly on social media and in group text messages, including to a subordinate who received them on-duty, during the aftermath of the George Zimmerman/Trayvon Martin trial which created a reasonable possibility that if unaddressed would lead to substantial community protests, hinder the ability to recruit minority candidates, and adversely affected the public's image of the police agency were not protected by the First Amendment.
- The Court skipped to the second step. The Court determined that the government's interest in ensuring the efficient execution of its duties by regulating the speech outweighed the employee's interests. Thus, the Court determined the speech was not protected by the First Amendment.
- Snipes v. Volusia County, 704 F.ed. Appx. 848 (11th Cir. 2017))

Any Questions?

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The Equal Access Act

- Federal law passed in 1984
- Requires federally-funded secondary schools to provide equal access to extracurricular student clubs.
- If at least one student led club meets outside of class time, schools must allow additional clubs to organize and have access.
- All groups/clubs have equal access to meeting spaces, PA system, school periodicals, bulletin board space, etc.
- If schools permit religious groups, it must allow any group focused on religion or irreligion.

First Amendment Potpourri:

- Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982):
- First Amendment imposes limitations on a local school board's exercise of its discretion to remove books from middle and high school libraries.
- Schools possess significant discretion to determine the content of their school libraries, but that discretion may not be exercised in a narrowly partisan or political manner.
- Whether removal of books violates First Amendment rights depends on the motivations of the governmental remover's actions.
- Local school boards may not remove books from school libraries for the purpose of restricting access to the political ideas or social perspectives discussed in the books when the action is motivated simply by the officials' disapproval of the ideas involved.

First Amendment Potpourri:

- Mahanoy Area School District v. B.L. by and through Levy, 141 S. Ct. 2038 (2021):
- Students possess some Constitutional rights to freedom of speech and expression even at school.
- Courts must apply First Amendment in light of the special characteristics of the school environment, including that schools stand "in loco parentis".
- Schools have a special interest in regulating speech that materially disrupts classwork or involves substantial disorder or invasion of the rights of others.
- Schools' special interest in regulating student speech does not end at the edge of campus. Instead, a school's regulatory interest remains high in some off-campus circumstances such as severe bullying or harassment targeting individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons; the writing of papers; the use of computers; participation in online school activities; and breaches of school security devices.
- Schools have a diminished ability to regulate off-campus student speech, compared to on-campus student speech.

First Amendment Potpourri:

- Mahanoy Area School District v. B.L. by and through Levy, 141 S. Ct. 2038 (2021): (CONT.)
- Discipline for student who made a social media post while off-campus outside of school hours that utilized profanity and was sent to a private group but did not identify the school or criticize the sports team, coaches, or school in question violated First Amendment.
- Social media post was not obscene, did not constitute fighting words, did not target member of school profanity with vulgar or abusive language, and did not substantially disrupt school.

First Amendment Potpourri:

- Moms For Liberty Brevard County, FL v. Brevard Public Schools, 6:21-cv-1849-RBD-GJK (M.D. Fla. Orlando Div. 2022):
- Challenges to SB policy as unconstitutionally restrictive and vague that requires all statements to be directed at Board chair, not Board members; permits Board chair to interrupt, warn, or terminate participant's statement that is too lengthy, personally directed, abusive, obscene, or irrelevant; and permits Board chair to request that individuals leave the meeting who do not show decorum.
- Further alleges that Board chair selectively applies policy to limit viewpoints with which she disagrees.

First Amendment Potpourri:

- Moms For Liberty Brevard County, FL v. Brevard Public Schools, 6:21-cv-1849-RBD-GJK (M.D. Fla. Orlando Div. 2022) (CONT.):
- School board meeting is a limited public forum.
- Court deemed policy facially content and viewpoint neutral.
- Court determines record does not support contention that certain viewpoints were favored while others were restricted.
- Record supports contention that policy was evenhandedly applied as a whole.
- Court determines policy is neither unconstitutionally vague or overbroad.

First Amendment Potpourri:

- Houston Community College System v. Wilson, 142 S. Ct. 1253 (2022):
- Board of Trustees' verbal censure of one of its trustee members for his speech made against the Board of Trustees challenged by censured trustee member based on First Amendment.
- Censured trustee member was an elected official who was expected to shoulder a degree of criticism from constituents and peers.
- First Amendment does not prohibit trustee member's censure under circumstances as the censure was a form of speech by other trustee members about the public conduct of another trustee member.
- Everyone involved was an equal member of the same deliberative body.
- Censure did not prevent censured trustee member from doing his job and did not deny him a privilege of office.
- The censure was not a materially adverse action capable of deterring the censured trustee member from exercising his own right to speak.

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