

# ESSAA

## Insights

Food for Thought from the ESSAA Legal Team

Empire State Supervisors and Administrators Association  
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## Navigating First Amendment Rights: A Guide for School Administrators

In the landscape of American education, the intersection of students' First Amendment rights and the responsibility of schools to maintain a safe and inclusive environment can be complex. With recent global events, such as the Israel-Hamas conflict, the war in Ukraine, violent demonstrations around the world, and domestic events including the overturning of *Roe v. Wade*, influx of immigration and the all too the regular occurrence of school shootings sparking passionate discussions and activism among students, it becomes crucial for school administrators to understand how to navigate issues of political speech, hate speech, and the prevention of bullying and harassment while upholding constitutional principles.

### Understanding First Amendment Rights

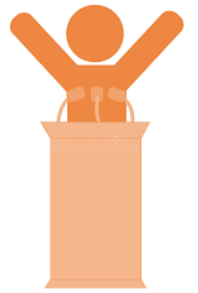
The First Amendment of the United States Constitution protects several fundamental freedoms, including the right to freedom of speech and expression. For students, this means they have the right to express their opinions, beliefs, and political viewpoints, even if they are controversial or unpopular.

### Political Speech in Schools

Political speech is at the heart of democratic discourse, and students have the right to engage in it both inside and outside of the classroom. In the landmark Supreme Court case *Tinker v. Des Moines Independent Community School District* (1969), the Court affirmed that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." This means that schools cannot censor or punish students for expressing political opinions, wearing political symbols, or participating in peaceful protests, as long as it does not substantially disrupt the educational environment.

### Limits on Free Speech

While the First Amendment protects political speech, it does not protect all forms of expression. Hate speech, defined as speech that attacks or demeans a particular group based on race, religion, gender, sexual orientation, or other characteristics, is not afforded the same level of protection. However, determining what constitutes hate speech can be subjective and context-dependent.



In the case of *Bethel School District v. Fraser* (1986), the Supreme Court ruled that schools can discipline students for lewd or vulgar speech that disrupts the educational process. Similarly, in *Morse v. Frederick* (2007), the Court held that schools can restrict speech that promotes illegal drug use. These cases illustrate that while students have broad free speech rights, schools can impose limits when speech disrupts the educational mission or promotes behavior contrary to school policies.

## Analysis of First Amendment Issues

### Bullying and Harassment

Bullying and harassment in schools present significant challenges to maintaining a safe and inclusive environment. While the First Amendment protects students' rights to express themselves, it does not shield them from consequences when their speech crosses the line into bullying or harassment.

In the case of *Davis v. Monroe County Board of Education* (1999), the Supreme Court held that schools can be held liable under Title IX for failing to address peer-on-peer harassment that is severe, pervasive, and objectively offensive. This decision underscores the responsibility of schools to take proactive measures to prevent and address bullying and harassment, even when it involves speech protected by the First Amendment.

Here are some points for you to remember in navigating these **First Amendment** issues:

*\*The accused student has rights too.* Sometimes overzealousness in defending a victim leads to neglect of the rights of the accused. Remember, especially in an alleged DASA/bullying context, that the accused bully has, by default, a right to free speech and keep this in mind throughout the process.

*\*Consider if any exceptions to free speech apply.* Free speech is a fundamental right. So, you will need to understand whether the speech in question falls into one of the exceptions to that rule. **These exceptions include:** disruption to the school environment (*Tinker*), true threats, "fighting words", pornography/promoting illegal activity, inciting public danger

*\*Identify the nexus (Tinker).* With so many discipline-related issues arising outside of school and/or on social media, your analysis should always include the question of whether the alleged speech will have an effect on the educational environment. Although the answer will usually be yes, you should be prepared to articulate how and why that is the case.

*\*Develop a plan.* Think through the criteria above and have a plan of action ready that you will be able to defend to both the alleged victim and the subject of the investigation, as well as your supervisors.

*\*Include Central Office/District Counsel.* As more fully discussed below, your ESSAA counsel is always there to assist you, including in these situations. But you should also include Central Office and your District's counsel in developing/approving your plan of action. Remember that unlike pedagogic decisions that you have expertise and training regarding, First Amendment issues can involve complex legal analysis, which is why they can end up before the United States Supreme Court. By getting the approval of District counsel, or at least central office in advance of your final decision, you will have insulated yourself in the event of legal or political challenges.

### **First Amendment Rights of Public Employees**

What are the First Amendment rights of public employees such as teachers and administrators? According to the courts, the government has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general, meaning that public employers may impose restraints on the First Amendment activities of its employees that are job-related even when such restraints would be unconstitutional if applied to the public at large. A critical aspect of this complexity lies in the balancing act between matters of public interest and private interest.

Expressions related to matters of public interest involve issues affecting the broader community, such as corruption, inefficiency, or policies affecting public welfare, including the education of children. In such instances, public employees enjoy greater latitude in exercising their First Amendment rights, as their speech contributes to the marketplace of ideas and facilitates democratic discourse. Courts have consistently upheld the rights of public employees to speak on matters of public concern, even if their views diverge from official policies.

Conversely, expressions rooted primarily in personal grievances or matters unrelated to public affairs receive less protection. When public employees speak on issues of private interest, their speech may disrupt workplace harmony, undermine the efficiency of government functions, or erode public confidence in the institution. Thus, restrictions on such speech aim to preserve the integrity of governmental operations while striking a delicate balance with individual liberties. Keep in mind that the distinction between public and private matters tends to be fact specific and in some cases counterintuitive.

Thus, deciding if a teacher's actions were insubordinate, or unprofessional, or protected by the First Amendment is not an analysis to be made unilaterally or in a vacuum. Before moving forward in such instances, always begin with contacting ESSAA counsel. Even if your supervisor tells you to write up a staff member, it is prudent before doing so to contact ESSAA counsel. The write up will bear your name and if the teacher's union or attorney accuses you of violating the First Amendment, your supervisor may not recall the discussion quite the same way as you do.

### **Academic Freedom**

It is difficult to talk about the First Amendment without a reference to academic freedom. In New York State, academic freedom for public school teachers and administrators is upheld within the legal framework established by state laws and regulations. While New York State Education Law does not explicitly define academic freedom, several statutes and guidelines protect educators' rights and responsibilities within the educational system.

One crucial aspect of academic freedom in New York is the protection of teachers' rights to instruct and discuss controversial issues within the curriculum. New York Education Law § 801-A affirms teachers' rights to address controversial topics in the classroom, provided they do so objectively and in a manner consistent with the educational goals of the school district.

Additionally, New York State Education Law § 3204 outlines requirements for curriculum development and implementation in public schools. While giving local school boards authority over curriculum decisions, this law ensures that curricula align with standards and provide students with a well-rounded education that includes diverse perspectives and critical thinking skills.

Furthermore, New York State's Commissioner's Regulations, particularly Part 100, set forth standards and guidelines for instruction, assessment, and professional conduct in public schools. These regulations establish expectations for educators regarding academic integrity, professionalism, and the promotion of intellectual growth among students.

In theory, these legal provisions afford public school teachers and administrators the flexibility to exercise academic freedom while fulfilling their obligations to provide high-quality education in a safe and inclusive environment. In practice it is yet another mine field for school administrators to navigate.

Here are some points for you to remember in navigating academic freedom issues:

*\*This is a complex area and even contemplating going it alone is an extremely poor strategy, as in addition to all the layers discussed above regarding the First Amendment, you add the teacher union into the mix when academic freedom is involved. Additionally, Board policies vary from district to district, and situations tend to be fact specific, as well as political minefields.*

*\*Start by reviewing whatever Board policies exist and also review the teacher contract to ascertain if there is any reference to academic freedom in the contract. Then contact ESSAA counsel immediately.*

## **Conclusion**

As guardians of students' rights, teacher rights, and the educational environment, school administrators play a vital role in navigating the complexities of academic freedom and First Amendment protections, particularly in the context of political speech, hate speech, and the prevention of bullying and harassment. Given these complexities, don't go it alone or make hasty decisions about issues that can explode at the Central Office, Board or community level. One of the benefits of membership in ESSAA is your direct access to our attorneys. You can problem solve real life situations and get assistance in developing strategies. More importantly, our attorneys will suggest how to share those strategies with the District before you implement them, as sometimes all decisions involving controversial topics will cause problems. Our advice is designed to best protect the interests of our members, which means you!

Remember a short call with one of our attorneys can save a lot of trouble down the line, so do not hesitate. If you are unsure who your ESSAA attorney is, you can contact your Association President or contact ESSAA directly at [info@essaa.org](mailto:info@essaa.org).