

Licensed to Speak or “Just Teach”?

Controversial teacher speech can create disciplinary challenges for individual school districts.

BY KELLEY R. TAYLOR, ESQ.

During a classroom lesson, a middle school civics teacher burns two U.S. flags; another social studies teacher is scrutinized for comparing comments from a presidential address to those of Adolf Hitler.

The situations represented by each of these headlines present important legal and ethical issues. From a legal standpoint, they allude to teacher speech and expression in schools and the First Amendment to the U.S. Constitution. In addition, the incidents intersect with other legislation (federal and local), as well as various school district policies.

At the heart of all of the law surrounding these situations, are the fundamental (but not entirely legal) questions: Do teachers have license to express themselves in the classroom? Or should teachers “just teach” and leave personal opinions and exceptional instructional displays for other less public and influential venues?

Fuel for the Fire

In August 2006, a seventh-grade social studies teacher in Kentucky burned two U.S. flags during a civics lesson on freedom of speech. According to

published reports on the incident, the teacher burned the flags and then asked the students in the class to write a paper describing how they felt about the event. After more than 20 parents allegedly complained, Jefferson County Public School officials temporarily reassigned the teacher to a nonteaching role. A police investigation followed, but the Jefferson County attorney’s office did not find sufficient evidence to warrant criminal charges. As of the writing of this article, the school district was reviewing the case to determine whether students were endangered by the teacher’s actions and whether the teacher acted contrary to school policy.

Kentucky school officials weren’t the only ones dealing with highly controversial teacher expression. In February 2006, following the president’s State of the Union address, a social studies teacher in Aurora, CO, made some controversial comments to his 10th-grade World Geography class. According to a student recording of the remarks (made with an MP3 player), the teacher compared some of the statements made by President Bush to those made by Adolf Hitler. The student and his parent complained about

the “biased and inappropriate” nature of the teacher’s comments.

The Cherry Creek School District placed the teacher on administrative leave pending its investigation of the incident. The district described the teacher’s comments as an apparent violation of district policy regarding “the balanced presentation of sensitive material.” On March 13, 2006, however, the teacher was reinstated into his teaching position. Cherry Creek school officials cited an expectation that teachers use “good judgment...[and objectivity] when presenting...controversial issues and personal viewpoints...” The district also acknowledged its commitment to academic freedom and free speech. In an official statement, school district officials described their continuing efforts to strike a balance between the legal and ethical obligations that come into play when students, teachers, and controversial subjects meet.

Letter of the Law?

When such incidents as these occur, there is not always formal legal precedent (i.e., adjudicated cases) for school leaders to look to. As a result, school officials must draw on their knowledge of relevant law and apply it and school district policy to the facts to determine what punishment, if any,



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fits the offense (if any). In the two instances presented, the primary law involved deals with flag burning and First Amendment free speech rights of public employees.

Revered freedom. Where the flag-burning civics lesson is concerned, local officials did not find basis for criminal charges; whether the teacher violated school policy remains to be seen. That leaves the legal and moral concerns with flag burning. Legally speaking, the U.S. Supreme Court has been clear that “punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering” (*U.S. v. Eichman*, 1990).

In other words, having the freedom to express oneself by burning the flag is a form of protected speech under the U.S. Constitution. On the facts presented, the teacher in Kentucky did not

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break any federal laws simply by burning the flags. Whether he acted inappropriately from a social standpoint is another issue altogether.

If news reports on the incident were any indication, many people had strong opinions about the teacher’s approach and how the school system should respond. Jefferson County Public School officials reportedly received countless e-mail messages and phone calls from interested parties debating whether the teacher, a 27-year veteran in that district, should be fired or admired for his actions. Although the

teacher had declined to comment, a spokesperson on his behalf indicated that the teacher had no political motivations for burning the flags. The display was merely intended to provoke student thought and discussion about free speech.

The schoolhouse gate. Thanks to years of repetition, most school leaders are aware of the legal notion that students do not shed their constitutional rights at the schoolhouse gate. Nevertheless, many are unaware that the same principle applies to teachers. The quote from the famous 1969 case, *Tinker v.*

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Des Moines Independent School District, states, “It can hardly be argued that either students or teachers shed their constitutional rights to speech or expression at the schoolhouse gate” (emphasis added). The familiar *Tinker* standard of materially and substantially disruptive speech and speech that collides with the rights of others has been applied to teacher speech and expression. Teacher expression cannot be squelched merely because it addresses a controversial topic. As is the case with student speech, however, teacher speech in the school setting can be constrained when it constitutes a disruption of the school environment, frustrates the school’s legitimate and compelling educational interests, or violates an existing school policy or other law.

Public concern. Given *Tinker* principles, the question remains whether the teacher in Colorado should have been disciplined for articulating his views on the president’s statements. Clearly, the teacher has a right to express his opinion and to draw historical parallels. Further, school district policy allowed Cherry Creek teachers to address controversial topics in class, although it required them to do so with an objective, balanced, and professional approach.

From a purely legal perspective, U.S. Supreme Court precedent provides some, although not exactly on-point, guidance. A seminal case, *Pickering v. Bd. of Education* (1968), involved a public school teacher who was fired

for criticizing the school board in a local paper. The teacher was reinstated. The High Court held that statements on matters of public concern made by public employees could not be the basis of discharge unless those statements were knowingly or recklessly false or substantially interfered with the employee’s ability to do his or her job. But the incident in Colorado was not so much about public concern as it was an arguably inherent job requirement to teach and provoke discussion about topics, whether political, controversial, or historical. As a result, a determination of “right” or “wrong” from an entirely legal perspective is difficult.

You Be the Judge

In the face of such options as firing, suspension, reassignment, and even doing nothing, school officials in the Kentucky flag-burning case decided (as of the date of this article) on temporary reassignment. The Cherry Creek school district completed their investigation and decided on reinstatement. Did those district officials do the right thing? Aside from the districts responses, were the teachers wrong to do what they did?

As school leaders across the country realize every day, the answers to the questions raised by these kinds of situations are not easy to identify. Often, incidents of this nature do not rise to the level of a lawsuit, although the teachers involved often have some sort of legal representation or other educated advocate looking out for their interests.

The ire of and pressure from dismayed students, parents, and other community leaders can obscure the correct, or desired, course of action, as can the social issues and various personal opinions involved.

The reality is that on any given day in any school district, the outcomes for a teacher who burns flags in class or expresses “off-putting” views about the president are going to be based on individual district responses to policy, social and political pressures, relevant law, and particular facts. Those outcomes may even come down to a school district’s view of the public school teacher’s role in education. Until the U.S. courts specifically address the free speech parameters for public school teachers vis-à-vis their students, the various approaches used to teach important, and sometimes controversial, ideas to students who deserve to learn about them may just need some collaborative fine-tuning by well-informed school leaders. **PL**

Resources

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