



**Washoe County School District**  
Every Child, By Name And Face, To Graduation™

# Office of the General Counsel Newsletter

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## Quick Tips/Links

- Office of the General Counsel webpage
- Civil Rights Compliance Forms

## The First Amendment and Student Speech

The First Amendment prohibits the government, including school districts, from abridging a student's freedom of speech. The United States Supreme Court has held that, although students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." Thus, the United States Supreme Court determined that schools may prohibit or punish student speech that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school or collide with the rights of others." Schools may regulate such speech even before it occurs, as long as they can point to "facts which might reasonably have led them to forecast" such a disruption. The United States Supreme Court is clear, however, that schools may not punish speech based on only an "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." The United States Supreme Court had expressed a high level of deference for those students who engage in passive speech (i.e. non-disruptive speech like the wearing of an armband or shirt to convey a message with no further action), particularly when that passive speech expresses a political message (i.e. expressions which comment on government action and issues which are legislated by the government, rather than the private conduct of an individual). However, student speech which is deemed profane or obscene, which promotes illegal drug use, and/or which could be considered hate speech (i.e. abusive or threatening speech or writing that expresses prejudice against a particular group, especially on the basis of membership in a protected class) is generally not considered protected speech and courts have permitted schools to discipline students who engage in such speech.

A very fact-specific inquiry by school administrators is required prior to censoring student speech. This can be challenging, particularly in determining whether the student speech could reasonably be considered to cause a disruption and ensuring that the speech is not censored simply to avoid any conflict that may result from a student passively expressing an unpopular viewpoint. As an example, it would be inappropriate to prohibit a student from wearing a facial mask or shirt which expresses support for a political candidate simply because other students do not support that candidate. In fact, if those students who oppose the political candidate taunt or disparage the student for wearing that particular clothing, the appropriate response would be to review whether those students were engaging in bullying behavior, rather than censoring the student who was engaging in passive political speech.

Given the fact-specific inquiry surrounding restrictions on student speech and the unique balance between freedom of speech and an administrator's role in creating a safe and respectful learning environment for all students, the Office of the General Counsel encourages all administrators to contact our Office or their Area Superintendent prior to censoring any student speech where it is unclear to the administrator whether such speech is protected or could be subject to discipline.

## The First Amendment and Staff Speech

When a District employee wears or displays politically charged statements or symbols at work in the District, is it protected free speech? The short answer is, no.

The U. S. Supreme Court in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), ruled that public employees do not have First Amendment protection for speech issued as part of their official duties. Writing for the majority, Justice Anthony M. Kennedy ruled 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." When a District employee makes statements pursuant to his/her official duties, whether the duties are as a teacher, administrator, bus driver,

- Staff Resources – Student Bullying Complaints, Investigation and Resolution Process
- OGC FAQs, Civil Rights Compliance FAQs, Labor Relations FAQs, Administrative Investigations FAQs

## Topics for Future Newsletters

- Do you have a topic you would like covered in a future OGC Newsletter? Email your ideas or areas of interest/questions/concerns to [bread@washoeschools.net](mailto:bread@washoeschools.net) for consideration of coverage in a future issue.

### Upcoming Staff Training Dates

#### CIVIL RIGHTS COMPLIANCE

##### Mandatory Coaches Training

- Tuesday, December 1<sup>st</sup> 6-7 pm
  - ZOOM
  - Contact [Ellie Centeno](#) for registration
- Wednesday, December 9<sup>th</sup> 6-7 pm
  - ZOOM
  - Contact [Ellie Centeno](#) for registration
- Tuesday, December 15<sup>th</sup> 6-7 pm
  - ZOOM
  - Contact [Ellie Centeno](#) for registration
- Thursday, January 7<sup>th</sup> 6-7 pm
  - ZOOM
  - Contact [Ellie Centeno](#) for registration
- Wednesday, January 13<sup>th</sup> 6-7 pm
  - ZOOM
  - Contact [Ellie Centeno](#) for registration
- Wednesday, January 20<sup>th</sup> 6-7 pm
  - ZOOM
  - Contact [Ellie Centeno](#) for registration

#### LABOR RELATIONS

- To be scheduled...

kitchen manager, etc., the employee is not speaking as a private citizen regarding a public concern and, therefore, such speech is not protected speech for First Amendment purposes.

One example is the Ninth Circuit Court of Appeals holding that a school district did not violate a teacher's First Amendment right to free speech by prohibiting him from using his public position to espouse his own views on the role of God in the Nation's history to captive students in his mathematics classroom. While banners displayed in a teacher's classroom, which emphasized God, were unquestionably of inherent public concern, by displaying such banners, the teacher was speaking as a public employee, not as a citizen. *See, Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011).

Outside of the workplace duties, District employees have a right to speak out on matters of public concern or importance as long as the expression is not outweighed by the District's interest in an efficient, disruption-free workplace. This balancing of interests is called the Pickering-Connick test. The test takes its name from two U.S. Supreme Court public-employee free-speech decisions: *Pickering v. Board of Education* (1968) and *Connick v. Myers* (1983). The test has two parts. The threshold part asks whether a public employee spoke on a matter of public concern defined as a matter of larger societal significance or importance and speech "relating to any matter of political, social or other concern to the community." If a public employee was disciplined for expression that is characterized as more of a private grievance, then the employer prevails. If, however, a public employee spoke on a matter of public concern, then the court proceeds to the second part of the test often called the balancing prong. Under this prong, the court must balance the employee's right to free speech against the employer's interests in an efficient, disruptive-free workplace.<sup>1</sup>

Contact the Office of the General Counsel with any questions or concerns regarding staff speech issues.

## Title IX and Sexual Harassment

In May 2020, the Department of Education issued new regulations that apply to Higher Education and K-12. The regulations lay out requirements for how a District must respond to sexual harassment complaints. The regulation lays out a complex process that must be followed by the Title IX Coordinator, the Investigator and the Decision-Maker.

The requirements apply to sexual harassment between students, between staff and students and between staff members. All District staff members are required to report sexual harassment complaints to the Title IX Coordinator. The Title IX Coordinator then receives a formal complaint from the Complainant to initiate the process.

Some of the hallmarks of the process is that when a District has actual knowledge of sexual harassment the District must offer supportive measures to the Complainant (alleged victim) and to the Respondent (alleged offender). The process must be neutral, and the Title IX Coordinator and the Investigator cannot participate in any decision-making. The Respondent cannot be disciplined for sexual harassment until the entire process is concluded and there is a finding that the Respondent is responsible for engaging in sexual harassment.

The new regulations conflict with Nevada state bullying laws in some respects. The definition of sexual harassment in the regulation is narrower than the definition for bullying based on sex in Nevada law. If a matter is dismissed under Title IX, the District will then follow our bullying procedures to resolve the complaint. Additionally, the regulations require the District to provide due process protections to both the Complainant and Respondent that take much longer than the two days state law allows for investigation. The regulations make clear that where there are conflicts between state and federal law the District is required to follow federal law.

The Department of Civil Rights Compliance will be training District staff on the implementation of the new regulations. In the meantime, if you have questions regarding sexual harassment contact the District Title IX Coordinator, Gina Session.

<sup>1</sup> <https://mtsu.edu/first-amendment/article/1608/pickering-connick-test>